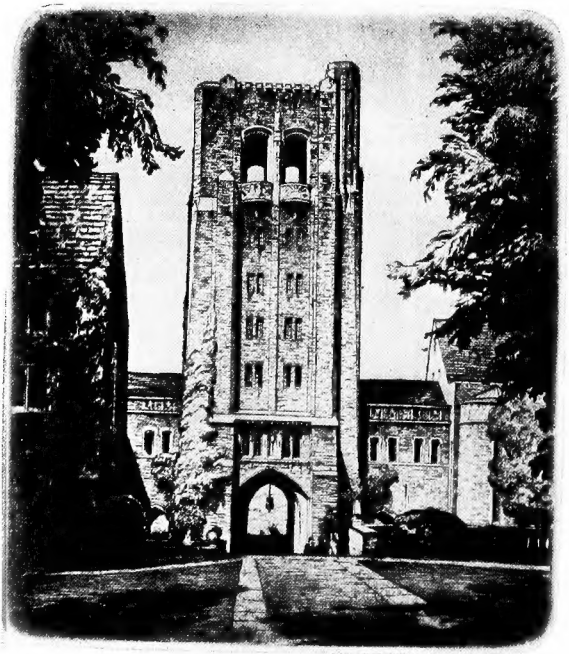

A TREATISE

ON

CRIMINAL PROCEDURE

BY

FRANCIS WHARTON, LL.D.,

AUTHOR OF TREATISE ON "CRIMINAL LAW," "EVIDENCE," "CONFLICT OF LAWS," "MEDICAL JURISPRUDENCE," ETC., ETC.

TENTH EDITION

WITH LARGE ADDITIONS BY

JAMES M. KERR

VOLUME I

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PREFACE TO NINTH EDITION

Since the issue of the eighth edition of this work, in 1880, the accumulation of important rulings bearing on it has required its careful revision. In carrying out this revision I have condensed the text as far as I could, but I have found it necessary, nevertheless, materially to increase the bulk of the volume. In the notes will be found references to more than three thousand cases not included in the prior edition.

F. W.

WASHINGTON, *Jan.* 1889.

PREFACE TO TENTH EDITION

In preparing a new edition of this work, in addition to the collection and insertion of later authorities and illustrative notes, it was deemed advisable to extend the scope of the work in some regards, and especially by including a full treatment of the requisites and sufficiency of indictments and informations for the various specific crimes and offenses. In carrying out this plan the chapters comprised within the work have been necessarily increased from twenty-one to one hundred, and almost one thousand new sections have been added. The number of cases cited has been more than quadrupled.

The new matter on Specific Crimes,—which ends with page 1708,—is thought in and of itself to justify this new edition. While it has been sought to bring out every point that has been adjudicated, and collect the cases, it must be borne in mind that most of the rulings cited, and a large proportion of the conflict pointed out, are due to statutory provisions in the various jurisdictions. The statute under which any particular decision was made should be carefully collated with the statute under which it is sought to be applied.

JAMES M. KERR.

LOS ANGELES, CAL., May 15, 1918.

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CRIMINAL PROCEDURE.

CHAPTER I.

APPREHENSION—IN GENERAL.

§ 1. INTRODUCTORY—"APPREHENSION" AND "ARREST." In speaking regarding the securing of the person and restraining of liberty, or holding to bail to appear in court to answer to a charge or charges of a violation or violations of persons alleged or supposed to have committed offenses against the criminal or penal laws of the state, nation or municipality, the physical act of thus taking into custody and detaining of liberty is indifferently and interchangeably spoken of as "apprehension" and as "arrest," as though the two words were exact synonyms;[1] but it is thought that a discriminating and scholarly use of these terms applies the words "apprehend" and "apprehension" to the taking and detention of persons on a charge, or on well-grounded suspicion, that they have violated a criminal or penal law—that is, the taking and detaining of persons in criminal cases; and

1 Crabb's Synonyms does not treat the words "apprehend" and "arrest." The same is true of all the other works on synonyms and antonyms examined, except Roget's New Thesaurus (Mawson's

applies the words "arrest" and "arrested" to the taking and detention of persons on process in civil cases.[2] That is to say, correctly and strictly speaking, a person is apprehended on a complaint issued by a magistrate, or a warrant issuing out of a criminal court of record, charging the commission, or the attempt to commit, rape or robbery or riot, or any other infraction of the criminal or penal laws, whether a felony or a misdemeanor; and is arrested under a capias ad respondendum, or other writ or process issuing out of a civil court, of whatever jurisdiction, requiring the taking and detaining of the person.[3]

§ 2. SAME—DISTINCTION SANCTIONED BY GOOD USAGE. The distinction contended for in the use of the words "apprehend" and "arrest" is sanctioned by the best usage and discerning scholarship among writers and speakers of recognized distinction. In the King James translation of the Holy Scriptures, the word "apprehend" is used three times, in the sense above contended for,[1] and the word "arrest" not at all, I believe. Oliver Goldsmith, in his "Story of Alcander and Septimus," says "the robber who had been really guilty" of the murder with which Alcander had been accused, "was apprehended selling his plunder."[2] Edward Everett, one of the finest word-artists

edition) under "Lawsuit," par. 969, and Feranold's English Synonyms and Antonyms, tit. "Arrest," p. 57—both of which works give the words as synonyms.

2 See Bacon's Abridgment, tit. "Apprehension." Black says that the term "apprehension" is applied exclusively to criminal cases, and "arrest" is applied to both civil and criminal cases—Law Dict., tit. "Apprehension." Bouvier declares that the word "arrest" is said to be more properly used in civil cases, and the word "apprehension" in criminal cases.—Law Dict. (Rawle's revision), tits. "Apprehension" and "Arrest."

3 "Apprehend is used in speaking of arrests on criminal charges, while arrest is used in speaking of civil offenses, not criminal in nature. In other words, one may make an arrest on civil process, while one can be apprehended on a criminal warrant."—White's Law in Shakespeare, § 283.

1 Acts, ch. XII, ver. 4; II Cor., ch. XI, ver. 32; Phil., ch. III, ver. 12.

2 The Bee, No. 1, Goldsmith's Works (Library ed., Harper), Vol. 5, p. 23.

this or any other country has produced, says: "Hancock and Adams, though removed by their friends from the immediate vicinity of the force sent to apprehend them, were apprised, too faithfully, that the work of death was begun."[3] Shakespeare,[4] that master-hand in

Saber-cuts of Saxon speech,[5]

is an unsatisfactory witness, having used the active verb "apprehend," in its physical sense, twenty times,[6] the active verb "arrest" twenty-two times,[7] and the word

3 Everett's Orations, p. 88.

4 Should we say Bacon! in meek deference to Judge Tuthill's solemn though unlearned and Dogberry "decision," as preposterous and as asinine as was the famous bull of Pope Alexander VI, in which he assumed to declare that all the Americas belonged to Spain!—but the pontifical "face" was saved by Pope Paul V, who undid the bull of his predecessor, and made a similar unauthorized disposition of the northern end of the North American continent.—See Parkham's "Pioneers of France in the New World" (Frontenac ed.), vol. II, p. 213.

Judge Tuthill's decision, it is to be noted, attempted to dispose in a summary manner of a dispute of many decades' standing, and over which the court had no jurisdiction whatever, for the point is not judicable in a court of law or equity.

5 Bret Harte's "How Are You Sanitary," Works (Standard Library ed.), vol. XII, p. 5.

6 All Shakespearean references are to the Globe edition, but "fit," also, the Rolfe edition, in most cases at least; and this is probably true of all standard editions: Comedy of Errors, act I, sce. 2, line 4. Coriolanus, act III, sce. 1, line 173. Henry V, act II, sce. 2, line 2; Act IV, sce. 7, line 168; act IV, sce. 8, line 18. Henry VI (Part II), act II, sce. 1, line 173. Henry VI (Part III), act I, sce. 1, line 71; act III, sce. 2, line 122. King Lear, act I, sce. 2, line 83; act II, sce. 1, line 110; act III, sce. 5, line 20. Love's Labor Lost, act I, sce. 1, line 276. Merry Wives of Windsor, act IV, sce. 5, line 119. Othello, act I, sce. 1, line 178; act I, sce. 2, line 77. Romeo and Juliet, act V, sce. 3, lines 53, 56. Timon of Athens, act I, sce. 1, line 212. Twelfth Night, act V, sce. 1, lines 68, 69.

7 Comedy of Errors, act IV, sce. 1, lines 69, 75, 106; act IV, sce. 2, lines 43, 44, 49; act IV, sce. 4, line 85; act V, sce. 1, line 230. Henry IV (Part II), act I, sce. 9, line 48; act IV, sce. 2, line 107. Henry V, act II, sce. 2, lines 143, 145. Henry VI (Part II), act III, sce. 1, lines 97, 136; act V, sce. 1, line 136; act V, sce. 5, line 201. Henry VIII, act IV, sce. 2, line 13. King Lear, act V, sce. 3, line 82. Measure for Measure, act I, sce. 2, line 60; act I, sce. 4, line 66. Richard II, act IV, sce. 1, line 151.

"'rest" (for arrest) four times.[8] Lord Macaulay seems to have uniformly used the vernacular word "arrest."[9] Many other instances, pro and con, as to the distinction contended for in the use of the words "apprehend" and "arrest" could be cited, but the above will serve sufficient illustration for the present purpose.[10]

§ 3. SAME—DOCTRINE OF THE DECISIONS. Discriminating judges, familiar with the nice shades in the meaning of the edged tools of speech of which they make use, and careful in the appositeness and technical precision of the words employed, draw the distinction contended for in the use of the words "apprehend" and "arrest";[1] but there is a multitude of other cases in which no consideration is given to the nice distinctions and shades in the meaning of, or a discriminating use of, these words.[2] In these latter

Twelfth Night, act III, sce. 4, line 360.

8 Comedy of Errors, act IV, sce. 2, lines 42, 45; act IV, sce. 3, line 25; act IV, sce. 4, line 3.

9 As samples see History of England, chapter XXI, vol. VII (Hurd & Houghton ed.), pp. 280, 331.

10 Clarendon says, in his History of England: "It was a rabble, of which nobody was named; and also is more flagrant, no one apprehended."

Grant says: "By the fugitive-slave law every Northern man was obliged, when properly summoned, to turn out and help apprehend the runaway slave of the Southern man."—"Personal Memoirs," vol. II, p. 543.

On the other hand, De Hass: "At the instigation of Herodias John was at once arrested."—"Buried Cities," pt. III, p. 24.

1 Montgomery County v. Robinson, 85 Ill. 174; Hogan v. Stophlet, 179 Ill. 150, 44 L. R. A. 809, 53 N. E. 604, affirming 74 Ill. App. 631; Com. v. Koffroth, 30 Pa. Co. Ct. 45; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812.

"The mere apprehension, or apprehension and conviction."—Mr. Justice Lamm, in Smith v. Vernon County, 188 Mo. 501, 506, 107 Am. St. Rep. 324, 327, 70 L. R. A. 59, 87 S. W. 949.

In the case of Ralls County v. Stephens, 104 Mo. App. 115, 78 S. W. 291, it is said that, in the real sense of the word, a man who took prompt and energetic measures to bring a criminal within the grasp of the law—made journeys, sent telegrams, and the like—apprehended the criminal and deserved to receive the reward offered for his capture, rather than the officer simply making the arrest.

2 As in Connecticut, where the supreme court declare that "apprehension of a person on mesne

cases the judges writing the opinions not only treat the words "apprehend" and "arrest" as synonymous, but, in some of the cases, they judicially determine that the words are synonymous and interchangeable[3]—a matter not properly judicable, in all probability, for it is not a matter of law but of etymology. It is to be noted that, as a matter of fact, this non-discriminating and interchangeable use of the words may be said to be largely predominant in the reported decisions of the courts of the various states, in the various federal courts, and in the English decisions.[4]

civil process to answer in a civil action is an 'arrest'."—Town of Hamden v. Collins, 85 Conn. 327, 82 Atl. 636, 638.

[3] The Missouri Statutes, speaking of "apprehension and arrest" (Mo. Rev. Stats. 1899, § 2474), the supreme court of that state, in Cummings v. Clinton County, 181 Mo. 162, 79 S. W. 1127, construed the words "apprehension" and "arrest" to be interchangeable terms —arrest meaning the same as apprehension; and this case was followed in this construction of the statute in the later case of Smith v. Vernon County, 188 Mo. 501, 107 Am. St. Rep. 324, 70 L. R. A. 59, 87 S. W. 949.

See Com. v. Koffroth, 30 Pa. Co. Ct. 45.

[4] Among the many cases showing this use see: ALA.—Gamble v. Fuqua, 148 Ala. 448, 42 So. 735; Childers v. State, 156 Ala. 96, 47 So. 70; Sanderson v. State, 168 Ala. 109, 53 So. 109. CAL.—People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064. CONN.—Town of Hamden v. Collins, 85 Conn. 327, 82 Atl. 636, 638. DEL.—Petit v. Colmery, 4 Penn. 266, 55 Atl. 344; State v. Mills, 6 Penn. 497, 69 Atl. 841. GA.—King v. State, 6 Ga. App. 332, 64 S. E. 1001. ILL.—Main v. McCarty, 15 Ill. 441; Conklin v. Whitmore, 132 Ill. App. 574. KY.—Hart v. Flynn's Exr., 38 Ky. (8 Dana) 190; Com. v. West, 113 S. W. 76. LA.—O'Malley v. Whitaker, 118 La. 906, 43 So. 545; Thomas v. Henderson, 125 La. 292, 51 So. 202. MAINE—Penny v. Walker, 68 Maine 430, 18 Am. Rep. 269. MASS.—French v. Bancroft, 42 Mass. (1 Metc.) 502; Eldredge v. Mitchell, 214 Mass. 480, 102 N. E. 969. MO.—State v. Pritchett, 219 Mo. 696, 119 S. W. 386. N. H. —Emery v. Chelsey, 18 N. H. 198. N. M.—Territory v. Lynch, 18 N. M. 15, 133 Pac. 405. N. Y.—Shorns v. Titus, 193 N. Y. 272, 85 N. E. 1077; People v. Governale, 193 N. Y. 581, 86 N. E. 554; Giorgio v. Batterman, 134 App. Div. 139, 118 N. Y. Supp. 828; Phillips v. Leary, 114 App. Div. 871, 100 N. Y. Supp. 200; People v. Breen, 44 Misc. 375, 89 N. Y. Supp. 998; People v. Bradley, 58 Misc. 507, 111 N. Y. Supp. 625. N. C.—State v. Baxton, 102 N. C. 129, 8 S. E. 774. OHIO—Williams v. Morris, 32 Ohio Cir.

§ 4. SAME—LAW TEXT-WRITERS. Among those who have written text books on the criminal branch of the law, or treated of that branch in other works, very little or no attention has been paid to the distinction between the word "apprehend" and the word "arrest" as above pointed out, and they seem generally[1] to use the word "arrest" to designate the act of apprehending a person on a charge of an offense committed, or attempted, against the criminal or penal laws, as well as the taking into custody of a person on a civil process.[2] And it is to be

Ct. Rep. 453. OKLA.—Holmes v. LeFors, 36 Okla. 729, 129 Pac. 718; Collegania v. State, 9 Okla. Cr. 425, 132 Pac. 375. PA.—Higbie v. Pennsylvania R. Co., 209 Pa. St. 452, 58 Atl. 858; In re Election Officers, 1 Brewst. 182; Com. v. Daniel, 4 Clark 49, 6 Pa. L. J. 330; Com. v. Keepers of Jail, 1 Del. Co. Ct. 215, 4 W. N. C. 540. TENN.—Herd v. State, 119 Tenn. 583, 108 S. W. 1064. TEX.—Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; Ex parte Muckenfuss, 52 Tex. Cr. App. 467, 107 S. W. 1131; Condron v. State, 69 Tex. Cr. App. 513, 155 S. W. 253. VT.—Scott v. Curtis, 27 Vt. 762; Usher v. Severance, 86 Vt. 523, 86 Atl. 741. FED.—United States v. Kirby, 74 U. S. (7 Wall.) 482, 7 L. Ed. 278; Ex parte Levi, 28 Fed. 651; United States v. Bond, 85 Fed. 633; O'Halloran v. McGuirk, 167 Fed. 493; United States v. Wise, Hayw. & H. 82, Fed. Cas. No. 16746a; United States v. Hart, Pet. C. C. 90, Fed. Cas. No. 15316. ENG.—Genner v Sparkes, 1 Salk. 79, 91 Eng. Repr. 74.

1 A notable exception is Roscoe's Criminal Evidence, in which the term apprehend is uniformly used.

2 John Cowell, author of "The Interpreter," writing in the latter part of the sixteenth century, says: "A man apprehended for debt is said to be arrested."

A recent misapprehension of the true import and nice shade in the meaning of the word apprehend, and of its proper application, is to be found in the third revised edition of Bouvier's Law Dictionary (vol. I, p. 241), where the editor, under the head of "arrest," in the subdivision "in civil practice," says that arrest is "the apprehension of a person by virtue of a legal authority to answer to the demands against him in a civil action," citing Gentry v. Griffith, 27 Tex. 461, 462, which case nowhere furnishes any support to the text, the point involved being the matter of a legislator's privilege from "arrest," which was held not to include citation or notice to appear. The editor might with propriety have cited Town of Hamden v. Collins, 85 Conn. 327, 82 Atl. 636, 638, in which the court uses the language: "Apprehension of a person under a mesne process to answer in a civil action is an 'arrest'."

noted further that this undiscriminating use of the words "apprehend" and "arrest" has been carried into many, if not most, of the state constitutions,[3] statutes and codes.[4]

§ 5. Derivation of the words—Etymological distinctions. The derivation of the words "apprehend" and "arrest," and the nice etymological distinctions in the shades of meaning of the root-words, justify the distinction above contended for in the use of those words; but to those who do not look beneath the general import and meaning of the root-words it also seems to lend justification for the vernacular use of the words interchangeably as synonyms.

§ 6. Same—Apprehend. The word "apprehend" represents words in the French[1] and Latin[2] meaning, ultimately, "to lay hold upon, seize," and from its earliest use in English this word has the "lay hold upon, seize" idea, being applied with reference to literal laying hold, legal laying hold; and applied, in law, means to seize, seize upon, to take hold of, to take into custody of the law, to make a prisoner of a person—especially seizing a criminal, or one reasonably presumed to have com-

3 As, for example, in Ala. Const. 1901, art. I, § 5; La. Const., art. 204.

4 As Ala. Code 1907, § 6270; Cal. Pen. Code, §§ 836, 839; Ga. Pen. Code 1895, § 896; Idaho Pen. Code 1901, § 5236, and Pen. Code 1903, § 834; Ky. Cr. Code Prac., §§ 37, 38; Miss. Code 1892, § 1387; Mo. Rev. Stats. 1899, § 2540; N. Y. Code Cr. Proc., §§ 117, 177, 183, and Cr. Code 1903, § 167; N. D. Rev. Codes 1899, § 7912; Ohio Gen. Code, §§ 12, 525; Ore. Ann. Codes & Stats. 1901, § 1601; Tenn. Shannon's Code, § 6997; Tex. Code Cr. Prac. 1895, arts. 42, 80, 114, and Pen. Code 1911, art. 479, and Utah Rev. Stats. 1898, § 4635.

1 Century Dictionary: Old French apprehendre, modern French apprehender; Universal Dict.: French apprehendre, apprehender—to seize; Webster's Dict.: French apprehender.

2 Burrill's Law Dictionary derives from Latin apprehendere—to take hold of; Century Dict.: From apprehendere and adhendere—lay hold upon, seize; Dr. Johnson's Dict. (ed. 1775): Derives from Latin apprehendo, and defines "to seize for trial and punishment"; Universal Dict.: Ap-

mitted an offense against the criminal law, and bringing him to justice.[3]

§ 7. Same—Arrest. The word "arrest" represents words from the French[1] and Latin[2] which mean,[3] literally, "to stop, restrain."[4] The word "arrest" is first recorded in Middle English in a few intransitive quotations meaning "to come to a stand, halt, stay." Its earliest transitive use in English—half a century later—means "to cause to stop, check or hinder the motion or action of," and, also about the same time, "to lay hold upon by legal authority."[5] In State v. Buxton,[6] the North Carolina court says that "the word 'arrest' has a technical meaning, applicable to legal proceedings. It implies that a person is thereby restrained of his liberty

prehendo; Webster's Dict.: Apprehendere—to lay hold of, seize.

3 "The term apprehension is more often applied to criminal cases, and arrest to civil cases; as, one having authority, may arrest on civil process, and apprehend on a criminal warrant," 1 Bouvier's L. Dict. (3rd ed.), pp. 217, 243.

1 Century Dictionary: Middle English aresten and arresten, derived from Old French arester, modern French arrêter—stop, restrain; Dr. Johnson's Dict. (ed. 1775): Arrester—to stop; Universal Dict. (same derivation); Webster's Dict.: Old French arester, modern French arrêter.

2 Century Dictionary: Medieval Latin, arrestare—stop, restrain; Webster's Dict.: Arrestare.

3 The Latin elements being "ad," to, and "restare," stay back, remain; restare, "re" signifies back and "stare," stand.

4 See discussion in Legrand v. Bedenger, 20 Ky. (4 T. B. Mon.) 539.

Old examples are also on record, of arrest being used in the literal sense of "laying hold upon, seize"—as in 1481, beasts are spoken of as arresting with their claws all that they can hold.

5 Jacobs says: "Arrest (arrestum) cometh from the French word arrester, to stop or stay. It is a restraint of a man's person, obliging him to be obedient to the law, and is defined to be the execution of a command of some court of record or officer of justice."—Jacobs' Law Dict., tit. "Arrest."

Tomlinson says: "An arrest is the beginning of an imprisonment, where a man is first taken and restrained of his liberty, by power or color of a lawful warrant; also it signifies the decree of a court by which a person is arrested."—Tomlinson's L. Dict., tit. "Arrest."

6 102 N. C. 129, 8 S. E. 774.

by some officer or agent of the law armed with lawful process authorizing and requiring the arrest to be made" —which is strictly true in a civil action, but is not correct when applied to those cases where a person is alleged or supposed to have committed an offense against the criminal or penal laws, for in such a case, in many instances, an apprehension may be made either by an officer of the law or by a private person, and with or without a warrant or process issuing out of some court, or a direction of some officer of justice "authorizing and requiring" the act to be done.[7] This is one of the technical distinctions between an apprehension and an arrest.

§ 8. SAME—ANOTHER GROUND OF DISTINCTION. A distinction better drawn than between criminal charges and civil cases would be one that recognizes in "apprehend" a mere act of seizing, or taking into custody, and "arrest" a placing under certain (prolonged) legal restraints—a difference of intention rather than of effect. The ground for such a distinction is more apparent in considering the nouns "apprehension" and "arrest," the legal apprehension of a man being a single act and also the legal arrest of him, whereas he might be said to be under arrest, but can hardly be said to be under apprehension.

[7] **At common law** private persons are justified, without a warrant, in apprehending and detaining until they can be carried before a magistrate, all persons found committing or attempting to commit a felony (R. v. Hunt, 1 Moo. C. C. 93); but it was otherwise as to crimes less than a felony.—Foster P. C. 318.

Private persons may make arrest, at common law, for a breach of the peace or a misdemeanor committed in their actual presence, as well as may an officer of the law.—Rich v. Bailey, 123 Ky. 827, 97 S. W. 787.

——**Kentucky Criminal Code**, § 35, has changed the common-law rule, providing arrests may be made by a peace officer or private person, declaring a private person may arrest when he has reasonable grounds to believe the person has committed a felony.—Rich v. Bailey, 123 Ky. 827, 97 S. W. 747.

Peace officers may, without a warrant, apprehend and detain persons on a reasonable suspicion that they have been guilty of the commission of a felony.—1 East. P. C. 301; 2 Hale P. C. 83, 84, 89.

§ 9. SAME—DIFFERENCE OF ULTIMATE MEANING, SIMILARITY IN USE. From what has been said it will be seen that though the ultimate meanings of the two words are somewhat different, and though "apprehend" might be taken to represent more markedly a seizure idea naturally associated with criminal charges, both words seem to have been used in English during the sixteenth century, without distinction, to represent the idea of "seize" and "lay hold upon by legal authority"; and the distinction of "apprehend" with reference to criminal charges and "arrest" with reference to civil cases, is apparently modern. It would seem, though, as if this distinction were based on an appreciation of the ultimate etymological sense of the two words, "apprehend" being given more to the original "seizing" idea of the word, "arrest" being given more to the original "stop, restrain" and "check or hinder the motion of" idea.

So far as the practical application is concerned in law, aside from the etymological and nice technical distinction between the two words, which has been pointed out, and the protection vouchsafed to "officers of the law" taking persons into custody in the shape of immunity from damages for the apprehension or arrest are concerned—with which this chapter has nothing to do—an apprehension and an arrest, in the popular understanding, describe the same overt act, namely, the act of seizing the person and detaining of his liberty and holding to answer to the court, by putting hands upon his body or clothing, or by any other act manifesting an intention and showing an ability to take him into custody, to the end that he may be forthcoming to answer in a court of justice, implies force, and applies not only to the original taking, but also to the continued detention of the person in custody.[1] To this extent, only, are the words synonymous and interchangeable.

1 "To arrest is to seize and retain a person in the custody of the law."—Baltimore & O. R. Co. v. Strube, 111 Md. 119, 73 Atl. 697.

CHAPTER II.

APPREHENSION—PRIVILEGE FROM ARREST.

§ 10. Generally. As a general proposition, no person is privileged from apprehension for treason or felony in any form, or for a misdemeanor, but there are certain privileges from arrest in civil actions, or even from the service of civil process requiring the taking of the person, in some cases.[1] The question of this privilege, while quite an important one and not without serious conflict in cases of the various jurisdictions, does not fall within the scope of this treatise, except in so far as it may have a bearing upon the question of immunity from arrest of parties or witnesses in a criminal proceeding while they are in necessary attendance upon the business of the trial and disposition of the case, going to and returning therefrom, and the extent of their privilege.

1 See, however, authorities in § 20, post.

Privilege from arrest is confined to parties in civil proceedings, unless it appears that the apprehension upon a criminal charge was merely a subterfuge to get defendant into custody in a civil suit.—Com. v. Daniel, 4 Clark (Pa.) 49, 6 Pa. law J. 330.

Witnesses attending court are not privileged from apprehension where charged with an indictable offense.—Ex parte Levi, 28 Fed. 651.

An outline of the general principle will be sufficient to show the reason for the rule in criminal cases, and is all that is attempted in this chapter.

§ 11. PARTIES AND WITNESSES—RESIDENT. It has long been the settled doctrine in this country—following the common law in this regard—that the parties[1] to an action,

[1] ARK.—Martin v. Bacon, 76 Ark. 160, 113 **Am. St. Rep.** 81, 6 **Ann. Cas.** 336, 88 S. W. 863. CAL.—Page v. Randall, 6 Cal. 332 (exempt from arrest, but not from ordinary process). ILL.—Graeer v. Young, 120 Ill. 184, 11 N. E. 167; Gregg v. Sumner, 21 Ill. App. 110. IND.—Wilson v. Donaldson, 117 Ind. 356, 3 **L. R. A.** 266, 20 N. E. 250. MD.—Long v. Hawken, 114 Md. 237, 42 **L. R. A.** (N. S.) 1101, 79 Atl. 190. MASS.—Com. v. Huggeford, 26 Mass. (9 Pick.) 257; Wood v. Neale, 72 Mass. (6 Gray) 538; Thompson's Case, 122 Mass. 428, 23 **Am. Rep.** 370. MICH.—Case v. Rosabacher, 15 Mich. 537; Jacobson v. Hosmer, 76 Mich. 234, 42 N. W. 1110. MINN.—First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308. NEB.—Palmer v. Rowan, 21 Neb. 452, 59 **Am. Rep.** 844, 32 N. W. 210. N. J.—Harris v. Granthan, 1 **N. J. L.** (Coxe) 142; Halsey v. Stewart, 4 N. J. L. (1 South.) 366; Dungan v. Miller, 37 N. J. L. (8 Vr.) 182. N. Y.—Clark v. Grant, 2 Wend. 257; Williams v. Bacon, 10 Wend. 636; Snelling v. Waterous, 2 Paige Ch. 314; Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Mathews v. Tufts, 87 N. Y. 568 (as creditor in bankruptcy proceedings and attorney for other creditors); Murphy v. Sweezy, 2 N. Y. Supp. 241. N. C.—Cooper v. Wyman, 122 N. C. 787, 65 **Am. St. Rep.** 731, 29 S. E. 947. N. D.—Hicks v. Besuchet, 7 N. D. 434. 66 **Am. St. Rep.** 655, 75 N. W. 793 (witness as well as litigant). OHIO—Compton v. Wilder, 40 Ohio St. 130; Barber v. Knowles, 77 Ohio St. 81; 14 **L. R. A.** (N. S.) 663, 82 N. E. 1065. PA.—Miles v. McCullough, 1 Binn. 77; Hayes v. Shields, 2 Yeates 222; Com. v. Donald, 4 Clark 49. R. I.—Waterman v. Merritt, 7 R. I. 345; Ellis v. Garmo, 17 R. I. 715, 19 **L. R. A.** 560, 24 Atl. 579. S. D.—Fisk v. Westover, 4 S. D. 235, 46 **Am. St. Rep.** 780, 55 N. W. 961. VA.—Richards v. Goodson, 2 Va. Cas. 381. WIS.—Moletor v. Sinnen, 76 Wis. 308, 20 **Am. St. Rep.** 71, 7 **L. R. A.** 817, 44 N. W. 1099. FED.—Bridges v. Sheldon, 18 Blatchf. 507, 7 Fed. 17; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7582; United States v. Bridgman, 9 Biss. 221, Fed. Cas. No. 14645; Blight v. Fisher, 1 Pet. C. C. 41, Fed. Cas. No. 1542; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10739; Brooks v. Farwell, 4 Fed. 166; Wilson Sewing Machine Co. v. Wilson, 22 Fed. 803; Small v. Montgomery, 23 Fed. 707; Kauffman v. Kennedy, 25 Fed. 785; Davis v. Cleveland, C. C. & St. L. R. Co., 146 Fed. 407.

Party attending trial as witness exempt from arrest on civil proc-

and their witnesses,[2] attending in good faith a legal tri-

ess.—Mackay v. Lewis, 7 Hun (N. Y.) 83.

Does not waive privilege by giving bond.—Mackay v. Lewis, supra. See Dickinson v. Farwell, 71 N. H. 213, 51 Atl. 624.

Contra: Tipton v. Harris, 7 Tenn. (Peck.) 414.

2 ARK.—Martin v. Bacon, 76 Ark. 160, 113 Am. St. Rep. 81, 6 Ann. Cas. 336, 88 S. W. 868 (summoned in a case in which he is also a party). CONN.—Bishop v. Vose, 27 Conn. 1; Chittenden v. Carter, 82 Conn. 590, 18 Ann. Cas. 125, 74 Atl. 884 (interested in suit, but not a party). IND.—Wilson v. Donaldson, 117 Ind. 356, 10 Am. St. Rep. 48, 3 L. R. A. 266, 20 N. E. 250. KAN.—Bolz v. Crane, 64 Kan. 572, 67 Pac. 1108. MAINE —Smith v. Jones, 76 Maine 138, 49 Am. Rep. 598. MD.—Bolgiano v. Gilbert Lock Co., 73 Md. 134, 20 Am. St. Rep. 582, 20 Atl. 788; Long v. Hawken, 114 Md. 237, 42 L. R. A. (N. S.) 1101, 79 Atl. 190. MASS. —Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370. MICH.—Letherby v. Shaver, 73 Mich. 500, 41 N. W. 677; Monroe v. St. Clair Circuit Judge, 125 Mich. 283, 52 L. R. A. 189, 84 N. W. 305. MINN. —Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308. MO.—Christian v. Williams, 111 Mo. 429, 20 S. W. 96. NEB.— Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210. N. H. —Ela v. Ela, 68 N. H. 314, 36 Atl. 15. N. J.—Jones v. Knauss, 31 N. J. Eq. (4 Stew.) 211; Dugan v. Miller, 37 N. J. L. (8 Vr.) 182; Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 Am. Rep. 754; Mulhearn v. Press Publishing Co., 53 N. J. L. 150, 11 L. R. A. 101, 21 Atl. 186. N. Y.—Sanford v. Chase, 3 Cow. 381; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 25; Parker v. Marco, 136 N. Y. 585, 32 Am. St. Rep. 770, 20 L. R. A. 45, 32 N. E. 989; Mackay v. Lewis, 7 Hun 83; Lamkin v. Starkey, 7 Hun 479; Thorp v. Adams, 58 Hun 63, 11 N. Y. Supp. 41; Hollender v. Hall, 58 Hun 603, 11 N. Y. Supp. 759. N. C.—Cooper v. Wyman, 122 N. C. 787, 65 Am. St. Rep. 731, 29 S. E. 947; White v. Underwood, 125 N. C. 25, 74 Am. St. Rep. 630, 46 L. R. A. 706, 34 S. E. 104. N. D.—Hicks v. Besuchet, 7 N. D. 434, 66 Am. St. Rep. 665, 75 N. W. 793 (suitor as well as witness). R. I.—Baldwin v. Emerson, 16 R. I. 34, 15 Atl. 83; Capwell v. Sipe, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14. S. C. —Breon v. Miller Lumber Co., 83 S. C. 225, 24 L. R. A. (N. S.) 278, 65 S. E. 214. S. D.—Fisk v. Westover, 4 S. D. 235, 46 Am. St. Rep. 780; 55 N. W. 961; Malloy v. Brewer, 7 S. D. 591, 58 Am. St. Rep. 586, 64 N. W. 1120. TENN.— Sewanee Coal, Coke & Lumber Co. v. Williamson & Co., 120 Tenn. 339, 107 S. W. 968. VA.—Com. v. Ronald, 4 Call. 97 WIS.—Moletor v. Sinnen, 76 Wis. 308, 20 Am. St. Rep. 71, 7 L. R. A. 817, 44 N. W. 1099. FED.—Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7582; Bridges v. Seldon, 18 Blatchf. 507, 7 Fed. 17; Blight v. Fisher, 1 Pet. C. C. 41, Fed. Cas. No. 1542; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10739; Brooks v. Farwell, 4 Fed. 166; Small v.

bunal,[3] are privileged in all jurisdictions from arrest[4] in a civil suit during such attendance, and have a reasonable time in going to and returning therefrom;[5] and in some

Montgomery, 23 Fed. 707; Kauffman v. Kennedy, 25 Fed. 785.

Voluntarily attending trial as a witness, service of process not void, but may be set aside by the court.—Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754.

Witness at lodgings while engaged in suit, privileged. Hurst's Case, 4 U. S. (4 Dall.) 387, 1 **L. Ed.** 878, Fed. Cas. No. 6924; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. 10793 (during day on which plaintiff nonsuited).

3 **While in actual attendance,** and have a reasonable time to prepare for departure.—Corn v. Ronald, 4 Call (Va.) 97; Richards v. Goodson, 2 Va. Cas. 381; Smythe v. Banks, 4 U. S. (4 Dall.) 329, 1 **L. Ed.** 154 (not for the whole term, or while transacting private business).

Attending reference before master, and in vacation.—Huddeson v. Prezir, 9 Phila. (Pa.) 65; Vincent v. Watson, 1 Rich. L. (S. C.) 194; Sidgier v. Berch, 9 Ves. 69, 32 Eng. Repr. 527.

Spectator not exempt.—McIntyre v. McIntyre, 5 Mack. (D. C.) 344.

4 **Service of writ in civil act not an arrest,** without statutory provision that "all persons necessarily going to, attending, or returning from the same," the superior court, "shall be free from arrest in any civil action."—Huntington v. Shultz, Harp. (S. C.) 452, 18 **Am. Dec.** 660.

5 GA.—Thornton v. American Writing Machine Co., 83 Ga. 288, 20 **Am. St. Rep.** 320, 9 S. E. 679. ILL.—Green v. Young, 120 Ill. 189, 11 N. E. 167. MICH.—Munroe v. St. Clair Circuit Judge, 125 Mich. 285, 52 **L. R. A.** 190, 84 N. W. 305. N. J.—Rogers v. Bullock, 3 N. J. L. (2 Pen.) 516 (subpoena served, necessary to indemnity for arrest); Halsey v. Stewart, 4 N. J. L. (1 South.) 366; Jones v. Knauss, 31 N. J. Eq. (4 Stew.) 211 (subpoena necessary to immunity). N. Y.—Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Parker v. Marco, 136 N. Y. 585, 32 **Am. St. Rep.** 770, 20 **L. R. A.** 45, 32 N. E. 989. N. C.—Moore v. Green, 73 N. C. 394, 21 **Am. Rep.** 470; Cooper v. Wyman, 122 N. C. 785, 65 **Am. St. Rep.** 371, 29 S. E. 947. PA.—Miles v. McCullough, 1 Binn. 77; Kay v. Jetto, 1 Pittsb. 117. R. I.—Capwell v. Sipe, 17 R. I. 475, 33 **Am. St. Rep.** 890, 23 Atl. 14. VT.—Scott v. Curtis, 27 Vt. 762. WIS.—Anderson v. Rountree, 1 Pin. 115; Cameron v. Roberts, 87 Wis. 291, 41 **Am. St. Rep.** 43, 58 N. W. 376. FED.—Lyell v. Goodwin, 4 McL. 29, Fed. Cas. No. 8616; Atchison v. Morris, 11 Fed. 582 (service not void, but voidable). ENG.—Hare v. Hide, 16 Q. B. (16 Ad. & E. N. S.) 394, 71 Eng. C. L. 394, 71 Eng. C. L. 393, 20 L. G. Q. B. N. S. 185, 15 Jur. 315; Anonymous, 1 Dowl. P. C. 175; Jacobs v. Jacobs, 3 Dowl. P. C. 675; Rex v. Douglas, 7 Jur. 39.

Amount of time allowed, a rea-

jurisdictions this immunity extends to freedom from service of a citation or a summons as well as to an arrest.[6] This immunity applies whether they are attending in the

sonable time, both going and coming.—Gregg v. Sumner, 21 Ill. App. 110; Bolgiano v. Gilbert Lock Co., 73 Md. 132, 25 **Am. St. Rep.** 582, 20 Atl. 788; Brett v. Brown, 13 Abb. Pr. N. S. (N. Y.) 295; Cooper v. Wyman, 122 N. C. 784, 65 **Am. St. Rep.** 731, 29 S. E. 947; Barber v. Knowles, 77 Ohio St. 81, 14 **L. R. A.** (N. S.) 663, 82 N. E. 1065; Ferree v. Pierce, 25 Pa. Co. Ct. 112 (an hour reasonable limit of exemption); Smythe v. Banks, 4 U. S. (4 Dall.) 329, 1 L. ed. 854, Fed. Cas. No. 13134; Lightfoot v. Cameron, 2 W. Bl. 1113, 96 Eng. Repr. 658 (suitor remaining in court after case seven or eight hours to get an opportunity to confer with his counsel, and going to dine with counsel and witnesses at tavern privileged); Silby v. Hills, 1 Moore & S. 253 (suitor on direct route home two hours after hearing, although he made some stops, privileged); Anonymous, 1 Smith 355 (remaining in town from middle of afternoon until middle of afternoon next day privilege lost where home but twelve miles distant); Mahon v. Mahon, 2 Ir. Eq. Rep. 440 (suitor, on way to solicitor's house to arrange as to exhibits, stopping at exhibition of pictures does not lose privilege).

Deviation. Suitor or witness not bound to return home by the nearest route.—Pitt v. Coomes, 5 Bar. & Ad. 1078, 110 Eng. Repr. 1091, 27 Eng. C. L. 452 (suitor stopping two hours at office to assort the papers, and calling at tailor shop later, both on way home, not a deviation and privilege not lost); Randall v. Gurney, 1 Chitty 679, 18 Eng. C. L. 370 (witness going out of course to secure papers required as exhibits, loses his privilege, a deviation); Ricketts v. Gurney, 1 Chitty 682, 18 Eng. C. L. 372 (witness going out of way to secure papers required as exhibits, does not lose his privilege); Willingham v. Matthews, 6 Taunt. 356, 128 Eng. Repr. 1072; 1 Eng. C. L. 652 (going somewhat out of way and stopping at a shop, privilege not lost).

Going beyond home without stopping, suitor loses his privilege. —Heron v. Stokes, 41 N. C. (6 Ir. Eq.) 125.

6 GA.—Thornton v. American Writing-Machine Co., 83 Ga. 288, 20 **Am. St. Rep.** 320, 6 **L. R. A.** 73, 9 S. E. 679. MD.—Peters v. League, 13 Md. 58, 71 **Am. Dec.** 622 (service not void, but irregular). MICH.—Letherby v. Shaver, 73 Mich. 500, 41 N. W. 677. N. J.—Jones v. Knauss, 31 N. J. Eq. (4 Stew.) 211. Dugan v. Miller, 37 N. J. L. (8 Vr.) 182; Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754. N. Y.—Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35. OHIO—Andrews v. Lembeck, 46 Ohio St. 38, 15 **Am. St. Rep.** 547, 18 N. E. 483; Barber v. Knowles, 77 Ohio St. 81, 14 **L. R. A.** (N. S.) 663, 82 N. E. 1065. PA.—Miles v. McCullough, 1 Binn. 47. VT.—In re Healey, 53 Vt. 496, 38 **Am. Rep.** 713. WIS.—Andrews v. Rountree,

county of their residence, in another county in the same state,[7] or in another state.[8] As has been well said in a New York case,[9] "this immunity does not depend upon statutory provisions, but is deemed necessary for the administration of justice; it is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority."[10]

The foundation of the rule, in common law, is the impolicy of permitting any action which will deter suitors and witnesses from coming into court[11] and thus impeding the process of justice; for it is the policy, both at common law and under the procedure in the various jurisdictions in this country, that witnesses should be produced

1 Pin. 115; Cameron v. Roberts, 87 Wis. 291, 41 **Am. St. Rep.** 43, 58 N. W. 376. FED.—Lyell v. Goodwin, 4 McL. 29, Fed. Cas. No. 8616; Matthews v. Puffer, 10 Fed. 66; Atchison v. Morris, 11 Fed 582; Larned v. Griffin, 12 Fed. 590.

Voluntary appearance, not exempt. Jones v. Knauss, 41 N. J. Eq. (4 Stew.) 211 (subpoena necessary to immunity).

Contra: Walpole v. Alexander, 3 Doug. 45, 99 Eng. Repr. 350, 26 Eng. C. L. 41.

7 ARK.—Powers v. Arkadelphia Lumber Co., 61 Ark. 508, 54 **Am. St. Rep.** 276, 33 S. W. 842; Martin v. Bacon, 76 Ark. 160, 113 **Am. St. Rep.** 81, 6 **Ann. Cas.** 336, 88 S. W. 868. CONN.—Chittenden v. Carter, 82 Conn. 590, 18 **Ann. Cas.** 125, 74 Atl. 884. ILL.—Gregg v. Sumner, 21 Ill. App. 110. KAN.—Bolz v. Crone, 64 Kan. 572, 67 Pac. 1108; Underwood v. Fosha, 73 Kan. 413, 9 **Ann. Cas.** 833, 85 Pac. 564. MASS.—Thompson's case, 122 Mass. 428, 33 **Am. Rep.** 370. MICH.—Jacobson v. Hosmer, 76 Mich. 234, sub nom. Jacobson v. Wayne Circuit Judge, 42 N. W. 1110. N. Y.—Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Matthews v. Tufts, 87 N. Y. 566; Hess v. Flansburg, 26 N. Y. Supp. 329. N. D.—Hicks v. Besuchet, 7 N. D. 434, 66 **Am. St. Rep.** 665, 75 N. W. 793. PA.—Addicks v. Bush, 1 Phila. 19. S. C.—Breon v. Miller Lumber Co., 83 S. C. 225, 24 **L. R. A.** (N. S.) 278, 65 S. E. 214. FED. —Larned v. Griffin, 12 Fed. 590; Central Trust Co. v. Milwaukee St. R. Co., 74 Fed. 442. ENG. —Goodwin v. Lordon, 1 Ad. & El. 378, 110 Eng. Repr. 1251, 28 Eng. C. L. 188.

8 See post, § 12.

9 Matthews v. Tufts, 87 N. Y. 570.

10 See Moore v. Greene, 73 N. C. 473; White v. Underwood, 125 N. C. 25, 74 **Am. St. Rep.** 630, 46 **L. R. A.** 706, 34 S. E. 104.

11 Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754; White v. Underwood, 125 N. C. 25, 74 **Am. St. Rep.** 630, 46 **L. R. A.** 706, 34 S. E. 104.

in court and have oral examination, as well as that parties to the action shall have full opportunity to be present and to be heard when their cases are reached and tried.[12] It is held to be the duty of the court to foster this policy from which the privilege and immunity spring.[13]

The privilege is a very ancient immunity, extending to every proceeding of a judicial nature taken in and under the direction of, or emanating from a duly constituted tribunal, which directly relates to the trial and determination of the issues involved in the cause,[14]—as to a hearing or reference,[15] bankruptcy proceedings,[16] and the

12 First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35, affirming Person v. Pardee, 6 Hun (N. Y.) 477.

13 Mitchell v. Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176; Hoffman v. Circuit Judge, 113 Mich. 109, 67 Am. St. Rep. 458, 38 L. R. A. 663, 71 N. W. 480; Merrill v. George, 23 How. Pr. (N. Y.) 331.

14 Powers v. Arkadelphia Lumber Co., 61 Ark. 508, 54 Am. St. Rep. 276, 33 S. W. 842; Parker v. Marco, 136 N. Y. 585, 32 Am. St. Rep. 770, 20 L. R. A. 45, 32 N. E. 989; Holmes v. Nelson, 1 Phila. (Pa.) 217 (taking depositions for use in case in United States supreme court); Ladd Metal Co. v. American Min. Co., 152 Fed. 1008 (taking depositions).

Any legal tribunal, whether a court of record or not.—Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

Attending injunction hearing in county other than that of residence, privileged.—Andrews v. Lembech, 46 Ohio St. 38, 15 Am. St. Rep. 547, 20 N. E. 549.

Attending sale under judicial decree, not exempt.—Greenleaf v. People's Bank, 133 N. C. 293, 98 Am. St. Rep. 709, 63 L. R. A. 499, 45 S. E. 638.

Witness in own behalf before legislature to establish claim against the state, privileged from arrest.—Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

15 Mulehon v. Press Publishing Co., 53 N. J. L. 153, 11 L. R. A. 101, 20 Atl. 186 (testifying before court commissioner on motion to set aside service of summons); Dickinson v. Farwell, 71 N. H. 215, 51 Atl. 624; Dugan v. Miller, 37 N. J. L. (8 Vr.) 182 (hearing before master in chancery); Carstains v. Knapp, 3 W. N. C. (Pa.) 292 (hearing before magistrate, going and coming from court).

Taking depositions.—Powers v. Arkadelphia Lumber Co., 61 Ark. 508, 54 Am. St. Rep. 276, 33 S. W. 842; Holmes v. Nelson, 1 Phila. (Pa.) 217 (attending as stockholder and attorney); Ladd Metal Co. v. American Min. Co., 152 Fed. 1008.

16 Matthews v. Tufts, 87 N. Y. 568.

like. Mr. Justice Cooley says in a well-considered Michigan case,[17] that "there is no doubt whatever that the privilege exists in the case of all proceedings in their nature judicial, whether taking place in court or not."

§ 12. SAME. NONRESIDENT. On principle, it would seem that this rule and the immunity should apply with especial force to nonresident suitors and witnesses, and while there is a marked cleavage in the judicial decisions upon this question[1] the better rule and the weight of precedent confirm the privilege and exemption,[2] whether the party

17 People v. Judge, 40 Mich. 729.

1 "Upon principle, as well as upon authority, this immunity . . . against them is absolute eundo, morando et redeundo. This rule is especially applicable in all its force to suitors and witnesses from foreign states attending upon the courts of this state . . . This immunity is one of the necessities for the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process." —Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

"The weight of authority is to the effect that the immunity is absolute from the service of any process unless the case is special." —In re Healey, 53 Vt. 694, 38 Am. Rep. 713.

2 ARK.—Martin v. Bacon, 76 Ark. 160, 113 Am. St. Rep. 81, 6 Ann. Cas. 336, 88 S. W. 863. CONN.—Wilson Sewing Machine Co. v. Wilson, 51 Conn. 595, 52 Fed. 803. GA.—Thornton v. American Writing-Machine Co., 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 697. ILL.—Gregg v. Sumner, 21 Ill. App. 110. IND.—Wilson v. Donaldson, 117 Ind. 356, 10 Am. St. Rep. 48, 3 L. R. A. 266, 20 N. E. 250; Minnich v. Packard, 42 Ind. App. 373, 85 N. E. 787. IOWA.—Murray v. Wilcox, 122 Iowa 188, 101 Am. St. Rep. 263, 64 L. R. A. 534, 97 N. W. 1087. MD.—Bolgiano v. Gilbert Lock Co., 73 Md. 132, 25 Am. St. Rep. 582, 20 Atl. 788; Mullen v. Sanborn, 79 Md. 364, 47 Am. St. Rep. 421, 25 L. R. A. 721, 29 Atl. 522; Long v. Hawken, 114 Md. 237, 42 L. R. A. (N. S.) 1101, 79 Atl. 190. MASS.—Chaffee v. Jones, 36 Mass. (19 Pick.) 260 (remaining for funeral of son); Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370. MICH.—Weale v. Clinton Circuit Judge, 158 Mich. 565, 123 N. W. 31. NEB.—Linton v. Cooper, 54 Neb. 438, 69 Am. St. Rep. 727, 74 N. W. 842 (twenty-four hours, not a waiver by witness where case not finished). N. H.—Ela v. Ela, 68 N. H. 312, 36 Atl. 15. N. J.—Harris v. Grantham, 1 N. J. L. (Coxe) 142; Halsey v. Stewart, 4 N. J. L. (1 South.) 366; Jones v. Knauss, 31 N. J. Eq. (4 Stew.) 211. N. Y.—Clark v. Grant, 2 Wend. 257 (waiting two days for report of

referee, and to prepare papers for motion to set aside report); Sanford v. Chase, 3 Cow. 388; Seaver v. Robinson, 3 Duer. 622; Norris v. Beach, 2 John. 294; Baurs v. Tuckerman, 7 John. 538 (immunity applies to nonresidents only); Hopkins v. Coburn, 1 Wend. 292; Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Parker v. Marco, 136 N. Y. 585, 32 **Am. St. Rep.** 77, 20 **L. R. A.** 45, 32 N. E. 989 (starting morning after notified not needed further, witness privileged); Finch v. Galligher, 25 Abb. N. S. 404, 12 N. Y. Supp. 487 (remaining two days with nothing to detain, privilege lost); Merrill v. George, 23 How. Pr. 331 (privilege accorded to nonresidents only); Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461 (exemption from arrest, but not from service of summons in civil action); Pope v. Negus, 14 N. Y. Civ. Proc. Rep. 406, 3 N. Y. Supp. 796 (remaining three hours after giving testimony, case not being finished, and he not knowing whether he would be recalled); Marks v. De L'Union Des Papeteries, 22 N. Y. Civ. Proc. Rep. 201, 19 N. Y. Supp. 470 (unnecessarily remaining two months, lost). N. C.—Hammerscald v. Rose, 52 N. C. (7 Jones L.) 629; Cooper v. Wyman, 122 N. C. 784, 65 **Am. Rep.** 731, 29 S. E. 947. N. D.—Hicks v. Besuchet, 7 N. D. 429, 66 **Am. St. Rep.** 665, 75 N. W. 793. OHIO—Barber v. Knowles, 77 Ohio St. 81, 14 **L. R. A.** (N. S.) 663, 82 N. E. 1065. PA.—Miles v. McCullough, 1 Binn. 77; Hayes v. Shields, 2 Yeates 222 (remaining twenty-four hours after verdict, forfeits exemption); Tyrone Bank v. Daly, 2 Pa. Dis. R. 558 (starting next day after verdict, not exempt). R. I.—Ellis v. De Garmo, 17 R. I. 715, 19 **L. R. A.** 560, 24 Atl. 579; Eliason's Petition, 19 R. I. 118, 32 Atl. 166. S. D.—Fick v. Westover, 4 S. D. 233, 46 **Am. St. Rep.** 780, 55 N. W. 961; Malloy v. Brewer, 7 S. D. 587, 58 **Am. St. Rep.** 856, 64 N. W. 1120. VT.—Hall's Case, 1 Tyl. 274; In re Healey, 53 Vt. 694, 38 **Am. Rep.** 713. WIS.—Moletor v. Sinnen, 76 Wis. 308, 20 **Am. St. Rep.** 71, 7 **L. R. A.** 817, 44 N. W. 1099; Cameron v. Roberts, 87 Wis. 291, 41 **Am. St. Rep.** 43, 58 N. W. 376. FED.—Smythe v. Banks, 4 U. S. (4 Dall.) 329, 1 **L. Ed.** 854; Hurst's Case, 4 U. S. (4 Dall.) 387, 1 **L. Ed.** 386; Lyell v. Goodwin, 4 McL. 29, Fed. Cas. No. 8616; Bridges v. Sheldon, 7 Fed. 36; Larned v. Griffin, 12 Fed. 590; Hale v. Wharton, 76 Fed. 739; Davis v. Cleveland C. C. & St. L. R. Co., 146 Fed. 407. ENG.—Cole v. Hawkins, Andrews 275, Eng. Repr.; Walpole v. Alexander, 3 Dougl. 45, 99 Eng. Repr. 530, 26 Eng. C. L. 41; Thinder v. Williams, 4 T. R. 377.

An ancient privilege, independent of statute, and liberally construed.—Coal, Coke & Lumber Co. v. Williamson & Co., 122 Tenn. 342, 107 S. W. 968.

Need not take first train home. —Kinsey v. American Hardwood Mfg. Co., 94 N. Y. Supp. 455; Wilbur v. Boyer, 1 W. N. C. (Pa.) 154.

Remaining several days consulting with counsel and advising as to cause and its conduct, exempt. —Kinney v. Lant, 68 Fed. 436.

Taking first or an early train home, privilege not lost.—Fidelity & Casualty Co. v. Everett, 97 Ga. 787, 25 S. E. 734; Sherman v.

involved in the particular case was attending as a suitor,[3]

Gundlach, 37 Minn. 118, 33 N. W. 549; Hicks v. Besuchet, 7 N. D. 429, 66 Am. St. Rep. 665, 75 N. W. 793; Kinney v. American Hardwood Mfg. Co., 94 N. Y. Supp. 455.

3 ARK.—Martin v. Bacon, 76 Ark. 160, 113 Am. St. Rep. 81, 6 Ann. Cas. 336, 88 S. W. 863. IND.—Minnick v. Packard, 42 Ind. App. 373, 85 N. E. 787. MD.—Long v. Hawken, 114 Md. 237, 42 L. R. A. (N. S.) 1101, 79 Atl. 190. NEB.—Linton v. Cooper, 54 Neb. 440, 69 Am. St. Rep. 727, 74 N. W. 842. N. H.—Martin v. Whitney, 74 N. H. 506, 69 Atl. 888 (attending hearing in equity proceeding). N. J.—Halsey v. Stewart, 4 N. J. L. (1 South.) 336 (nonresident plaintiff); Dugan v. Miller, 37 N. J. L. (8 Vr.) 182 (nonresident defendant); Richardson v. Smith, 74 N. J. L. 114, 65 Atl. 162. N. Y.—Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35, following Van Lieuw v. Johnson, unreported; Parker v. Marco, 136 N. Y. 585, 32 Am. St. Rep. 770, 20 L. R. A. 45, 32 N. E. 989; Lucas v. Albee, 1 Den. 666; Goldsmith v. Haskell, 120 App. Div. 404, 105 N. Y. Supp. 327 (returning from hearing in bankruptcy); People ex rel. Hess v. Inman, 74 Hun 131, 26 N. Y. Supp. 329; Graves v. Graham, 19 Misc. 620, 44 N. Y. Supp. 415; Cake v. Haight, 30 Misc. 388, 63 N. Y. Supp. 1043. N. C.—Cooper v. Wyman, 122 N. C. 787, 65 Am. St. Rep. 731, 29 S. E. 947. OHIO—Barber v. Knowles, 77 Ohio St. 81, 14 L. R. A. (N. S.) 663, 82 N. E. 1065. S. D.—Fisk v. Westover, 4 S. D. 235, 46 Am. St. Rep. 780, 55 N. W. 961 (civil process can not be served on nonresident attending court as suitor or witness). WIS.—Cameron v. Roberts, 87 Wis. 291, 41 Am. St. Rep. 43, 58 N. W. 376. FED.—Hurst's Case, 4 U. S. (4 Dall.) 387, 1 L. Ed. 386; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7582; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10379 (nonresident defendant); Davis v. Cleveland, C. C. C. & St. L. Co., 146 Fed. 407.

In Hurst Case, 4 U. S. (4 Dall.) 387, 1 L. Ed. 386, it is held that a suitor from another state who, while in attendance on court as a suitor, has been subpoenaed as a witness in another case, is privileged from an arrest on execution out of a state court while at his lodgings.

Coming to attend to private business as well as to attend trial, exemption does not apply.—Finucane v. Warner, 194 N. Y. 163, 86 N. E. 1118.

Looker-on at court-house during hearing of another case, exemption does not apply.—McIntire v. McIntire, 5 Mack. (D. C.) 344.

Remaining for own pleasure, where case not called, defendant's privilege lost.—Cake v. Haight, 30 Misc. (N. Y.) 386, 63 N. Y. Supp. 1043.

Submitting to service under special agreement, service vacated upon plaintiff repudiating agreement.—Graves v. Graham, 19 Misc. (N. Y.) 620, 44 N. Y. Supp. 415.

Sued in federal court of another state, exemption from process in such state.—Parker v. Marco, 136

or in the capacity of a witness[4] merely, or in both the

N. Y. 585, 32 **Am. St. Rep.** 770, 20 **L. R. A.** 45, 32 N. E. 989.

Voluntarily attending court for purposes other than trial of cause, exemption from arrest does not attach.—Monroe v. Atkinson, 125 Mich. 283, 52 **L. R. A.** 189, 84 N. W. 305 (owner of vessel who delivered same under contract of sale free from liens, attending court on notice of purchaser that boat had been libeled, to try to arrange for discharge, subject to arrest in another suit).

Voluntarily in state on private legal business, not exempt.—Reed v. Browning, 130 Ind. 577, 30 N. E. 704; Levi v. Kaufman, 12 Ind. App. 348, 39 N. E. 1045.

4 ARK.—Martin v. Bacon, 76 Ark. 160, 113 **Am. St. Rep.** 81, 6 **Ann. Cas.** 336, 88 S. W. 863. IND.—Wilson v. Donaldson, 117 Ind. 256, 10 **Am. St. Rep.** 48, 3 **L. R. A.** 266, 20 N. E. 250. MD.—Bolgiano v. Gilbert Lock Co., 73 Md. 134, 25 **Am. St. Rep.** 582, 20 Atl. 788; Long v. Hawken, 114 Md. 237, 42 **L. R. A.** (N. S.) 1101, 79 Atl. 190. MICH.—Mitchell v. Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176. MINN.—Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308. NEB.—Palmer v. Rowan, 21 Neb. 452, 59 **Am. Rep.** 844, 32 N. W. 210; Linton v. Cooper, 54 Neb. 440, 69 **Am. St. Rep.** 727, 74 N. W. 842. N. H.—Ela v. Ela, 68 N. H. 314, 36 Atl. 15; Martin v. Whitney, 74 N. H. 506, 69 Atl. 888 (attending hearing in equity proceedings). N. J.—Dugan v. Miller, 37 N. J. L. (8 Vr.) 182; Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754; Richardson v. Smith, 74 N. J. L. 114, 65 Atl. 162. N. Y.—Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Matthews v. Tufts, 87 N. Y. 568; People ex rel. Ballin v. Smith, 184 N. Y. 76, 35 N. Y. Civ. Proc. Rep. 326, 76 N. E. 925 (witness in supplementary proceedings); Weston v. Citizen's Nat. Bank, 64 App. Div. 148, 71 N. Y. Supp. 827 (personal privilege which may be waived); Goldsmith v. Haskell, 120 App. Div. 404, 105 N. Y. Supp. 327 (returning from hearing in bankruptcy); People ex rel. Hess v. Inman, 74 Hun 131, 26 N. Y. Supp. 329; Cake v. Haight, 30 Misc. 388, 63 N. Y. Supp. 1043. N. C.—Cooper v. Wyman, 122 N. C. 787, 65 **Am. St. Rep.** 731, 29 S. E. 947. PA.—Miles v. McCullough, 1 Binn. 77; Huddeson v. Prizer, 9 Phila. 65. S. D.—Fisk v. Westover, 4 S. D. 235, 46 **Am. St. Rep.** 780, 55 N. W. 961; Malloy v. Brewer, 7 S. D. 591, 58 **Am. St. Rep.** 586, 64 N. W. 1120. VT.—In re Healey, 58 Vt. 694, 38 **Am. Rep.** 713. FED.—Atchison v. Morris, 11 Fed. 582; Small v. Montgomery, 23 Fed. 707; Kauffman v. Kennedy, 25 Fed. 785.

Delay in returning from Friday afternoon until Monday morning, privilege lost.—Sizer v. Hampton & B. R. & Lumber Co., 57 App. Div. (N. Y.) 390, 68 N. Y. Supp. 232.

Voluntary appearance without subpoena, not exempt.—Mullen v. Sanborn, 79 Md. 364, 47 **Am. St. Rep.** 421, 25 **L. R. A.** 721, 29 Atl. 522; Baisley v. Baisley, 113 Mo. 544, 35 **Am. St. Rep.** 726, 21 N. W. 129; Rogers v. Bullock, 3 N. J. L. (2 Pen.) 516; Micheals v. Hain, 78 Hun (N. Y.) 500, 29 N. Y. Supp. 567. **Contra:** Walpole v. Alexan-

capacity of a suitor and of a witness,[5] and extend to service of civil process not requiring taking the person into custody.[6] A respectable line of decisions, however,

der, 3 Dougl. 45, 99 Eng. Repr. 530, 26 Eng. C. L. 41.

Witness from another state not subject to arrest in civil suit while in attendance as a witness, and while going to and returning from court.—Micheals v. Schott, Howell N. P. (Mich.) 71.

Resident of another state arrested while in attendance as a witness before a referee, and before he had completed his testimony, conferred no jurisdiction on the court, and he was entitled to discharge on return day under the state statutes or on application to the supreme court, and giving bail was not a waiver of his privilege. —Dickinson v. Farwell, 71 N. H. 213, 51 Atl. 624. See Mackay v. Lewis, 7 Hun (N. Y.) 83.

Contra: Tipton v. Harris, 7 Tenn. (Peck.) 414.

While at lodgings awaiting the call of the suit, witness is exempt. —Hurst's Case, 4 U. S. (4 Dall.) 387, 1 L. Ed. 878.

"The tendency of courts to enlarge the privilege, and afford full protection to suitor and witness from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning; and we think the decided weight of authority has extended the privilege so far, at least, as to exempt a nonresident of another state who comes into this state as a witness to give evidence here from service of process for the commencement of a civil action against him in this state, and that the privilege protects him going and returning, provided he acts bona fide and without reasonable delay."—Bolgiano v. Gilbert Lock Co., 73 Md. 123, 25 Am. St. Rep. 582, 20 Atl. 788.

[5] Wilson v. Donaldson, 117 Ind. 353, 10 Am. St. Rep. 48, 3 L. R. A. 266, 20 N. E. 250; Long v. Hawken, 114 Md. 239, 42 L. R. A. (N. S.) 1108, 79 Atl. 190 (defendant and witness); Merrill v. George, 23 How. Pr. (N. Y.) 331; Wilson Sewing Machine Co. v. Wilson, 23 Blatchf. 51, 22 Fed. 803.

Attendance as party and witness, by telegram directing sheriff to seize, by attachment, goods of plaintiff, can not plead privilege from action for malicious prosecution.—Nichols v. Horton, 4 McC. 567, 14 Fed. 327.

Foreign plaintiff in attachment attending as witness, not privileged from service for maliciously bringing attachment suit.—Mullen v. Sanborn, 79 Md. 364, 47 Am. St. Rep. 421, 25 L. R. A. 721, 9 Atl. 522.

Waiver of privilege by party. See Gyer v. Irwin, 4 U. S. (4 Dall.) 107, 1 L. Ed. 762; Wood v. Davis, 34 N. H. 328; Randall v. Crandall, 6 Hill (N. Y.) 342; Stewart v. Howard, 15 Barb. (N. Y.) 26; Farmer v. Robbins, 47 How. Pr. (N. Y.) 415; Green v. Bonnafon, 2 Miles (Pa.) 219; Tipton v. Harris, 7 Tenn. (Peck.) 414; Washburn v. Phelps, 24 Vt. 506.

[6] See ante § 11, footnote 6.—Page v. Randall, 6 Cal. 32 (exempts from arrest only, not from ordinary processes of court);

many of them founded on local statutory provisions, holds that nonresident suitors are amenable to the process of the courts of the state in which the trial is being held,[7] though witnesses are exempt.[8]

Dickinson v. Farwell, 7 N. H. 214, 51 Atl. 624 (giving of bail upon arrest on civil process, not waiver of exemption); Hemmerskold v. Rose, 52 N. C. (7 Jones L.) 629; Richardson v. Goodson, 2 Va. Ca. 381.

Exemption from service of summons.—IND.—Wilson v. Donaldson, 117 Ind. 356, 10 **Am. St. Rep.** 48, 3 **L. R. A.** 266, 20 N. E. 250 (summons will be vacated). N. J.—Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754 (service not void, but may be set aside by the court). N. Y.—Hopkins v. Coburn, 1 Wend. 292; Sanford v. Chase, 3 Cow. 381; Norris v. Beach, 2 John. 294; Person v. Grier, 66 N. Y. 124, 23 **Am. Rep.** 35; Pollard v. Union Pac. R. Co., 7 Abb. Pr. (N. S.) 70; Seaver v. Robinson, 3 Duer. 622; Jenkins v. Smith, 57 How. Pr. 171. VT.—In re Healey, 58 Vt. 694, 38 **Am. Rep.** 713. WIS.—Cameron v. Roberts, 87 Wis. 291, 41 **Am. St. Rep.** 43, 58 N. W. 376. ENG.—Poole v. Gould, 1 Hurl. & N. 99.

[7] **Nonresident suitor may be** served with summons.—CAL.—Page v. Randall, 6 Cal. 32. CONN.—Bishop v. Vose, 27 Conn. 1, virtually overruled in Wilson Sewing Machine Co. v. Wilson, 51 Conn. 595, 22 Fed. 803. IDAHO.—Guynn v. McDaneld, 4 Idaho 605, 95 **Am. St. Rep.** 158, 43 Pac. 74 (defendant may serve summons on nonresident plaintiff). KY.—Legrand v. Bedinger, 20 Ky. (4 T. B. Mon.) 539. MD.—Mullen v. Sanborn, 79 Md. 364, 47 **Am. St. Rep.** 421, 29 Atl. 522. MO.—Baisley v. Baisley, 113 Mo. 544, 35 **Am. St. Rep.** 726, 21 S. W. 29 (under statute). N. Y.—Bours v. Tuckerman, 7 John. 538; Hopkins v. Coburn, 1 Wend. 292. R. I.—Baldwin v. Emerson, 16 R. I. 304, 27 **Am. St. Rep.** 741, 15 Atl. 83; Capwell v. Sipe, 17 R. I. 475, 33 **Am. St. Rep.** 890, 23 Atl. 14; Ellis v. De Garmo, 17 R. I. 715, 24 Atl. 579. S. C.—Hunter v. Cleveland, 1 Brev. 167; Sadler v. Ray, 5 Rich. L. 523. TENN.—Grove v. Campbell, 17 Tenn. (9 Yerg.) 7.

[8] IND.—Wilson v. Donaldson, 117 Ind. 353, 10 **Am. St. Rep.** 48, 3 **L. R. A.** 266, 20 N. E. 250. KY.—Linn v. Hogan, 121 Ky. 629, 87 S. W. 1101 (witness may be served with notice of appeal to court of appeals while going, attending, or returning from court in obedience to summons). MD.—Bolgiano v. Gilbert Lock Co., 73 Md. 132, 25 **Am. St. Rep.** 582, 20 Atl. 788. MINN.—Sherman v. Gunderlach, 37 Minn. 118, 33 N. W. 549. MO.—Christian v. Williams, 111 Mo. 429, 20 S. W. 96, reversing 35 Mo. App. 297 (holding nonresident witness attending trial not exempt from service of summons in civil cause). NEB.—Linton v. Cooper, 54 Neb. 438, 69 **Am. St. Rep.** 727, 74 N. W. 842. N. H.—Ela v. Ela, 68 N. H. 321, 36 Atl. 15. N. J.—Dugan v. Miller, 37 N. J. L. (8 Vr.) 182; Massey v. Colville, 45 N. J. L. (16 Vr.) 119, 46 **Am. Rep.** 754; Mulhearn v. Press Publishing Co., 53

Nonresident officer of foreign corporation coming into the state as a party[9] or as a witness[10] to testify at the trial of a cause in court or before a court commissioner,[11] or another officer or body appointed or designated by the court, is entitled to the exemption both in his personal relation and his corporate capacity.[12]

N. J. L. 153, 11 **L. R. A.** 101, 20 Atl. 760. N. Y.—Parker v. Marco, 136 N. Y. 585, 32 **Am. St. Rep.** 770, 20 **L. R. A.** 45, 32 N. E. 989. N. C.—Cooper v. Wyman, 122 N. C. 784, 65 **Am. St. Rep.** 731, 29 S. E. 947. N. D.—Hicks v. Besuchet, 7 N. D. 429, 66 **Am. St. Rep.** 665, 75 N. W. 793. R. I.—Capwell v. Sipe, 17 R. I. 475, 33 **Am. St. Rep.** 890, 23 Atl. 14 (unless he is a party also, in which case he is not exempt). S. D.—Malloy v. Brewer, 7 S. D. 587, 58 **Am. St. Rep.** 856, 64 N. W. 1120. VT.—Booream v. Wheeler, 12 Vt. 311 (holding arrest of person in civil suit in violation of his privilege as a witness in another case, is no cause for abating the writ). FED.—Atchison v. Morris, 11 Bis. 191, 11 Fed. 582; Brooks v. Farwell, 2 McCr. 220, 4 Fed. 166; Kauffman v. Kennedy, 25 Fed. 785.

Voluntary attendance on summons, merely, without arrest, not privileged.—See Wilder v. Welsh, 1 McAr. (D. C.) 566; Legrand v. Bedinger, 20 Ky. (4 T. B. Mon.) 530; Hopkins v. Coburn, 1 Wend. (N. Y.) 292; Pollard v. Union Pac. R. Co., 7 Abb. Pr. N. S. (N. Y.) 70; Handenbrook's Case, 8 Abb. Pr. (N. Y.) 416; Hunter v. Cleveland, 1 Brev. (S. C.) 167; Huntington v. Shultz, Harper (S. C.) 452, 18 **Am. Dec.** 660.

9 GA.—Fox v. Hale & N. Silver Min. Co., 108 Cal. 369, 41 Pac. 308 (superintendent attending trial of cause); Fidelity & Casualty Co. v. Everett, 97 Ga. 787, 25 S. E. 734 (inspector attending as witness); Holmes v. Nelson, 1 Phila. (Pa.) 217 (stockholder taking deposition in action pending in United States Supreme Court); American Woodenware Co. v. Stem, 63 Fed. 676 (treasurer); Ladd Metal Co. v. American Min. Co., 152 Fed. 1008 (secretary).

10 Mulhearn v. Press Publishing Co., 53 N. J. L. 153, 11 **L. R. A.** 101, 21 Atl. 186 (vice president); Sheehan v. Bradford, B. & K. R. Co. 15 N. Y. Civ. Proc. Rep. 429, 3 N. Y. Supp. 790 (director); Kensey v. American Hardwood Mfg. Co., 94 N. Y. Supp. 455; Western N. Y. & P. R. Co. v. Clermont & M. C. R. Co., 9 Pa. Dis. Rep. 299 (president); Sewanee Coal, Coke & Lumber Co. v. William & Co., 120 Tenn. 345, 107 S. W. 968.

11 Mulhearn v. Press Publishing Co., 53 N. J. L. 153, 11 **L. R. A.** 101, 21 Atl. 186.

12 **Nonresident officer of domestic corporation,** privilege does not attach to, and service on him is valid service on corporation.—Brean v. Miller Lumber Co., 83 S. C. 221, 24 **L. R. A.** (N. S.) 276, 65 S. E. 214.

Attendance on judicial sale under decree of federal court, no exemption.—Greenleaf v. People's Bank, 133 N. C. 293, 98 **Am. St. Rep.** 709, 63 **L. R. A.** 499, 45 S. E. 638.

Passing through state on way to attend court in another jurisdiction, both suitors and witnesses are privileged from arrest[13] or the service of civil process issuing out of the courts of the state traversed,[14] is the doctrine of the weight of decision.

Privilege as affected by route taken or time consumed in going to or returning from court, as affecting the privilege and exemption. A reasonable latitude is allowed and the most direct route is not required to be taken; a reasonable deviation or reasonable delays re allowed, provided, only, they do not arise in carrying out a purpose entirely distinct from going to, attending, and returning from court.[15]

§ 13. JUDGES, ATTORNEYS AND JURORS IN CASE. A judge,[1] presiding at a cause pending in his court, is given the full

13 Holyoke & South Hadley Falls Ice Co. v. Amsden, 21 L. R. A. 319, 55 Fed. 593 (a case of first impression); Crank v. Wheaton, 23 Lanc. L. Rev. (Pa.) 206 (going to attend suit); Crank v. Wheaton, 15 Pa. Dis. R. 721 (returning from attendance).

14 Barber v. Knowles, 77 Ohio St. 81, 14 L. R. A. (N. S.) 663, 82 N. E. 1065, and cases cited.

15 Barber v. Knowles, 77 Ohio St. 81, 14 L. R. A. (N. S.) 663, 82 N. E. 1065.

As to deviation and delays, see Tyrone Bank v. Doty, 2 Pa. Dis. Rep. 558 (going most direct route next day after verdict, exempt); Ex parte Hall, 1 Tyl. (Vt.) 274 (detained by storm until next day, and compelled to go twenty miles out of his way, witness does not lose privilege); Ex parte Clarke, 2 Deacon & C. 99 (witness taking direct route to boat for home, going into another street for a person who was to accompany him on the boat, and remaining at the house until the arrival of the boat, did not forfeit privilege).

Stopping to announce to counsel on opposite side that nothing would be done in the case, is not a deviation.—Salinger v Adler, 2 Robt. (N. Y.) 704.

1 **Judges are exempt from arrest** in civil cases during their attendance at court.—Com. v. Ronald, 4 Call (Va.) 97.

But may be served with process in a civil action when at home or not sitting in circuit.—Lyell v Goodwin, 4 McL 29, Fed. Cas. No. 8616.

Judge of supreme court of United States arrested on capias ad respondendum, in a case in which the federal court has no jurisdiction, is not entitled to be discharged on common bail.—Gratz

privilege.[2] At common law the full privilege and immunity were extended to attorneys,[3] also, and have been extended to them in some jurisdictions in this country;[4] but in other jurisdictions it has been said that an attor-

v. Wilson, 6 N. J. L. (1 Halst.) 419.

Justice of the peace can not be served with summons while he is holding court.—Cameron v. Roberts, 87 Wis 291, 41 **Am. St. Rep.** 43, 58 N. W. 376.

2 **Judge not liable to be arrested** by process proceeding out of own court, but must be proceeded against by bill.—In re Livingston, 8 John. (N. Y.) 351.

Judges privileged from arrest, also exempt from service of civil process in civil suit, where about to set out on his circuit.—Lyell v. Goodwin, 4 McL. 29, Fed. Cas. No. 8616.

Officers of court, supreme court and common pleas, chancery courts, and other inferior courts, are liable to arrest on mesne process, except during actual sitting of their respective courts, and may be held to bail like other persons. —Secore v. Bell, 18 John. (N. Y.) 52 (under act April 1813).

3 Hoffman v. Circuit Judge, 113 Mich. 109, 67 **Am. St. Rep.** 458, 38 **L. R. A.** 663, 71 N. W. 480; Matthews v. Tufts, 87 N. Y. 568 (attorney privileged from process while attending bankruptcy proceedings); Com. v. Ronald, 4 Call (Va.) 97 (privileged from service of process in civil suits, while attending court); Central Trust Co. v. Milwaukee Street R. Co., 74 Fed. 442 (nonresident attorney attending the court in another county).

In Long's Case, 2 Mod. 181, 86 Eng. Repr. 1012, an attorney arrested near court was discharged, on question of privilege, by giving common bail.

Foundation of the rule is "the impolicy of permitting an act which will deter suitors or witnesses from attending courts," and this reason applies with equal force to an attorney in the case as to suitors or witnesses.—Hoffman v. Circuit Judge, 113 Mich. 109, 67 **Am. St. Rep.** 458, 38 **L. R. A.** 663, 71 N. W. 480.

Blackstone says that "clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending), are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege), as being personally present in court).—3 Bl. Com. 289.

4 **Privilege from arrest while attending,** going to, and returning from court (Ill. Rev. Stats. c. 12, § 8) does not exempt from service in civil suit while in attendance on court.—Robinson v. Lincoln, 27 Fed. 342 (foreign attorney has no greater privilege).

Process out of a justice's court against an attorney, and served during term of court in which he is an attorney or counselor, abated, though not returnable until after the end of the term.—Gilbert v. Vanderpool, 15 John. (N. Y.) 242.

ney is not entitled to immunity.[5] In accordance with the latter doctrine it has been held that a foreign attorney coming into the state and to attend on the courts in the state, in the interests of his client, is not entitled to claim a privilege of exemption.[6]

Jurors at common law are entitled to the same privileges and exemptions as witnesses in the case.[7]

§ 14. ATTENDANCE ON FEDERAL COURT. On principle, and carrying out the spirit and purpose of the privilege, persons in attendance on a federal court sitting in a state other than that of their residence, should be entitled to the same privileges and exemptions from arrest and other processes out of state courts, as they are in the

5 Mr. Justice Clark, in dissenting opinion, in McNeill v. Duban & C. R. Co., 135 N. C. 721, 67 L. R. A. 245, 47 S. E. 765, says: "The court in Greenleaf v. People's Bank, 133 N. C. 292, 98 Am. St. Rep. 709, 63 L. R. A. 499, 45 S. E. 638, held that lawyers and judges were not a privileged class."

Traveling from one county to another in practice of his profession, not exempt from service of process.—First Nat. Bank v. Doty, 12 Pa. Co. Ct. Rep. 287, 2 Pa. Dist. Rep. 558 (though sworn as a witness in case in which engaged).

Attorney practicing in A county, but residing in B county, is subject to service of summons in A county while attending trial of cause.—Parker Sav. Bank v. McCandless, 6 Pa. Co. Ct. Rep. 327.

Illinois Statute exempts attorneys from arrest while attending court, but does not exempt either a resident or a nonresident attorney from the service of a summons in a civil action while he is in attendance upon a court.—Robbins v. Lincoln, 27 Fed. 342.

6 Greenleaf v. People's Bank, 133 N. C. 200, 98 Am. St. Rep. 709, 63 L. R. A. 903, 45 S. E. 638.

7 Page v. Randall, 6 Cal. 32 (exempting of jurors from arrest, not from ordinary processes of court); Brookes v. Chelsey, 4 Har. & McH. (Md.) 295; In re McNiel, 3 Mass. 288; Bower v. Tato, 115 Mich. 368, 73 N. W. 421 (juror's privilege from arrest is a personal one, going not to the validity of process, but to that of the service); United States v. Edme, 9 Serg. & R. (Pa) 151; Grove v. Campbell, 17 Tenn. (9 Yerg.) 7 (exempt from arrest, but not from service of summons not requiring arrest).

Statute prohibiting arrest, in civil cases, of persons attending court as jurors or as witnesses, is not an implied repeal of common-law exemption.—Cooper v. Wyman, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947.

case of causes pending in the state courts; and such privilege of exemption has been applied both to the parties to actions[1] and to their witnesses in the cause;[2] and this is thought to be the better rule, though there is a respectable line of authority emanating principally from jurisdictions in which the common-law privilege is only partially conferred, holding that a nonresident is not exempt from service of process in a civil suit against him while in attendance upon a federal court while in the state;[3] but no case has been found which goes to the length of upholding an arrest under such circumstances.

§ 15. AMBASSADORS. Foreign ministers and their families are not only privileged from arrest in civil cases but also from apprehension on criminal charges.[1]

§ 16. ARMY OFFICERS AND SOLDIERS. Upon the same principles of public policy and general welfare of the state, and by statutory enactment in many of the states, persons engaged in the military service, whether in the state militia or in the regular army, are exempt from arrest in civil causes,[1] as well as from the service of process in a

1 Sewanee Coal, Coke & Land. Co. v. Williams & Co., 120 Tenn. 345, 107 S. W. 968; Holmes v. Nelson, 1 Phila. (Pa.) 217; Parker v. Hotchkiss, 1 Wall. Jr. 269 Fed. Cas. No. 10739; Ex parte Hurst, 1 Wash. C. C. 186, Fed. Cas. No. 6924; Bridges v. Sheldon, 7 Fed. 17, 42; Ex parte Schulenburg, 25 Fed. 211 (proper method of procedure, where service in violation of privilege, discussed).

Attending sale under federal court decree, no exemption.—Greenleaf v. People's Bank, 133 N. C. 293, 98 **Am. St. Rep.** 709, 63 **L. R. A.** 499, 45 S. E. 638.

2 Sewanee Coal, Coke & Land Co. v Williams & Co., 120 Tenn. 345, 107 S. W. 968.

Witness coming into state in obedience to subpoena of federal court, exempt from apprehension on state criminal process.—United States v. Baird, 85 Fed. 633.

3 Gwynn v. McDaneld, 4 Idaho 605, 96 **Am. St. Rep.** 158, 43 Pac. 74.

1 Comte de Garden, Traite complet de diplomatie; Holtzend. Encycl. i. 798; United States v. Benner, Baldw. C. C. 234, Fed. Cas. No. 14568; United States v. Lafontaine, 4 Cr. C. C. 173, Fed. Cas. No. 15550; Cabrera, Ex parte, 1 Wash. C. C. 232, Fed. Cas. No. 2278.

1 In re Roode, 2 Wheeler's Cr. Cas. 541 (act congress, March 16, 1812, § 23).

Attendance required, in order to put within immunity.—Morgan v.

civil action while in actual service or when going to, or returning[2] from any muster, state encampment or military meeting.[3] This exemption is a personal privilege

Eckart, 1 U. S. (1 Dall.) 295, 1 L. Ed. 144 (lieutenant of county voluntarily appearing before executive council to solicit commission, not exempt).

Commissioned officer not exempted from arrest on civil processes by act of congress, March 3, 1799, military code, § 19; not by state statute.—Ex parte Harlan, 39 Ala. 563. See White v. Lowther, 3 Ga. 397 (lieutenant in company raised under act of congress, not exempt from arrest on civil process); Moses v. Mellett, 3 Strob. (S. C.) 210.

Debtor already under arrest not relieved by enlistment, under act of congress Dec. 12, 1812.—Ex parte Field, 5 Hall. L. J. (Pa.) 474.

Exemption from time sworn in, only, and not from time soldier goes to be sworn in.—Rank v. Wegner, 1 Pears. (Pa.) 532.

Mustering into service of United States militiaman does not lose his privilege to exemption under state statute.—People v. Campbell, 40 N. Y. 133 (laws 1858, c. 129, § 17).

Noncommissioned officers and privates in voluntary service of army, are exempt from arrest for debt.—Moses v. Mellett, 3 Strob. (S. C.) 210.

Paymaster appointed by President under act of congress, not within exemption of Pennsylvania act April 2, 1822, or act of April 18, 1861.—Mechanics' Sav. Bank v. Sallode, 1 Woodw. Dec. (Pa.) 23.

Soldier on furlough from army may be apprehended by state authorities; application to the commanding officer for his delivery is not necessary.—Ex parte Roberts, 16 Iowa 600.

2 **Militiaman out of state,** can not claim exemption of statutes of state of residence, on the ground that he is on his way under orders of commanding officer to attend company meeting, for escort duty, within the state.—Manchester v. Manchester, 6 R. I. 127.

Public reception at which militiamen attend at call of governor, not within exemption.—Kirkpatrick v. Irvy, 3 McC. (S. C.) 205.

Pennsylvania act 1887, §§ 26, 127, regulating national guard, does not exempt military men returning from annual encampment from service of writ of scire facias.—Land Title & Trust Co. v. Crump, 16 Pa. Co. Ct. Rep. 593.

Though this act does not expressly exempt militiamen from civil process, while on military duty on the ground of public policy, they are exempt from service of process in a county other than that of their residence, while going to or returning from an authorized encampment.—Land Title & Trust Co. v. Rambo, 174 Pa. St. 566, 34 Atl. 207.

3 ALA.—Greening v. Sheffield, Minor 276 (service of capias, though not requiring bail, while returning from military muster, void). MINN.—Williams v. McGrade, 13 Minn. (Gil. 165) 174, (act 1865, c. 71). N. C.—Murphy v. Mc

which must be technically claimed and in the proper manner.[4]

Apprehension on criminal charge is not within the privilege and exemption;[5] but a court, it seems, will not issue a warrant of arrest for a military man charged with the commission of murder on the high seas or upon a naval vessel, pending an investigation by a court of inquiry instituted by the secretary of the navy.

§ 17. CONSULS. The privileges and exemptions which ambassadors and foreign ministers enjoy do not extend to consuls.[1] They are subject to apprehension and prosecution for a misdemeanor,[2] and to indictment and prosecution for a felony, such as sending anonymous and

Combs, 33 N. C. (11 Ired.) 274. PA.—Wright v. Quinn, 1 Yates 163 (act January 2, 1878, although war with Great Britain had ceased); Breitenbach v. Bush, 44 Pa. St. 313, 84 Am. Dec. 442 (levari facias sur mortgage, within immunity of act April 18, 1861); Coxe's Exr. v. Martin, 44 Pa. St. 322 (includes scire facias on mortgage); Drexel v. Miller, 49 Pa. St. 246 (scire facias on mortgage within exemption of act April 18, 1861); Davidson v. Barclay, 63 Pa. St. 406 (act April 18, 1861); Land Title & Trust Co. v. Rambo, 174 Pa. St. 566, 34 Atl. 207 (act April 13, 1887); Heck v. Fink, 1 Woodw. Dec. 102 (act 1822, § 70, service on members of company while on march under orders). S. C.—Hickman v. Armstrong, 2 Brev. 176; Gregg v. Summers, 1 McC. 461 (act 1794 embraces not only process requiring bail, but any other process).

4 Williams v. McGrade, 13 Minn. 174 (Gil. 165); Hunter v. Weidner, 1 Woodw. Dec. (Pa.) 6.

Compare: Hickman v. Armstrong, 2 Brev. (S. C.) 176, holding that where process served while attending military muster, a judgment rendered by default was void.

5 United States v. Mackenzie, 1 N. Y. Leg. Obs. 227, Fed. Cas. No. 15690.

1 United States v. Ravara, 2 U. S. (2 Dall.) 297, 299, 1 L. Ed. 388, Fed. Cas. No. 16122, Whart. St. Tr. 90.

Trading counsel is liable to the ordinary processes of court in all matters that concern his trade, the same as an ordinary merchant.—Scott v. Hobe, 108 Wis. 239, 84 N. W. 181.

2 State v. De La Foste, 2 Nott. & McC. (S. C.) 217; United States v. Ravara, 2 U. S. (2 Dall.) 297, 1 L. Ed. 388, Fed. Cas. No. 16122, Wharton's St. Tr. 90.

threatening letters,[3] for rape,[4] and other similar offenses against the criminal laws of the country.

§ 18. MEMBERS OF CONGRESS AND LEGISLATURES. Freedom of legislators, state and federal, from arrest in civil proceedings or from the service of a simple process rests upon the highest grounds of public policy.[1] By provision of the federal constitution[2] senators and representatives in congress will, "in all cases, except treason, felony, or breach of the peace,"[3] be privileged from arrest[4] during their attendance at their respective legislative halls and also while going to and returning from the same;[5] and

3 United States v. Ravara, 2 U. S. (2 Dall.) 299 note, 1 L. Ed. 388 (without the note), Fed. Cas. No. 16122a.

4 Com. v. Kosloff, 5 Serg. & R. (Pa.) 545.

1 Lord Denman says: "The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members."—Stockdale v. Hansard, 9 Ad. & E. 1, 114, 112 Eng. Repr. 1112, 1156, 36 Eng. C. L. 1, 81. See, also, Cassidy v. Steuart, 2 Man. & Gr. 437, 133 Eng. Repr. 817, 40 Eng. C. L. 680.

2 Art. 1, § 6.

In Bolton v. Martin, 1 U. S. (1 Dall.) 296, 1 L. Ed. 144, a member of the state convention met to consider the United States constitution was held to be privileged from arrest, or the service of a summons in a civil action, while the convention was in session, and for a reasonable period before and after its close, on the ground of privilege of parliament. See criticism of the doctrine in Berlet v. Weary, 67 Neb. 75, 81-82, 108 Am. St. Rep. 616, 2 Ann. Cas. 610, 60 L. R. A. 609, 93 N. W. 238.

3 Congressman not privileged from apprehension on a charge that he is about to fight a duel.—United States v. Wise, Hayw. & H. 82, Fed. Cas. No. 16746a.

Privilege does not protect from apprehension on a charge of probable cause to believe a breach of peace is about to be committed.—United States v. Wise, Hayw. & H. 82, Fed. Cas. No. 16746a.

4 As to discharge by reason of subsequent privilege, where person arrested before privilege attached is surrendered by his bail after privilege attached.—Coxe v. McClenachan, 3 U. S. (3 Dall.) 478, 1 L. Ed. 687.

5 Privilege applies while attending congress, only, or actually on journey to or returning from the seat of government.—Lewis v. Elmendorf, 2 John. Cas. (N. Y.) 222.

Time going and returning in attendance on session is not limited to the exact number of days required for the journey, or the line

this privilege and immunity extend to delegates from the territories,[6] as well as to persons duly commissioned, although congress subsequently decides that the party commissioned was not entitled to the seat,[7] as well as to senators and representatives. It has been held that this exemption from arrest also extends to exemptions from trial.[8]

Civil suits and processes not accompanied by the arrest of the person, stand on a different footing and, while there is a hopeless conflict in the decisions,[9] the weight of authority and better doctrine is that they are not within the privileges and exemptions,[10] although a

of travel to the most direct route. —Miner v. Markham, 28 Fed. 387.

The privilege is restricted to a reasonable time for making the journey; and it has been held that forty days before the session opens or after it closes is not a reasonable time.—Hoppin v. Jenckes, 8 R. I. 453, 5 **Am. Rep.** 597.

6 Doty v. Strong, 1 Pinn. (Wis.) 84, Burnett 158.

7 Dutton v. Halstead, 2 Clark (Pa.) 450, 2 Pa. L. J. 237 (delaying in return through lack of funds will not affect the privilege).

8 Doty v. Strong, 1 Pinn. (Wis.) 84, Burnett 158.

Continuance of pending cause in court can not be claimed as a matter of privilege by a member of congress.—Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10290.

9 **Privilege from arrest,** exemption from suit or any civil process which may interfere with public business, during term of privilege. —Anderson v. Rountree, 1 Pinn. (Wis.) 115 (by common law exempt from service of civil process during attendance).

10 D. C.—Merrick v. Giddings, McA. & M. (D. C.) 55; Howard v. Citizens' Bank & Trust Co., 12 App. (D. C.) 222. KY.—Catlett v. Morton, 14 Ky. (4 Litt.) 122; Johnson v. Offcutt, 61 Ky. (4 Met.) 20. MICH.—Case v. Rorabacher, 15 Mich. 537. NEB.—Berlet v. Weary, 67 Neb. 75, 108 **Am. St. Rep.** 619, 2 **Ann. Cas.** 610, 60 **L. R. A.** 609, 93 N. W. 238 (not exempt from service of civil process not requiring arrest). N. H.—Bartlett v. Blair, 68 N. H. 232, 38 Atl. 1004. S. C.—Worth v. Norton, 56 S. C. 56, 76 **Am. St. Rep.** 524, 45 **L. R. A.** 563, 33 S. E. 792 (exemption of members of congress from arrest while in session, or while going to and returning therefrom, does not extend to service of process in a civil action, nor exempt them from such service while absent or leaving from congress attending to private business while congress is in session). TEX.—Gentry v. Griffith, 27 Tex. 461 (not privileged from service of process in civil case under the constitutional provision exempting from arrest). VA.—McPherson v. Nesmith, 3

somewhat recent case[11] holds that the privilege extends to an exemption from service of process unaccompanied by an arrest while on the way to attend session of congress.

Apprehension on a criminal charge is not within the privilege and exemption of legislators;[12] and it has been held that an indictment on a criminal charge by a federal[13] or by a state[14] court is not in violence of the congressional privilege, where not accompanied or followed by an apprehension of the person; and this being true, there would seem to be no valid reason for an exemption from service of process in a criminal cause where the person is not taken into custody.[15]

Legislators of state are entitled to the "privilege of parliament,"[16] and by constitution in many of the states, the privilege has been enlarged so as to exempt them,

Gratt. (Va.) 237 (not privileged from issuing of process, but from service upon their persons, servants or estates, during the limitation.—1 Rev. Code, c. 51, § 31). FED.—Kimberly v. Butler, 16 Pittsb. Leg. J. 11, 3 Am. L. Rev. 777, 1 Chicago L. News 245, 2 Balt. Law Trans. 276, Fed. Cas. No. 7777.

Service of process upon may be made the same as upon any other person, except that there can not be an arrest in a civil action while going or returning from a session, or while in attendance thereon.—Merrick v. Giddings, McA. & M. 55.

Not privileged from service in civil case not requiring bail, either under Kentucky constitution or act Dec. 17, 1795.—Catlett v. Morton, 14 Ky. (4 Litt.) 122; Johnson v. Offutt, 61 Ky. (4 Met.) 19.

11 **Exempt from service of process,** though not accompanied by arrest of person, while on his way to attend congress.—Miner v. Markham, 28 Fed. 387.

12 Scott v. Curtis, 27 Vt. 762.

13 Williamson v. United States, 207 U. S. 425, 52 **L. R. A.** 278, 28 Supp. Ct. Rep. 163 (indictment while in the house of representatives, under U. S. Rev. Stats., § 5440, in conspiring to commit the crime of subornation of perjury). See United States v. Wise, Hayw. & H. 82, Fed. Cas. No. 16746a.

14 State v. Smalls, 11 S. C. 262.

15 United States v. Cooper, 4 U. S. (4 Dall.) 341, 1 **L. Ed.** 859, Fed. Cas. No. 14861; Respublica v. Duane, 4 Yeates (Pa.) 347.

Legislator on way to state capitol to attend session, not exempt from arrest for embezzlement.—Com. v. Keeper of Jail, 4 W. N. C. (Pa.) 540, 1 Del. Co. Rep. 215.

16 **Doctrine of Bolton v. Martin,** 1 U. S. (1 Dall.) 296, 1 **L. Ed.** 144, has been applied to state legislators in Gyer v. Irwin, 4 U. S. (4

not only from arrest, but from any service of civil process also,[17] such as in Connecticut,[18] Kansas,[19] South Carolina,[20] and Virginia;[21] but in the majority of the states the exemption is merely the common-law privilege, without the immunity from service of process in civil causes where an arrest of the person does not accompany the service.[22] But the privilege from arrest in civil cases does not extend to apprehension in criminal cases.[23]

§ 19. OFFICERS AND EMPLOYEES OF THE GOVERNMENT. The privilege and immunity of certain officers from

Dall.) 107, 1 **L. Ed.** 762; Gray v. Sill, 13 W. N. C. (Pa.) 59, and Ross v. Brown, 7 Pa. Co. Ct. Rep. 142.

17 Cooley's Const. Lim. (5th ed.) 161.

18 King v. Coit, 4 Day (Conn.) 129.

19 **Service of process during session,** void under Kansas constitution.—Cook v. Senior, 3 Kan. App. 278, 45 Pac. 126 (member attending session trying impeachment, is privileged).

20 Tillinghast v. Carr, 4 McC. L. (S. C.) 1.

21 McPherson v. Nesmith, 3 Gratt. (Va.) 237 (exemption from "all process whatsoever," did not prevent issuance of writ, but suspended service during the privilege, only).

Courts do not notice, ex officio, the privilege, and timely advantage must be taken of immunity. —Prentis v. Com., 1 Rand. (Va.) 697, 16 **Am. Dec.** 782.

This was the common-law and true rule.—Chase v. Fisher, 16 Maine 136; McPherson v. Nesmith, 3 Gratt. (Va.) 241; Gyer v. Irwin, 4 U. S. (4 Dall.) 107, 1 **L. Ed.** 762; Lyell v. Goodwin, 4 McL. 29, Fed. Cas. No. 8616; Holiday v. Pitt, 2 Str. 985, 93 Eng. Repr. 984.

22 Catlett v. Morton, 14 Ky. (4 Litt.) 122 (legislators subject to any process except arrest, same as other citizens), affirmed Johnson v. Offutt, 61 Ky. (4 Met.) 19; Thodes v. Walsh, 55 Minn. 542, 23 **L. R. A.** 632, 57 N. W. 213 (service of summons during session); State ex rel. Benton v. Elder, 31 Neb. 169, 10 **L. R. A.** 796, 47 N. W. 710; Berlet v. Weary, 67 Neb. 75, 108 **Am. St. Rep.** 616, 2 Ann. Cas. 610, 60 **L. R. A.** 609, 93 N. W. 238.

Legislators, in a proper case, may be served with civil process while at seat of government.—Peters v. League, 13 Md. 58, 71 **Am. Dec.** 622 (member city council held subject to attachment while in discharge of his duties); Gentry v. Griffith, 27 Tex. 461 (citation in civil suit).

Contra: Orth v. McCook, 2 Ohio Dec. 624, 4 West. L. Month. 215 (legislators can not be served at seat of government, though joined with others served at their residences).

23 Supra foot notes 12-15, this section; Com. v. Keeper of Jail, 13 Phila. (Pa.) 273.

arrest have already been discussed.[1] This privilege and immunity extends to election officers,[2] but not to other officers and employees of the federal[3] or state[4] government.

Apprehension on charge of crime is not within the privilege from arrest belonging to certain officers of our government privileged from arrest in civil proceedings, because that privilege and exemption do not extend to criminal prosecution.[5]

1 See ante, §§ 13-18.

2 **Election officers** exempt from arrest on election day, at polls and going to and returning from polls, except for treason, felony or breach of the peace. In re Election Officers, 1 Brewst. (Pa.) 182 (can not be arrested for rejecting vote).

3 **On process issued out of state court** on a charge of felony.—United States v. Kirby, 74 U. S. (7 Wall.) 482, 19 L. Ed. 278.

Custom officers, not exempt from arrest under Rev. Stat., § 5447.—Ex parte Murray, 35 Fed. 496.

Mail carrier, at the time engaged in transporting mail, is liable to apprehension on warrant charging an offense against the laws of the state, even though the offense is not a felony, but merely a violation of the liquor laws.—Penny v. Walker, 64 Maine 430, 18 Am. Rep. 269.

Driver of mail carriage may be apprehended for fast driving through crowded street.—United States v. Hart, Pet. C. C. 390, Fed. Cas. No. 15316.

Police officers—United States marshal not exempt from arrest and imprisonment in civil case.—Parsons v. Stanton, 2 Day (Conn.) 300; Wilcox v. Buckingham, 2 Day (Conn.) 304.

4 **Sheriff,** not privileged from arrest in civil action and imprisonment same as any other person.—George v. Fellows, 58 N. H. 494; Day v. Brett, 6 John. (N. Y.) 222; Hill v. Lott, 10 How. Pr. (N. Y.) 46.

Sheriff-elect, not exempt while soliciting his commission before the executive council who have not required his attendance.—Morgan v. Eckart, 1 U. S. (1 Dall.) 295, 1 L. Ed. 144.

Deputy sheriff, not exempt from arrest on civil process.—George v. Fellows, 58 N. H. 494.

Superintendent of police of New York exempt from arrest.—Hart v. Kennedy, 14 Abb. Pr. 432; 23 How. Pr. 417 (Metropolitan police act, § 34).

Police captain is exempt from arrest under the same act.—Id.

Police patrolman subject to arrest, where not on duty, under the same act, Id.; Coxson v. Doland, 2 Daly 66 (Metropolitan police act, § 34, as amended Stats. 1864, c. 403).

5 See United States v. Kirby, 74 U. S. (7 Wall.) 482, 19 L. Ed. 278; Penny v. Walker, 64 Mo. 430.

§ 20. DEFENDANTS AND WITNESSES[1] IN CRIMINAL CASES. It has been said that there is a distinction between parties in a civil suit and defendants in a criminal case with respect to privilege, in that parties to a civil suit appear in court voluntarily and should be encouraged to appear by immunity from arrest; whereas defendants in criminal cases appear involuntarily only, and need not be encouraged;[2] and that for this reason the privilege and exemption do not extend to criminal cases,[3] as where the defendant has been brought into the state as a fugitive from justice,[4] taken from one county to another or

1 Smythe v. Banks, 4 U. S. (4 Dall.) 239, 1 L. Ed. 854 (privileged from arrest for a reasonable time).

Witness coming into state in obedience to a subpoena from a federal court, is exempt from apprehension on state criminal process.—United States v. Baird, 85 Fed. 633.

2 Byler v. Jones, 22 Mo. App. 623; Moore v. Greene, 73 N. C. 394, 21 Am. Rep. 470; Williams v. Bacon, 10 Wend. (N. Y.) 636; Com. v. Daniel, 4 Clark (Pa.) 49, 6 Pa. L. J. 330; Addicks v. Bush, 1 Phila. (Pa.) 19; Key v. Jetto, 1 Pittsb. (Pa.) 117; Scott v. Curtis, 27 Vt. 762.

"There is no public policy to encourage the latter."—Clark, J., in White v. Underwood, 125 N. C. 25, 74 Am. St. Rep. 630, 46 L. R. A. 706, 34 S. C. 104. See Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 134 Am. St. Rep. 886, 27 L. R. A. (N. S.) 333, 90 N. E. 962.

Foundation of distinction by Rodman, J., in Moore v. Greene, 73 N. C. 394, 21 Am. Rep. 470, is placed on the language of Lord Campbell (quoted in foot note 8, this section), in Hare v. Hyde, 16 Q. B. (16 Ad. & E. N. S.) 394, 71 Eng. C. L. 393, 20 L. J. Q. B. N. S. 185, 15 Jur. 315; but it is manifest that the defendant in that case waived his privilege by "remaining as a spectator," after he was acquitted and ordered discharged. If he had immediately gone about his business of returning to his home, the decision of the court might have been different when acting on his arrest in a civil case.

3 Wood v. Boyle, 177 Pa. St. 620, 55 Am. St. Rep. 747, 35 Atl. 853.

4 ALA.—Ex parte Hardy, 68 Ala. 303. KAN.—In re Wheeler, 34 Kan. 96, 8 Pac. 276. NEB.—In re Walker, 61 Neb. 803, 86 N. W. 510. N. J.—Rutledge v. Knauss, 73 N. J. L. 399, 64 Atl. 988. N. Y.—Williams v. Bacon, 10 Wend. 636; Adriance v. Legrave, 59 N. Y. 110, 17 Am. Rep. 317; People ex rel. Post v. Cross, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 246; Slade v. Joseph, 5 Daly 187; Bank of Metropolis v. White, 26 Misc. 505, 57 N. Y. Supp. 460. PA.—Com. v. Daniel, 4 Clark 49.

In Michigan a person brought into the state on a charge of crime

brought within the territorial jurisdiction[5] of the court[6]

is exempt from arrest in civil proceedings until he has had a reasonable time in which to leave the state.—Weale v. Clinton Circuit Judge, 158 Mich. 565, 123 N. W. 31.

In Ohio, in Compton v. Wilder, 40 Ohio St. 130, a resident of Pennsylvania was extradited upon requisition by the governor of Ohio, on the application of C, and after he had entered into a recognizance to appear before the county court at the next term, and before he had an opportunity to return to his home in Pennsylvania, a summons and order of arrest were issued and served in a civil action brought by C, and the service was held to have been properly set aside.

A person indicted and brought into the jurisdiction by extradition, waives his privilege from arrest in a civil action by filing a motion for bail, which raises an issue of fact, not only as to his right to bail, but also as to a complete defense to the action.—White v. Marshall, 23 Ohio C. I. C. C. T. R. 376.

In Wisconsin, in the case of Moletor v. Sinnen, 76 Wis. 308, 20 **Am. St. Rep. 71, 7 L. R. A.** 817, 41 N. W. 199, it is held that a person brought into the state upon a requisition, who is discharged on hearing, is not subject to an arrest in a civil action until after a reasonable time has elapsed for his departure.

5 **Charged with crime in another county,** privileged from arrest in a civil action in such other county until prisoner has had a reasonable time for his return to his home county.—Byler v. Jones, 22 Mo. App. 623; Palmer v. Rowan, 21 Neb. 452, 59 **Am. Rep.** 844, 32 N. W. 210; Walker v. Stevens, 52 Neb. 653, 72 N. W. 1038; Baldwin v. Branch Circuit Judge, 48 Mich. 525, 12 N. W. 686 (exempt from arrest on a civil warrant for the same matter at the suit prosecutor, only).

In Chaffee v. Jones, 36 Mass. (19 Pick.) 261, where the party pleaded his privilege in an abatement of the action, it was held that the privilege had been waived.

6 Weale v. Clinton Circuit Judge, 158 Mich. 565, 123 N. W. 31 (arrest for alienation of affections of relator's wife); Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 134 **Am. St. Rep.** 886, 27 **L. R. A.** (N. S.) 339, 90 N. E. 962 (nonresident defendant coming into state to attend trial of indictment against him, without privilege or exemption).

Brought by criminal process with the jurisdiction of the court, person is privileged. ARK.—Martin v. Bacon, 76 Ark. 161, 113 **Am. St. Rep.** 81, 6 **Ann. Cas.** 336, 88 S. W. 863 (coming into state to attend court to avoid forfeiture of bail bond, exempt). IOWA—Murray v. Wilcox, 122 Iowa 188, 101 **Am. St. Rep.** 263, 64 **L. R. A.** 534, 97 N. W. 1087 (coming into the state to attend trial of indictment in accordance with obligations of bail bond, and as a witness, exempt). MO.—Byler v. Jones, 79 Mo. 261; Christian v. Williams, 111 Mo. 435, 20 S. W. 96; Holker v. Hennessey, 141 Mo. 527, 536, 64 **Am. St. Rep.** 524, 529, 39 **L. R. A.** 165, 42 S. W.

by criminal process, after discharge on bail,[7] trial and acquittal[8] or in those cases in which there has been a con-

1090. N. Y.—Lagrave's Case, 14 Abb. Pr. N. S. 335; Benninghoff v. Oswell, 37 How. Pr. 235; Underwood v. Fetter, 6 N. Y. Leg. Obs. 66; Murphy v. Sweezy, 2 N. Y. Supp. 241. PA.—Addicks v. Bush, 1 Phila. 19. FED.—Kaufman v. Graves, 173 Fed. 554 (exemption applies to criminal, as well as civil cases). ENG.—Gilpin v. Benjamine, L. R. 4 Exch. 131, 38 L. J. Exch. N. S. 50, 19 L. T. N. S. 830, 17 Week. Rep. 885; Callans v. Sherry, Alcock & N. (Ir.) 125; Williams v. Steele, 4 Ir. Law Rec. 169; Kelly v. Barnwell, 1 Cooke & Alcock (Ir.) 94.

Fugitive from justice brought into state on a bona fide criminal charge, and not as a mere pretext, not privileged.—Williams v. Bacon, 10 Wend. (N. Y.) 636.

Citizen of one state indicted in federal court of another state, who comes therein to plead under an arrangement with the district attorney that he may appear without arrest, plead and give bail, is exempt, while so in the state, from liability to civil process.—United States v. Bridgman, 9 Biss. 221, 8 Am. L. Rec. 541, 12 Chicago Leg. News 133, Fed. Cas. No. 14645.

[7] COLO.—In re Popejoy, 26 Colo. 32, 55 Pac. 1083. IOWA—Murray v. Wilson, 122 Iowa 109, 64 **L. R. A.** 536, 97 N. W. 1087 (defendant coming into state for trial in accordance with bail bond.) N. Y.—Netograph Mfg. Co. v. Scrugham, 197 N. Y. 380, 134 **Am. St. Rep.** 886, 27 **L. R. A.** (N. S.) 335, 90 N. E. 962 (rule not applicable to person arrested who has given bail, because constructively in custody, not voluntary attendant). N. C.—Moore v. Greene, 73 N. C. 394, 21 **Am. Rep.** 470. OHIO—Compton v. Wilder, 40 Ohio St. 130. PA.—Key v. Jetto, 1 Pittsb. 117 (charged with crime before magistrate, and discharged on recognizance for further hearing, not privileged). VT.—Scott v. Curtis, 27 Vt. 762. ENG.—Hare v. Hyde, 16 Q. B. (16 Ad. & E. N. S.) 394, 7 Eng. C. L. 393, 20 L. J. Q. B. N. S. 185, 15 Jur. 315; Anonymous, 1 Dowl. P. C. 157; Jacobs v. Jacobs, 3 Dowl. P. C. 675; Rex v. Douglas, 7 Jur. 39.

Bail requiring attendance from another state or county, party privileged until a reasonable time to enable him to return home.—Palmer v. Rowan, 21 Neb. 452, 59 **Am. Rep.** 844, 32 N. W. 210.

[8] Addicks v. Bush, 1 Phila. (Pa.) 19. In the Matter of Douglas, 3 Q. B. (3 Ad. & E. N. S.) 825, 43 Eng. C. L. 992, 3 Gale & D. 509, 12 L. J. Q. B. N. S. 49, 7 Jur. 39; Goodwin v. Lordon, 1 Ad. & E. 378, 3 Neb. & M. 879, 2 Dowl. P. C. 504, Eng. Repr. 28 Eng. C. L.; Hare v. Hyde, 16 Q. B. (16 Ad. & E. N. S.) 394.

Lord Campbell, in Hare v. Hyde, 16 Q. B. (16 Ad. & E. N. S.) 394, 71 Eng. C. L. 373, 20 L. J. Q. B. N. S. 185, 15 Jur. 315, says: "I am of the opinion that the defendant has no privilege in respect of his having been tried and acquitted and ordered to be discharged. He was, after that, in the same position as any other of the circumstances in court. The cases show that an acquitted person has no privilege redeundo; and it follows

viction,[9] as well as where held in jail[10] under charge or in prison under sentence.[11] But there is a hopeless conflict in the decisions in regard to this matter and the practitioner must be guided by the doctrine in the particular jurisdiction.

that while remaining as a spectator he was not privileged more than any one else."

In Missouri, in the case of Byler v. Jones, 22 Mo. App. 623, it is held that a person arrested on a criminal charge in another county, and discharged on the hearing or trial, is immune from civil process or arrest in a civil action until he has had a reasonable time in which to leave the county where the trial is had and the prisoner discharged.

In Nebraska, in the case of Palmer v. Rowan, 21 Neb. 452, 59 **Am. Rep.** 844, 32 N. W. 210, it is held that one charged with a criminal offense in a county other than that of his residence, who is discharged on the trial, is privileged from civil process in the county where tried and acquitted until the elapse of a reasonable time to enable him to return to his home.

9 Lucas v. Albee, 1 Den. (N. Y.) 666.

10 **Confined in jail in default of bail** on a criminal charge, person not privileged from civil process. —White v. Underwood, 125 N. C. 25, 74 **Am. St. Rep.** 630, 46 **L. R. A.** 706, 34 S. E. 104.

11 CONN. — Dunn's Appeal, 34 Conn. 82. KY.—Smith v. McGlasson, 30 Ky. (7 J. J. Marsh.) 154. MO.—Byler v. Jones, 21 Mo. App. 623. N. Y.—Williams v. Bacon, 10 Wend. 636; Platner v. Sherwood, 6 John. Ch. 130; Phelps v. Phelps, 7 Paige Ch. 150; Davis v. Duffie, 1 Abb. App. Dec. 486, 3 Keyes 606, affirming 8 Bosw. 617; Morris v. Walsh, 1 Abb. Pr. 387; In re Johnson, 21 Abb. N. C. 172; Slade v. Joseph, 5 Daly 187; Bonnell v. Rome, W. & O. R. Co., 12 Hun 218 N. C.—Moore v. Greene, 73 N. C. 394, 21 **Am. Rep.** 470; White v. Underwood, 125 N. C. 25, 74 **Am. St. Rep.** 630, 46 **L. R. A.** 706, 34 S. E. 104. PA.—Davis v. Cummins, 3 Yeates 387. ENG.—Ramsay v. McDonald, 1 W. Bl. 30, 96 Eng. Repr. 16; Hutchins v. Kenrick, 2 Burr. 1048, 97 Eng. Repr. 701; Coopin v. Gunner, 2 Ld. Raym. 1572, 92 Eng. Repr. 518; Williams v. Smith, 1 Dowl. P. C. 703; Loveitt v. Hill, 4 Dowl. P. C. 579.

Compare: Anonymous, Mosley 237, 25 Eng. Repr. 369 (no process can be served on a prisoner committed at the suit of the crown, without leave, though he at once appears); Ex parte Smith, Alcock & N. (Ir.) 126; Brown v. Tracey, 9 How. Pr. (N. Y.) 93; Troup v. Wood, 4 Johns. Ch. (N. Y.) 228, probably overruled in Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 130.

Extent of privilege from arrest while going to or from court, extends to all proceedings of a judicial nature, whether in court or not, and protects a person going to or from place of confinement under former arrest.—People v. Judge of Superior Ct., 40 Mich. 729.

On way to consult counsel after apprehension on criminal charge, a person is privileged from arrest in a civil suit.—Jacobson v. Hossmer, 76 Mich. 234, 42 N. W. 1110.

CHAPTER III.

APPREHENSION—ACTS AND FACTS CONSTITUTING.

§ 21. Introductory. It has already been pointed out[1] that in order to constitute a legal apprehension there must be a touching or putting the hands upon the body or clothing[2] of the person apprehended, or the doing of some other act manifesting an intention to apprehend; and there must also be a show of present ability to take the person into custody to answer in a court of justice;[3] and, also, that the word and act imply a certain degree of force and restraint,[4] or the present ability to exercise or exert it.

1 See ante, § 9.

2 **A touching or corporal seizing** is requisite to a valid arrest, under the doctrine of some of the old and some of the modern cases. —See Horner v. Batten, Bull. N. P. 62; Genner v. Sparks, 6 Mod. 173, 87 Eng. Repr. 928; Genner v. Sparkes, 1 Salk. 79, 91 Eng. Repr. 74; United States v. Benner, 1 Bald. 234, 239, Fed. Cas. No. 14568; Lawson v. Bunzines, 3 Harr. (Del.) 416. But see authorities, post note 4, this section.

However slight the touch, has been held to be sufficient to constitute a valid arrest. "If he had touched the defendant, even with the end of his finger, it would have been an arrest" (Genner v. Sparks, 6 Mod. 173, 87 Eng. Repr. 928, 929), "although he did not succeed in stopping or holding him." —Whitehead v. Keyes, 85 Mass. (3 Allen) 495, 81 Am. Dec. 672.

3 See People ex rel. Taranto v. Erlanger, 132 Fed. 883.

4 **Actual force or manual touching** of the body is not necessary to constitute either an apprehension or an arrest, it being sufficient that the party be within the power of the officer or person making the arrest, and submits to be taken into custody. ALA.—Collins v. Fowler, 10 Ala. 858; Field v. Ireland, 21 Ala. 240. GA.—Courtoy v. Dozier, 20 Ga. 369. IND.—Cooper v. Adams, 2 Blackf. 294. KY.—Hart v. Flynn's Exr., 38 Ky. (8 Dana) 190. MAINE—Strout v. Gooch, 8 Maine 127. N. H.—Huntington v. Blaisdell, 2 N. H. 318; Pike v. Hanson, 9 N. H. 491; Em-

Mere words will not suffice to constitute a valid apprehension where the party resists, flees, or refuses to submit.[5] The rule is otherwise in those cases in which the party accompanies the officer or otherwise submits to his power,[6] actual submission to and being within the power of the officer being sufficient.[7]

ery v. Chesley, 18 N. H. 198, 201; Butler v. Washburn, 25 N. H. 251, 258. N. J.—State v. Hahn, 40 N. J. L. (11 Vr.) 228; Hebrew v. Prelis, 73 N. J. L. 621, 118 **Am. St. Rep.** 716, 7 **L. R. A.** (N. S.) 580, 64 Atl. 121. N. Y.—Bissell v. Gold, 1 Wend. 210, 19 **Am. Dec.** 480; Callahan v. Searles, 78 Hun 239, 60 N. Y. S. R. 314, 28 N. Y. Supp. 904; Hart v. McDonald, 1 N. Y. City Rep. 181; Searls v. Viets, 2 Thomp. & C. 224. N. C.—Jones v. Jones, 35 N. C. (13 Ired. L.) 448; State v. Buxton, 102 N. C. 129, 8 S. E. 774. VT.—Godell v. Tower, 77 Vt. 61, 107 **Am. St. Rep.** 745, 58 Atl. 790. WASH.—State v. Deatherage, 35 Wash. 326, 77 Pac. 504. ENG.—Horner v. Batten, Bull. N. P. 62; Sir James Wingfield's Case, 8 Car. 1; Williams v. Jones, Cas. temp. Hardw. 301, 95 Eng. Repr. 193; Genner v. Sparkes, 1 Salk. 79, 91 Eng. Repr. 74.

"If bailiff who has a process against one says to him when he is on horseback or in a coach, 'you are my prisoner, I have a warrant for you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, this is an arrest" (Genner v. Sparkes, 1 Salk. 79, 91 Eng. Repr. 74); but the officer must exercise a controlling authority over the person, and have in his hands the process to enforce.—Lansing v. Case, 4 N. Y. Leg. Obs. 221.

Contra: A line of cases, following the views of Lord Mansfield, as expressed in Arrowsmith v. Le Mesurier, 2 Bos. & P., N. R. 211, 127 Eng. Repr. 605, 9 Rev. Rep. 642, that if a warrant be shown by the officer charged with its execution to the person accused with the commission of an offense, and the latter, without compulsion, attends the officer to the magistrate or court, and is dismissed on hearing, this does not constitute such an arrest as will support trespass and false imprisonment.—See Bisten v. Barridge, 3 Campb. 139; McClaughan v. Clayton, Holt N. P. 478.

[5] Fuller v. Bowker, 11 Mich. 204; Case v. State (Miss.), 17 So. 379; Russen v. Lucas, 1 Car. & P. 153, 12 Eng. C. L. 98.

[6] Pike v. Hanson, 9 N. H. 491; Emery v. Chesley, 18 N. H. 198; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 **Am. Dec.** 480; Searls v. Viets, 2 Thomp. & C. (N. Y.) 224; see, also, cases cited in note 7 post, this section.

[7] ALA.—Field v. Ireland, 21 Ala. 240. ARK.—Floyd v. State, 12 Ark. 43, 54 **Am. Dec.** 250. DEL.—Bloomer v. Caunters, 1 Harr. 143. GA.—Courtoy v. Dozier, 20 Ga. 369. MASS.—Mowry v. Chase, 100 Mass. 79. MICH.—Brushaber v.

Restraint of the person and of the right of locomotion, actual or potential, are absolutely essential to a valid apprehension.[8]

§ 22. CORPORAL CONTROL AND NOTICE ARE ESSENTIAL. To constitute an apprehension so as to make the defendant guilty of escape in case he does not submit and follow,[1] it is enough that there should be some degree, however slight, of corporal control.[2] Thus to inform a defendant that he is apprehended, and to lock the door,[3] or to touch him with only a finger,[4] provided he be informed at the time that he is apprehended,[5] constitutes a valid apprehension. And corporal touch is not necessary, provided it be waived by the defendant, which can be done by his

Stegemann, 22 Mich. 266. N. H.—Pike v. Hanson, 9 N. H. 491; Emery v. Chesley, 18 N. H. 198. N. Y.—Searls v. Viets, 2 Thomp. & C. 224. N. C.—Harkins v. Young, 2 Dev. & B. L. 527, 31 Am. Dec. 426. TENN.—Bloomer v. State, 35 Tenn. (3 Sneed) 66; Smith v. State, 26 Tenn. (7 Humph.) 43. TEX.—Herring v. State, 3 Tex. App. 108. FED.—Johnson v. Tompkins, 1 Bald. 571, Fed. Cas. No. 7416. ENG.—Horner v. Beatten, Bull. N. P. 62; Grainger v. Hill, 4 Bing. N. C. 212, 132 Eng. Repr. 769, 33 Eng. C. L. 561; Warner v. Riddiford, 4 C. B. (N. S.) 180, 205, 140 Eng. Repr. 1052, 1062, 93 Eng. C. L. 180, 204.

8 See DEL.—Lawson v. Bunzines, 3 Harr. 416; Petit v. Calmery, 4 Pen. 266, 55 Atl. 344. ILL.—Montgomery County v. Robinson, 85 Ill. 174, 176. KY.—Legrand v. Bedinger, 20 Ky. (4 T. B. Mon.) 540; Hart v. Flynn's Exr., 38 Ky. (8 Dana) 190; Rich v. Bailey, 123 Ky. 827, 97 S. W. 747. MD.—Baltimore & O. R. Co. v. Strube, 111 Md. 119, 73 Atl. 697. MASS.—French v. Bancroft, 42 Mass. (1 Met.) 502, 504. MINN.—Judson v. Reardon, 16 Minn. 431; Rhodes v. Walsh, 55 Minn. 542, 23 L. R. A. 632, 57 N. W. 212; Steenerson v. Polk County, 68 Minn. 509, 71 N. W. 687. N. H.—Emery v. Chesley, 18 N. H. 198, 201. N. Y.—Lansing v. Case, 4 Leg. Obs. 221. N. C.—State v. Buxton, 102 N. C. 129, 8 S. E. 774. S. C.—Huntington v. Shultz, Harp. 452, 18 Am. Dec. 660. TEX.—Gentry v. Griffith, 27 Tex. 462. VT.—In re Fitton, 68 Vt. 297, 35 Atl. 319. FED.—United States v. Benner, 1 Bald. 234, Fed. Cas. No. 14568.

1 See ante, § 21, foot notes 6 and 7.

2 See ante, § 21, foot note 4.

3 Williams v. Jones, Cas. temp. Hardwicke 284, 195 Eng. Repr. 193.

4 See ante, § 21, foot note 2.

5 Genner v. Sparkes, 1 Salk. 79, 91 Eng. Repr. 74.

submission to the process, and placing himself in the power of the officer.[6] But it is essential that there should be notice of arrest given either expressly or by implication; and without such notice no amount of physical restraint can constitute an arrest.[7] The amount of force justifiable in arresting is discussed elsewhere.[8]

§ 23. NOTICE MAY BE GIVEN BY IMPLICATION. Where an officer[1] is seeking to apprehend for a felony or a misdemeanor, it is his duty to give to the party he is seeking to apprehend clear and distinct notice of his purpose and authority, and of the fact that he is legally qualified;[2] because if the person sought to be apprehended has no notice that the attempted apprehension is by lawful authority, he has the right to resist the attempt to take

6 See Kerr's Whart. Cr. Law, §§ 402, 444, 1672-4; Emery v. Chesley, 18 N. H. 198; Searls v. Viets, 2 Thomp. & C. (N. Y.) 224; Russen v. Lucas, 1 Car. & P. 153, 12 Eng. C. L. 98; George v. Radford, Moody & M. 244.

7 Kerr's Whart. Crim. Law, §§ 521-571; Yates v. People, 32 N. Y. 509; State v. Belk, 76 N. C. 10; Mackalley's Case, 9 Coke 65; 77 Eng. Repr. 828; R. v. Howarth, 1 Ry. & Moody C. C. 207; R. v. Gardener, 1 Ry. & Moody C. C. 390; R. v. Payne, 1 Ry. & Moody C. C. 378.

8 In Kerr's Whart. Crim. Law the topic in the text is discussed at large in §§ 540-571.

As to the right to resist officers, see Kerr's Whart. Crim. Law, §§ 849-856.

1 A person other than an officer, seeking to apprehend for felony without a warrant in his possession, should make known on demand, that a warrant exists, stating where it is, and that he claims to be acting under its authority, or by command of the officer who has it in his possession; but the omission so to do will not justify the party apprehended, or sought to be apprehended, in resisting the apprehension, where he in fact already knows, or on reasonable and probable grounds believes that he is under charge of felony, that a warrant is out for his apprehension, and that the apprehension attempted is really in consequence of the substance of the warrant and its attempted execution.—Robinson v. State, 93 Ga. 77, 44 Am. St. Rep. 127, 9 Am. Cr. R. 570, 18 S. E. 1018.

2 Otherwise in jurisdictions where officer empowered by law to apprehend without a warrant.—Shovlin v. Com., 106 Pa. St. 369, 6 Am. Cr. R. 41.

Demand for authority by person sought to be apprehended, made under real ignorance of the true state of affairs and in good faith for the purpose of enlisting what

him into custody, and the apprehension, if made under such circumstances, is illegal.[3]

But this notice may be given by implication.[4] If, as has been seen, a constable command the peace,[5] or show his badge or staff of office,[6] this is a sufficient intimation of his authority. In such a case it is not necessary to prove the officer's appointment as constable; proof that he was accustomed to act as constable is sufficient.[7] Where he shows his warrant,[8] or where it appears that he is known to the defendant to be an officer;[9] as, for instance,

was actually wanted and needed, on failure to comply with the demand, he will be justified in resisting to any reasonable and proper extent.—Robinson v. State, 93 Ga. 77, 44 Am. St. Rep. 127, 9 Am. Cr. R. 570, 18 S. E. 1018.

3 Franklin v. Amerson, 118 Ga. 860, 13 Am. Cr. R. 1, 45 S. E. 698. See Snelling v. State, 87 Ga. 50, 13 S. E. 154; Jones v. State, 114 Ga. 73, 39 S. E. 861.

4 People v. Pool, 27 Cal. 572. See Kerr's Whart. Crim. Law, §§ 529, 571, 2003.

Arrest in commission of act or upon fresh pursuit afterwards, officer not required to give notice of his official character, because the person arrested must know why he is arrested.—People v. Pool, 27 Cal. 572. See R. v. Whithorne, 3 Car. & P. 394, 14 Eng. C. L. 627; R. v. Davis, 7 Car. & P. 785, 32 Eng. C. L. 872; R. v. Payne, 1 Moo. C. C. 378.

As to what is sufficient notice, it has been said that the command: "You are my prisoners—surrender," constitutes a sufficient notice of the character of the officer.—People v. Pool, 27 Cal. 572. See Mackalley's Case, 9 Coke 68b, 69a.

"I arrest you by authority of the state of Vermont," also held to be sufficient notice of the official character of the person seeking to make the arrest.—State v. Taylor, 70 Vt. 1, 67 Am. St. Rep. 648, 42 L. R. A. 673, 39 Atl. 447.

As to information a person is entitled to on arrest. See 43 L. R. A. 673.

5 1 Hale 561.

Where an offender is openly engaged in breaking the law, it will be sufficient if the officer announces his official position and demands his surrender; if this is refused, the officer may use such force as may be necessary to secure his prisoner.—Shovlin v. Com., 106 Pa. St. 369, 5 Am. Cr. R. 41.

6 Foster, 311; Yates v. People, 32 N. Y. 509; R. v. Woolmer, 1 Moody C. C. 334; Kerr's Whart. Crim. Law, § 1972.

7 East P. C. 315; Whart. Crim. Evid. § 833.

8 1 Hale 461.

9 A person about to be apprehended, who is acquainted with the officer and knows of his official position, has sufficient knowledge of that fact, and the officer is not required to make a declara-

when the defendant says: "Stand off; I know you well enough; come at your peril;"[10] this is notice enough.[11]

tion of his official position; and this is true both as to the officer seeking to apprehend, and as to parties assisting him therein.—State v. Shaw, 73 Vt. 148, 13 Am. Cr. R. 51, 50 Atl. 863; Rex v. Davis, 7 Carr. & P. 785, 32 Eng. C. L. 872; Rex v. Howarth, 1 Moo. C. C. 207; Rex v. Woolmer, 1 Moo. C. C. 334; Rex v. Payne, 1 Moo. C. C. 378; Reg. v. Porter, 12 Cox C. C. 444.

10 R. v. Pew, Cro. Car. 183.

11 1 Hale 438. See People v. Pool, 27 Cal. 572.

CHAPTER IV.

APPREHENSION—WARRANTS FOR.

§ 24. CRIMINAL PROCEDURE USUALLY COMMENCES WITH OATH BEFORE MAGISTRATE. The usual commencement of a criminal procedure is a preliminary oath[1] before a magis-

[1] **Affidavit by any one** who is competent to make oath to it, is sufficient.—IOWA—Santo v. State, 2 Iowa 165, 63 Am. Dec. 487. KAN.—Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423. LA.—State v. Touchet, 46 La. Ann. 827, 15 So. 390 (justice of the peace authorized to issue warrant on oath of one or more "credible" witnesses, not required to accept affidavit of any person who may offer to make it). MAINE—Campbell v. Thompson, 16 Maine 117. MASS.—Com. v. Tobias, 141 Mass. 129, 6 N. E. 217; Com. v. Alden, 143 Mass. 113, 9 N. E. 15; Com. v. Carroll, 145 Mass. 403, 14 N. E. 618; Com. v. Murphy, 147 Mass. 577, 18 N. E. 418; Com. v. Gay, 153 Mass. 211, 26 N. E. 571, 852. MICH.—People v. Lynch, 23 Mich. 274; Pardee v. Smith, 27 Mich. 33. MONT.—State v. Clancy, 20 Mont. 498, 52 Pac. 267 (information by county attorney, who has to make an oath to perform the duties imposed on him by law). N. H.—State v. Howard, 69 N. H. 507, 43 Atl. 592. N. Y.—People v. Stokes, Abb. N. C. (N. Y.) 200, 24 N. Y. Supp. 727 (person convicted of felony, who is by statute made competent witness in any cause or proceedings; where affidavit was by felon convict whose testimony incompetent at trial, court refused to quash proceedings. State v. Killet, 2 Bail, S. C. 289). OHIO—Kaubach v. State, 25 Ohio Cir. Ct. R. 488 (affidavit need not be followed by the filing of an information). R. I.—State v. Woodmansee, 19 R. I. 651, 35 Atl. 961. TEX.—Rivers v. State, 10 Tex. App. 177 (convict pardoned and competent to testify; but see Perez v. State, 20 Tex. App. 327). FED.—United States v. Skinner, 1 Brun. Col. Cas. 446, Fed. Cas. No. 16309.

—Specified officers designated to file affidavit, others not compe-

trate,[2] upon which, if it appear on the face of such oath that a criminal offense has been committed by the defendant[3] within the magistrate's jurisdiction, a warrant of

tent to do so.—Foster v. Clinton Co., 51 Iowa 541, 2 N. W. 207.

Contra: State v. Howard, 69 N. H. 507, 43 Atl. 529.

Wife may make complaint against husband for assault with intent to do great bodily harm.—People v. Sebring, 66 Mich. 705, 35 N. W. 808 (less than the crime of murder); Goodwin v. State, 114 Wis. 318, 90 N. W. 170 (with intent to kill).

Can not make complaint against him for indecent assault on his daughter.—People v. Westbrook, 94 Mich. 629, 54 N. W. 486.

Affidavit filed after warrant issues, comes too late; it can not be made to relate back so as to confer jurisdiction on the justice to issue the warrant.—Smith v. Clausmeier, 136 Ind. 105, 43 Am. St. Rep. 311, 35 N. E. 904.

Affidavit of complaining party not sufficient in Missouri, except under contingencies provided for in the statute; prosecuting attorney must act.—McCaslay v. Garrett, 31 Mo. App. 354.

Affidavit of complaint not necessary where statute does not require it, though it does require examination of complaint on oath.—State v. Price, 111 N. C. 703, 16 S. E. 414.

Complaint not under oath, nor in writing, that a crime has been committed, is all that is necessary to authorize magistrate to issue warrant.—People v. Hicks, 18 Barb. (N. Y.) 153; State v. Killet, 2 Bail. L. (S. C.) 290.

Contra: Myers v. People, 67 Ill. 503; Carey v. State, 5 Tex. App. 462.

Verification of information is neither an oath nor an affirmation within a constitutional provision that "no warrant shall issue but on probable cause supported by oath or affirmation."—City of Atchison v. Bartholow, 4 Kan. 124, 139, 140; Thompson v. Higginbotham, 18 Kan. 42, 44; State v. Gleason, 32 Kan. 245, 4 Pac. 363.

2 People v. Le Roy, 65 Cal. 615, 4 Pac. 649.

Clerk of court has no power to take affidavit on which warrant for apprehension may issue.—Lloyd v. State, 70 Ala. 32.

Contra: State v. Louner, 26 Neb. 757, 42 N. W. 762.

Offense on high seas, complaint must be sworn to before the court or judge, or clerk of the court, or some commissioner authorized to act in absence of the judge; affidavit before a deputy clerk of the court acting as a notary public and not as clerk, is insufficient.—United States v. Smith, 17 Fed. 510.

3 **Affidavit before notary** that affiant bought liquor of defendant "at his saloon on one Sunday in the month of May, 1888," does not meet the requirements under N. Y. Code Cr. Proc., §§ 145-148, and fails to state the commission of an offense.—People v. Nowak, 52 Hun (N. Y.) 613, 7 N. Y. Cr. R. 69, 5 N. Y. Supp. 239.

apprehension issues.[4] The affidavit must be specific,[5] and must aver personal knowledge[6] on the part of the affiant.

[4] Woodall v. McMillan, 38 Ala. 622; Pierson v. State, 129 Ala. 120, 29 So. 843; Ormond v. Ball, 120 Ga. 916, 48 S. E. 383; Housh v. People, 75 Ill. 487; State v. Graffmuller, 26 Minn. 6, 46 N. W. 445; Blodgett v. Race, 18 Hun (N. Y.) 132; People v. Pratt, 22 Hun (N. Y.) 200.

A second warrant on same affidavit, after apprehension and hearing by other justices under first warrant, is unauthorized; the justice becomes functus officio as to all matters in the affidavit.—State v. Sneed, 84 N. C. 816.

Assistant of justice of the peace may issue warrants in criminal cases, where the justice is absent or unable to serve, where by law may act through assistant.—State v. Chappell, 26 R. I. 375, 58 Atl. 1009.

Complaint before magistrate the prescribed procedure, court will not relieve against an indictment by grand jury, where it is necessary for that body to act to prevent the statute of limitations from attaching. People v. Strong, 1 Abb. Pr. N. S. (N. Y.) 244.

Commission of offense in another county, justice of the peace has no jurisdiction to issue warrant for apprehension.—Hill v. Taylor, 50 Mich. 549, 15 N. W. 899.

—In another jurisdiction within same county, justice can not make warrant returnable before himself. —McCrag v. Burr, 106 App. Div. (N. Y.) 275, 17 N. Y. Ann. Cas. 96, 94 N. Y. Supp. 675, affirmed 186 N. Y. 467, 79 N. E. 715.

Commission of offense within county justice may send his warrant into any other county in the state.—Garner v. Smith, 40 Tex. 505.

Under statute providing for the apprehension and punishment of men who desert their wives or children, it seems that a justice may issue a warrant to another county.—Keller v. Com., 71 Pa. St. 413.

Magistrate having no jurisdiction of crime charged, he may make the warrant returnable to the proper criminal court having jurisdiction.—Pierson v. State, 129 Ala. 120, 29 So. 843.

Offense an indictable one, no objection to justice issuing warrant for apprehension of offender. —Ex parte Bishop, 4 Mo. 219.

Punishment inflicted a fine only, the defendant may be arrested and required to find bail.—Jackson, ex parte, 14 Blatch. 245, Fed. Cas. No. 7124.

Under North Carolina statute a mayor pro tem may issue warrant in criminal cases. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

Warrant being required by law apprehension without warrant is not due process of law, "and arbitrary or despotic power no man possesses under our system of government."—Board v. Schroever, 58 Ill. 353; State v. James, 78 N. C. 455; Muscoe v. Com., 86 Va. 443, 8 Am. Cr. R. 602, 10 S. E. 534.

[5] State v. Beebe, 83 Md. 171; State v. Burrell, 86 Ind. 313.

[6] **Affidavit on information and belief** is insufficient to justify issuance of warrant for apprehen-

Mere belief is not sufficient.[7] If the affiant can not testify to knowledge of the facts, other witnesses should be brought forward to supply the defect; but without affidavit to the inculpatory facts a warrant should not issue.[8]

§ 25. OFFICER MAY BE DESCRIBED BY OFFICE. The affidavit being thus specific and direct, a warrant issues for the defendant's apprehension. Under the common-law practice, this warrant is addressed to a constable, or officer, or other person whose name is specified;[1] the usual and best

sion of defendant.—State v. Clark, 34 Kan. 289, 8 Pac. 528; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; People v. Heffron, 53 Mich. 527, 19 N. W. 170 (affiant alleging he "has good reason to believe, and does believe"); Blodgett v. Race, 18 Hun (N. Y.) 132; In re Blum, 9 Misc. (N. Y.) 571, 30 N. Y. Supp. 396; Charge to Grand Jury, 9 Pittsb. R. 174; State v. Good, 77 Tenn. (9. Lea) 240 (affiant told justice he knew nothing of the facts, but got his information from others).

Contra: State v. Carey, 56 Kan. 84, 42 Pac. 371; Daniels v. State, 2 Tex. App. 353 (county attorney can make on information and belief); Clark v. State, 23 Tex. App. 260, 5 S. W. 115 (affiant alleging he "has good reason to believe, and does believe" defendant committed the crime charged); Hall v. State, 32 Tex. Cr. R. 594, 25 S. W. 292; Andrews v. State (Tex. Cr. R.), 25 S. W. 425, 1894; Staley v. State (Tex. Cr. R.), 29 S. W. 272, 1895; Anderson v. State, 34 Tex. Cr. R. 69, 29 S. W. 384.

Affidavit should be obtained from person communicating the facts.—Daniels v. State, 2 Tex. App. 353.

Complaint insufficiently verified warrant should be quashed and accused discharged.—State v. Gleason, 32 Kan. 245, 4 Pac. 363.

Evidence of hearsay knowledge, only, on part of prosecuting witness, of the contents of the complaint sworn to by him positively, not admissible on motion to quash warrant.—State v. Carey, 56 Kan. 84, 42 Pac. 371; City of Holton v. Brimrod, 8 Kan. App. 265, 55 Pac. 505.

7 **Best knowledge and belief** sufficient to justify issuance of warrant.—State v. Hobbs, 39 Me. 212.

Good reason to believe is sufficient to justify issuance of warrant, under Texas Code Cr. Proc. —Dodson v. State, 35 Tex. Cr. R. 571, 34 S. W. 754.

8 Com. v. Lottery Tickets, 59 Mass. (5 Cush.) 369; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; People v. Heffron, 53 Mich. 527, 19 N. W. 170; People v. Recorder, 6 Hill (N. Y.) 429.

Hearsay is not excluded when the object is information. — See State v. Good, 77 Tenn. (9 Lea) 240.

1 Meek v. Pierce, 19 Wis. 300; R. v. Whalley, 7 Car. & P. 245, 32 Eng. C. L. 594.

course being to name the constable of the ward or precinct. When addressed to the sheriff of the county, the latter may act by deputy. Whether a constable may act through deputy has been doubted; and in England the negative seems to be held.[2] In English practice a warrant may be directed to officers by the description of their office, and the same is true in most, if not all, the states of the Union.[3] When addressed by name, the officer named may execute the warrant anywhere within the jurisdiction of the magistrate granting the warrant. When addressed to officers designating them only by the description of their office, the officer acting can execute the warrant only within the precincts of his office.[4]

Indorsement of name of person on warrant for apprehension of an accused, appointing him a special constable "to execute the within process," is sufficient under a statute authorizing justices to appoint a constable for a particular occasion "specified in writing."—State v. Hallbeck, 40 S. C. 298, 18 S. C. 919.

Officer of county, warrant must be addressed to; where the name of the county is omited, the warrant will be illegal.—Toliver v. State, 32 Tex. Cr. R. 444, 24 S. W. 286.

Private person may not be designated, unless there exists a necessity therefor, which necessity must be expressed in the warrant. —Com. v. Foster, 1 Mass. 488.

Direction to private party should be in cases of great emergency, only, and should be written, at least when the precept is written. —State v. Call, 150 N. C. 805, 63 S. E. 95.

Where warrant, in the body, is directed "to the sheriff or any constable in the county," authority to serve the same by a private person can not be conferred by indorsement on the back.—Abbott v. Booth, 51 Barb. (N. Y.) 546.

[2] 1 Chit. Crim. Law 48.

[3] Johnson v. State, 73 Ala. 21 (any constable in the county); Wilson v. State, 99 Ala. 194, 13 So. 427 (to any lawful officer of the state); Tesh v. Com., 34 Ky. (4 Dana) 522; State v. McNally, 34 Me. 210, 56 Am. Dec. 650 (to any sheriff, city marshal or deputy); Abbott v. Booth, 51 Barb. (N. Y.) 546.

Direction to private person only where necessary, and that necessity expressed in the body of the warrant.—Com. v. Foster, 1 Mass. 488.

[4] 1 Chit. Crim. L. 48, citing R. v. Weir, 1 Barn. S. C. 288, 107 Eng. Repr. 108, 8 Eng. C. L. 125; 2 Dow. & R. 44.

§ 26. Form and sufficiency of warrant. Technical accuracy is not required.[1] If the language is such as to enable the court to gather from it, according to the ordinary acceptance of the language used therein, that an offense has been committed under provisions of statute,[2]

1 Rhodes v. King, 52 Ala. 272; In re Stewart, 60 Kan. 781, 57 Pac. 976.

But as a justice can act in his own county, only, if name of county be omitted, the warrant will be illegal. — Toliver v. State, 32 Tex. Cr. R. 444, 24 S. W. 286.

Complaint and warrant may be on same paper, and affidavit made part of warrant by reference thereto.—State v. Goyette, 11 R. I. 592.

May be in name of people, or of the magistrate. — Dickinson v. Rogers, 19 John. (N. Y.) 279.

2 Spear v. State, 120 Ala. 351, 25 So. 46 ("offense of carrying a concealed pistol," sufficient); State v. Bryson, 84 N. C. 780.

Affidavit filed, not an essential part of warrant.—State v. Bryson, 84 N. C. 780.

Affidavit setting forth offense in full, it is sufficient for the warrant to state "to answer the above charge," where the affidavit is incorporated into and made part of the warrant.—State v. Sharp, 125 N. C. 628, 74 **Am. St. Rep.** 663, 34 S. E. 263. See State v. Sykes, 104 N. C. 694, 10 S. E. 101.

"Assault with intent to murder" sufficiently describes offense under a statute requiring a warrant to state the offense by name or in language from which it may clearly be inferred.—Spraggins v. State, 139 Ala. 93, 35 So. 1000.

Charging defacement of building on highway, charges a crime; because if the building be lawfully upon the highway it was as much a crime to deface it there as it would have been to deface it elsewhere. — State v. Yourex, 30 Wash. 611, 71 Pac. 203.

Designation by name of crime charged, is sufficient; technical averment of crime not required.—Spraggins v. State, 139 Ala. 93, 35 So. 1000; In re Stewart, 60 Kan. 781, 57 Pac. 976.

Fullness of statement required in an information, not necessary in a warrant.—State v. Baker, 57 Kan. 541, 46 Pac. 947.

"Gambling in a public place" does not describe the prohibited offense of gaming at certain places with cards, dice or similar devices, and is insufficient. — McGee v. State, 115 Ala. 135, 22 So. 113.

"Offense of breaking into storehouse of said J et al., in said county, has been committed," etc., held to sufficiently describe the offense, as it will be presumed that the breaking was with intent to steal.—Adams v. Coe, 123 Ala. 664, 26 So. 652.

Particulars of crime need not be stated where the warrant is in the form prescribed by statute and containing the statement of crime required.—Krausskopf v. Tallman, 38 App. Div. N. Y. 273, 56 N. Y.

it will be sufficient;[3] it need not state the circumstances which give the magistrate jurisdiction,[4] or recite that it is issued on a sworn complaint, when the statute merely requires that the justice examine complainant on oath.[5]

Name and description of the accused should be inserted in the body of the warrant; and where the name is unknown there must be such a description of the person accused as will enable the officer to identify him when found.[6]

Signature[7] *and seal* are generally held to be necessary

Supp. 967, affirmed 170 N. Y. 560, 62 N. E. 264.

"Peddling goods by selling goods, wares, and merchandise consisting of," etc., "without a license, contrary to the form of statute," sufficiently describes the offense charged.—Wade v. Com., 3 Ky. L. Rep. 442.

Substance of offense charged is all warrant need recite.—Hawkins v. Ralston, 95 Mich. 63, 13 Am. St. Rep. 376, 37 N. W. 45.

Warrant must specify some particular offense.—Yaner v. People, 34 Mich. 286.

"With force and arms" did set fire to and burn specified mill, referring to act as a felony, held to be a sufficient description of the offense of burning charged.—People v. Pichette, 111 Mich. 461, 69 N. W. 739.

3 Rhodes v. King, 52 Ala. 272; State v. Staples, 37 Me. 228.

Warrant stating that A complained on oath that B and others named, violently assaulted him, and requiring the officer to apprehend them and bring them before a justice, is sufficient.—Flack v. Aukeney, 1 Ill. (Breese) 187.

4 Atchison v. Spencer, 9 Wend. (N. Y.) 62.

5 State v. Price, 111 N. C. 703, 16 S. C. 414.

6 Allison v. People, 6 Colo. App. 80, 39 Pac. 903. As to blank warrants, see post § 27.

As to "John Doe," see post § 28.

7 People v. Crocker, 1 Mich. N. P. 31.

Name written in body of warrant, and indorsed on back, without the formal signature of the justice, insufficient.—Davis v. Sanders, 40 S. C. 509, 19 S. E. 138.

Signature by judge, when warrant should have been signed by clerk of the court by order of the judge, does not render the warrant void.—Monroe v. Berry, 29 Ky. L. Rep. 602, 90 S. W. 38.

Signature by the clerk instead of the public judge of the court, is not for that reason invalid.—O'Brien v. City of Cleveland, 1 Clev. L. Rep. 100.

Signature in lead pencil, not a sufficient signature.—United States v. Thompson, 2 Cr. C. C. 407, Fed. Cas. No. 16484.

Signature without official character specified by the justice is a

in order to give a warrant for the apprehension of a person validity,[8] and to justify an officer in apprehending thereunder,[9] except in those jurisdictions, and under those circumstances, where and in which warrants are expressly authorized by statute to be issued without seals.

§ 27. SAME—BLANK WARRANTS. At common law, a warrant for the apprehension of an offender must be

sufficient signature. — Siller v. Ward, 4 N. C. 161, 1 Car. L. Repos. 584.

[8] 2 Inst. 52; 1 Hale 577; 2 Hale 110, 111; Hawk. b. 2, c. 13, § 21. ARK.—Woolford v. Dugan, 2 Ark. 131, 35 **Am. Dec.** 52. GA.—State v. Casewell, T. U. P. Charlt. 280. MAINE—State v. Coyle, 33 Maine 427; State v. Davis, 36 Me. 366, 58 **Am. Dec.** 757. MICH.—People v. Crocker, 1 Mich. N. P. 31. N. Y. —People v. Holcomb, 3 Park. Cr. R. 656. N. C.—State v. Curtis, 2 N. C. (1 Hayw.) 471; Welch v. Scott, 27 N. C. (5 Ired. L.) 72; State v. Worley, 33 N. C. (11 Ired. L.) 242. TENN.—Tackett v. State, 11 Tenn. (3 Yerg.) 392, 24 **Am. Dec.** 582; Bell v. Farnsworth, 30 Tenn. (11 Humph.) 608. FED.—United States v. Clough, 5 C. C. A. 140, 6 U. S. App. 377, 55 Fed. 373, reversing 47 Fed. 791 (on other grounds). ENG.—Padfield v. Cohell, Willes 411, 125 Eng. Repr. 1241.

Objections for defects in this regard must be timely made. It will be too late to make them on appeal, or on trial after hearing and after being bound over to the grand jury and an indictment returned. —See Santo v. State, 2 Iowa 165, 63 **Am. Dec.** 487, 517; State v. Nichols, 5 Iowa 414.

Seal of the justice, or of the justice's clerk who issues it, not the seal of the court to which the warrant is returnable, is required to render it valid.—State v. Goyette, 11 R. I. 313.

Seal to affidavit, where affidavit and warrant are on the same paper, has been held to be a sufficient seal to the warrant.—State v. Coyle, 33 Maine 427.

United States commissioner having no seal of office, issuing a warrant without a seal, it not being required by any act of congress or statute of the state that the warrant shall be under seal, is valid.—Starr v. United States, 153 U. S. 614, 38 **L. Ed.** 841, 14 Sup. Ct. Rep. 919.

Wafer seal attached to warrant for apprehension of accused, being the usual seal in such cases, is prima facie sufficient without proof that it is the seal of the magistrate, or that it has been adopted by him.—State v. McNally, 34 Maine 210, 56 **Am. Dec.** 650.

Word "seal" in a scroll, sufficient in some jurisdictions. — United States v. Hedges, 2 Cr. C. C. 43, Fed. Cas. No. 15339.

[9] **Seal not required by statute** to be affixed to a justice's warrant for the apprehension of an offender, none is required.—State v. McNally, 34 Maine 210, 56 **Am. Dec.** 650; State v. Vough, Harper (S. C.) 313.

complete and perfect, when it leaves the hands of the magistrate, (1) as to the offense committed and (2) as to the person charged; and if it is defective in either of these regards it is invalid and affords no protection to the officer executing it.[1] The principles of the common law in this regard have been affirmed in the American constitutions, conformed to in practice, and by the great weight of authority in this country a warrant for the apprehension of an accused person not containing these essential elements is invalid, and furnishes no protection to the officer acting under it.[2]

Warrant for apprehension of unnamed party, or containing a wrong name for the party to be apprehended[3] is void, except in those cases where it contains a descriptio personæ such as will enable the officer to identify the accused.[4] Thus, where a magistrate signed

1 1 Hale's P. C. 465; 1 East's P. C. 110, 111; Foster's Crown Law 312, 1 Chit. Cr. L. 39, 40; Money v. Leach, 1 W. Bl. 555, 561, 562, 96 Eng. Repr. 320, 323, 3 Burr. 1742, 1766, 1767, 97 Eng. Repr. 1075, 1087, 1088, 119 How. St. Tr. 102; Housin v. Barrow, 6 Durnf. & E. 122; Hoye v. Bush, 1 Man. & G. 775, 2 Scott N. R. 86, 133 Eng Repr. 545, 39 Eng. C. L. 1020; Rex v. Hood, 1 Moo. C. C. 281; Huckle v. Money, 2 Wilson K. B. 205, 195 Eng. Repr. 768.

2 GA.—Johnson v. Riley, 13 Ga. 97, 137. ILL.—Rafferty v. People, 69 Ill. 111, 18 **Am. Rep.** 601. MASS. —Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 **Am. Dec.** 669. N. H. —Melvin v. Fisher, 8 N. H. 407; Clark v. Bragdon, 37 N. H. 562, 565. N. Y.—Griswold v. Sedgwick, 6 Cow. 456, 1 Wend. 126; Holley v. Mix, 3 Wend. 350, 354, 20 **Am. Dec.** 702; Scott v. Ely, 4 Wend. 555; Gurnsey v. Lovell, 9 Wend. 319. WIS.—Scheer v. Keown, 29 Wis. 586. FED.—West v. Cabell, 153 U. S. 78, 38 **L. Ed.** 643, 14 Sup. Ct. Rep. 572.

Warrant changed after it leaves the hands of issuing magistrate, by another magistrate, before whom it is made returnable, by his adding the name of a person against whom it shall run, renders the warrant void.—Hoskins v. Young, 19 N. C. (2 Dev. & B. L.) 527, 31 **Am. Dec.** 426.

3 West v. Cabell, 153 U. S. 78, 38 **L. Ed.** 643, 14 Sup. Ct. Rep. 572.

"Amel" for "Amiel," and "Brearly" for "Brairley," in a warrant for apprehension, held to be idem sonans.—People v. Gosch, 82 Mich. 22, 46 N. W. 101.

4 Allison v. People, 6 Colo. App. 80, sub nom. People ex rel. Prisk v. Allison, 39 Pac. 903; Colter v. Lower, 35 Ind. 285, 9 **Am. Rep.** 735; Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 **Am. Dec.** 669; Mel-

blank warrants and put them into the hands of a police sergeant, who filled in the names of persons to be apprehended, as occasion demanded, it was held that a warrant so filled in did not authorize the apprehension, by a police officer, of a person whose name was thus inserted therein.[5]

Person whose name is unknown.[6] It has been said, however, a warrant may be duly issued against him with a blank left as to the name, and such warrant will justify the apprehension of the proper person, and the name of the defendant may be filled in when ascertained after his apprehension,[7] but this is thought to be an unsound doctrine, and an unsafe practice to follow.

§ 28. SAME—"JOHN DOE" WARRANTS. It follows, on principle, from what has already been said regarding the essential requirements of warrants[1] for the apprehension of persons accused, and about blank warrants,[2] that a warrant for the apprehension of a person whose true name is unknown, by the name of "John Doe" or "Richard Roe," "whose other or true name is unknown," is void, without other and further descriptions of the person to be apprehended,[3] and such warrant will

vin v. Fisher, 8 N. H. 406; Alford v. State, 8 Tex. App. 545; Scheer v. Keown, 29 Wis. 586; West v. Cabell, 153 U. S. 78, 38 L. Ed. 643, 14 Sup. Ct. Rep. 572.

"A B and Company" being the description in a warrant for apprehension of accused parties, and commanding the arrest of "said company," the description is too uncertain to justify an apprehension.—Hoskins v. Young, 19 N. C. (2 Dev. & B. L.) 527, 31 Am. Dec. 426.

5 Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601.

6 As to "John Doe" warrants. See post, § 28.

7 Bailey v. Wiggins, 5 Harr. (Del.) 465, 60 Am. Dec. 650.

1 See ante, § 26.

2 See ante, § 27.

3 1 Hale P. C. 577; 2 Ind. 119; Fost. C. L. 317, 7 Dane Abr. 248; 1 Chit. Cr. L. 39; Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 Am. Dec. 669; Mead v. Hawes, 7 Cow. (N. Y.) 332.

In New York prior to 1830 act, a person could not lawfully be apprehended under a warrant containing a fictitious name, even though he was the proper party wanted.—Gurnsey v. Lovell, 9 Wend. 319.

not justify the officer in acting under it.[4] Such a warrant must, in addition, contain the best descriptio personæ possible to be obtained of the person or persons to be apprehended, and this description must be sufficient to indicate clearly the proper person or persons upon whom the warrant is to be served; and should state his personal appearance and peculiarities, give his occupation and place of residence, and any other circumstances by means of which he can be identified.[5]

Person apprehended in act of committing a crime, under a "John Doe" warrant, on the other hand, the apprehension will not be illegal, or the officer liable, because under such circumstances it is not necessary that a warrant should have been issued.[6]

§ 29. SAME—DEFECTIVE WARRANTS. A warrant for the apprehension of an accused person, emanating from a magistrate who is not presumed to have acquired technical knowledge of the law (and if he has, is not required to use it) technical precision and sufficiency in the warrant are not required to the same extent as are required

4 Sanford v. Nichols, 13 Mass. 286, 7 **Am. Dec.** 151; Pearce v. Atwood, 13 Mass. 324, 344; Com. v. Kennard, 25 Mass. (8 Pick.) 133; Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 **Am. Dec.** 669; Sadgett v. Clipson, 8 East 328, 103 Eng. Repr. 368; Hoye v. Bush, 1 Man. & G. 775, 2 Scott N. R. 86, 133 Eng. Repr. 454, 39 Eng. C. L. 1020; Rex v. Hood, 1 Moo. C. C. 281.

A "John Doe" warrant being defective and void on its face, the officer has no right to apprehend the person charged therein; and if he attempts, he acts without warrant, and becomes a trespasser; the person sought to be apprehended has a right to resist by force using no more force than is necessary to resist the unlawful acts of the officer; and a private person doing the same act, stands on the same footing; and any third person may lawfully interfere to prevent an apprehension under such a warrant, doing no more than is necessary for that purpose.—Com. v. Crotty, 92 Mass. (10 Allen) 404, 405, 87 **Am. Dec.** 669; approved in West v. Cabell, 153 U. S. 78, 38 **L. Ed.** 643, 14 Sup. Ct. Rep. 572.

5 Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 **Am. Dec.** 669.

6 State v. Sutter, 71 W. Va. 371, 43 **L. R. A. (N. S.)** 399, 76 S. E. 811.

in an indictment or information, and want of technical precision will not be regarded if the warrant is in proper form and otherwise sufficient.[1] A mere clerical omission, which is apparent, and which does not mislead any one, or in any way prejudice the accused, will be disregarded.[2]

Indefinite description of offense[3] in the warrant for the apprehension of a person will not constitute a fatal defect, where from the warrant the defendant could know, and evidence at the preliminary examination showed that he did know, the nature of the offense charged.[4]

1 See ante, § 26.

2 ALA.—Johnson v. State, 73 Ala. 21 ("me" omitted after the word "before," in the clause stating by whom issued, does not impair the warrant); Wilson v. State, 99 Ala. 194, 13 So. 427 ("Pike county criminal court," instead of "criminal court of Pike county," harmless). CAL.—People v. George, 121 Cal. 492, 53 Pac. 1098 (misstatement of name of person making an oath to the affidavit, does not vitiate subsequent proceedings). CONN.—Hender v. Taylor, 29 Conn. 448 (directing person be brought "before me or any other justice in the county," no justice being designated). KAN.—State v. Aldrich, 50 Kan. 666, 23 Pac. 408 (directing officer to bring accused before magistrate issuing warrant instead of before "some magistrate of the county," as the statute provides, not void). MASS.—Com. v. Martin, 98 Mass. 4 (alleging commission of offense on "twenty-third" day of the month, the word "third" being written above the line and over a word crossed out in ink, apparently "second," sufficient). MICH.—People v. Gosch, 82 Mich. 22, 46 N. W. 101 (improper spelling of name, as "Amel" for "Amiel," and "Brearly" for "Brairley," immaterial, words idem sonans); People v. Kahler, 93 Mich. 625, 53 N. W. 826 (the introduction of the word "to wit" in the phrase "a large quantity of, to wit, spirituous liquor," is harmless). N. Y.—Payne v. Barnes, 5 Barb. 465; People v. Holmes, 41 Hun 55 (a defect which can not prejudice should be disregarded). WIS.—Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473 (warrant issued in March charging crime committed in May of same year instead of May of preceding year, as charged in the affidavit, is a mere clerical error, not misleading and does not vitiate the warrant); Bookhout v. State, 66 Wis. 415, 28 N. W. 179 ("to answer such complaint," instead of "to be dealt with according to law," immaterial error).

3 As to requirement that offense described be one denounced by the statute. See ante, § 26.

4 State v. Tennison, 39 Kan. 726, 18 Pac. 948.

Indefinite description of the person is fatal to the validity of the warrant in those cases where insufficient to enable the parties charged to be identified and apprehended. Thus, a warrant stating an offense to have been committed by "A B and Company," and requiring the officer to apprehend "said company," the description was held to be too uncertain to justify an apprehension.[5]

Two offenses charged will not avoid the warrant if the justice has jurisdiction of both offenses, and the officer must execute the writ.[6] While it is better for the warrant to specify a particular offense of which, under the statute, the accused is guilty, yet the warrant will not be fatally defective where it recites that the defendant, with others, is guilty of each and all of the several acts prohibited by a specified statute.[7]

Fatal defect in warrant, not to lay the venue properly,[8] or to fail to make the warrant returnable at any time, or before any person;[9] or if it fails to negative an exception in the statute defining the offense charged, where the justice has jurisdiction to try the case and pronounce judgment,[10] but it seems to be otherwise where his jurisdiction is limited to holding preliminary hearing.

Timely objections for defects in the affidavit or complaint, or in the warrant founded thereon, must be made; otherwise they will be presumed to have been waived, and will not be considered by the court.[11] Thus, voluntarily

5 Haskins v. Young, 19 N. C. (2 Dev. & B. L.) 527, 31 Am. Dec. 426.

6 Patterson v. Kise, 2 Blackf. (Ind.) 127.

7 Lacey v. Palmer, 93 Va. 159, 28 S. E. 930.

8 State v. Williamson, 81 N. C. 540.

9 United States v. Ameida, 2 Wheel. Cr. Cas. (N. Y.) 576.

10 State v. Harr, — W. Va. —, 88 S. E. 44.

11 ALA.—Dillard v. State, 151 Ala. 94, 44 So. 396 (oral demurrer to warrant not entertained). ARK.—Cox v. City of Jonesboro, 112 Ark. 96, 164 S. W. 767. CAL.—People v. Staples, 91 Cal. 23, 27 Pac. 523 (after hearing and commitment, irregularity in warrant immaterial). KAN.—State v. Tennison, 39 Kan. 726, 18 Pac. 948. MAINE—State v. Regan, 67 Maine 380. MASS.—Com. v. Gregory, 73 Mass. (7 Gray) 498 (objection can

entering into a recognizance for appearance, without objection to the sufficiency of the warrant;[12] waiving pre-

not be taken after trial and conviction); Com. v. Hart, 123 Mass. 416. MICH.—People v. Dowd, 44 Mich. 488, 7 N. W. 71 (objection not made on examination, can not be made when arraigned to plead); People v. Allen, 51 Mich. 176, 16 N. W. 370; People v. Kenyon, 93 Mich. 19, 52 N. W. 1033; People v. Turner, 116 Mich. 390, 74 N. W. 519; People v. Lowerie, 163 Mich. 514, 128 N. W. 741 (where defendant pleads guilty on being brought before justice). NEB.—Bartley v. State, 53 Neb. 310, 73 N. W. 744 (court will not inquire into validity of warrant issued by magistrate). N. Y.—Day v. Wilbur, 2 Cai. 134; People v. Buatt, 70 Misc. 453, 126 N. Y. Supp. 1114 (failure to object that warrant served in another county was not indorsed by a justice of that county not made until appearing with counsel for trial, too late). N. C.—State v. Turner, — N. C. —, 86 S. E. 1019. N. D.—State v. McLain, 13 N. D. 368, 102 N. W. 407. R. I.—State v. Sherman, 16 R. I. 631, 18 Atl. 1040 (objection must be taken before general appearance). S. C.—State v. Myes, 24 S. C. 190 (voluntarily appearing and submitting to trial, waiver of defects); City of Florence v. Berry, 61 S. C. 237, 39 S. E. 389.

As to remedy for defective warrant by motion in abatement or discharge; and, if allowed, issuance of corrected warrant.—State v. Turner, — N. C. —, 86 S. E. 1019.

Announcement ready for trial does not prevent court inquiring into regularity of process.—See State v. Ritter, 3 Mo. App. 562.

Doubted whether any objection, when defendant is once before the court, to the form of the warrant on which apprehended, is open to him at any stage of the prosecution.—Com. v. Waite, 131 Mass. 417.

Pleading not guilty, and adjournment for trial, accused can not on adjourned day, withdraw plea and move to dismiss, for defects in warrant, etc.—People v. Allen, 51 Mich. 176, 16 N. W. 370; People v. Kenyon, 93 Mich. 19, 52 N. W. 1033.

Prosecution not quashed for defective warrant or affidavit, the purpose having been served when accused is brought before the justice.—Cox v. City of Johnsboro, 112 Ark. 96, 164 S. W. 676; State v. Cale, 150 N. C. 805, 63 S. E. 958.

Contra: Town of Hamden v. Collins, 85 Conn. 327, 82 Atl. 636, wherein it is held that appearance pursuant to a void warrant, does not deprive the accused of his right to objection to jurisdiction of the court.

12 State v. Downs, 8 Ind. 41; Ard v. State, 114 Ind. 542, 16 N. E. 504 (applying for continuance and entering into a recognizance, waiver of defects in process or service); State v. Stredder, 3 Kan. App. 631, 44 Pac. 34; State v. Eldred, 8 Kan. App. 625, 56 Pac. 153; State v. Graff, 10 Kan. App. 286, 61 Pac. 680, reversed on another point in 70 Kan. 840, 61 Pac. 683; People v. Turner, 116 Mich. 390, 74 N. W. 519; State v. McLain, 13 N. D. 368,

liminary examination;[13] agreeing to go to trial on the merits of the case,[14] will cure all defects in prior preliminary proceedings.

§ 30. Manner of executing warrant. It has been said that it is the duty of an officer, who executes a warrant of apprehension, to state the nature and substance of the process which gives him the authority he professes to exercise and, if it is demanded, to exhibit his warrant, in order that the party to be apprehended may have no excuse for resistance.[1] On the other hand, it is said that the accused is required to submit to apprehension, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity, until he has brought his prisoner into safe custody, to make him acquainted with the cause of his apprehension, or the nature, substance and contents of the warrant under which it is made; that these are obviously successive steps, and that they can not all occur at the same instance of time; that the explanation must follow his apprehension, and exhibition for perusal of the warrant must come after the authority of the officer has been acknowledged and the power under which the apprehension is made has been acquiesced in.[2]

102 N. W. 407 (warrant issued without showing of probable cause upon oath).

Giving bail, after pleading not guilty, and demanding jury trial, without objection to jurisdiction, the jurisdiction was not conferred, under a void warrant, to try accused.—People v. Gardner, 71 Misc. (N. Y.) 335, 130 N. Y. Supp. 202.

13 People v. Harris, 103 Mich. 473, 61 N. W. 871; Everson v. State, 4 Neb. Unof. 109, 93 N. W. 394.

14 State v. Dibble, 59 Conn. 168, 25 Atl. 155; Borough of North Plainfield v. Goodwin, 72 N. J. L. 146, 60 Atl. 571.

1 1 Chit. Cr. L. 51; Stewart v. Feeley, 118 Iowa 524, 92 N. W. 670; Territory v. McGinnis, 10 N. M. 260, 61 Fed. 208; Shovlin v. Com., 106 Pa. St. 369, 5 Am. Cr. R. 41.

See, also, authorities in foot notes 5 et seq., this section.

Notice of intention, whether sufficient under the circumstances, is a mixed question of law and fact. —Territory v. McGinnis, 10 N. M. 260, 61 Fed. 208.

2 State v. Lovell, 23 Iowa 304;

Possession of warrant issued for the apprehension of a person on the charge of an offense less than a felony, and placed in the hands of an officer for execution, at the time he undertakes the apprehension, is essential, because in such a case the officer, in attempting to apprehend without the warrant in his presence, would not be in the execution of his office;[3] but it seems that an officer who has knowledge of the issuance of a warrant for a person, on the charge of a felony, may apprehend him without the possession of the warrant at the time.[4]

Com. v. Cooley, 72 Mass. (6 Gray) 350.

3 MICH.—People v. McLean, 68 Mich. 480, 36 N. W. 231 (deputy can not apprehend for misdemeanor where absent sheriff has warrant). MINN.—State ex rel. Olson v. Leindecker, 91 Minn. 277, 13 Am. Cr. R. 13, 97 N. W. 972. N. J.—Webb v. State, 51 N. J. L. 189, 8 Am. Cr. R. 41, 17 Atl. 113. N. Y.—People v. Shanley, 40 Hun 477. TEX.—Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62. VA.—Muscoe v. Com., 86 Va. 443, 8 Am. Cr. R. 602, 10 S. E. 534. ENG.—Gilliard v. Laxton, 2 Best. & S. 362, 9 Cox C. C. 127, 121 Eng. Repr. 1109, 101 Eng. C. Sl. 363; Reg. v. Chapman, 12 Best. & S. 12, 12 Cox C. C. 4, 2 Moak's Eng. Repr. 160; Hogg v. Ward, 3 Hurl. & N. 417; Codd v. Cabe, L. R. 1 Exch. Div. 352.

Apprehension on letter from police official of another state, for a past misdemeanor, without possession of the warrant, is illegal, and officer apprehending is liable.—Scott v. Eldridge, 154 Mass. 25, 12 L. R. A. 379, 27 N. E. 677.

Apprehension on telegram or telephone message by an officer in another state having warrant for a misdemeanor, the party apprehending acts without legal right of authority, and is liable.—McCullough v. Greenfield, 133 Mich. 463, 1 Ann. Cas. 924, 62 L. R. A. 906, 95 N. W. 532. See Westberry v. Clanton, 136 Ga. 796, 72 S. E. 238.

Direction of warrant "to any constable" of the county, will not protect an officer apprehending without possession of the warrant. Webb v. State, 51 N. J. L. 189, 8 Am. Cr. R. 41, 17 Atl. 13; Codd v. Cabe, L. R. 1 Exch. Div. 352.

Person called in by officer to assist in the apprehension, need not have possession of the warrant.—Com. v. Black, 12 Pa. Co. Ct. R. 31, 2 Pa. Dist. R. 46; Kirbre v. State, 5 Tex. App. 60.

Village marshal without warrant has no right to apprehend and take into his custody one who has been found guilty of a violation of a village ordinance; the fact that such writ has been issued and delivered to him, but has been surrendered by him to the village attorney, will not authorize the act. —State ex rel. Olson v. Leindecker, 91 Minn. 277, 13 Am. Cr. R. 13, 97 N. W. 972.

4 Drennan v. People, 10 Mich. 169.

Duty to show and read warrant by a known officer is a question upon which the cases in the various jurisdictions are not agreed, some holding it to be necessary, especially where requested,[5] apprehension being resisted,[6] officer not known to be such[7] or acting out of his district;[8] but the weight of authority seems to be to the effect that a known officer, seeking to apprehend, is not required to show or read the warrant under which he is acting.[9] A

5 See 1 Chit. Crim. L. 41; Frost v. Thomas, 24 Wend. (N. Y.) 418; People v. Shanley, 40 Hun (N. Y.) 477; State v. Garrett, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359.

Lord Kenyon says: "I do not think that a person is to take it for granted that another who says he has a warrant against him, without producing it, speaks the truth. It is very important that, in all cases where an apprehension is made by virtue of a warrant, the warrant, if demanded, at least should be produced."—Hall v. Roche, 8 T. R. 188.

Third person may not require officer to produce warrant.—State v. Amistead, 106 N. C. 639, 10 S. E. 872.

Under statute requiring officer to show warrant if required, it is not enough that person apprehended knew warrant had been issued.—People v. Shanley, 40 Hun (N. Y.) 477.

6 Com. v. Field, 13 Mass. 321; Com. v. Cooley, 72 Mass. (6 Gray) 350; Com. v. Hewes, 1 Brewst. (Pa.) 348.

Apprehension resisted, officer not required to exhibit warrant under which he is acting.—State v. Townsend, 5 Har. (Del.) 487.

7 State v. Garrett, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359; State v. Belk, 7 N. C. 10; State v. McNich, 90 N. C. 695.

8 Com. v. Field, 13 Mass. 321; State v. Curtis, 2 N. C. (1 Hayw.) 471; State v. Kerby, 24 N. C. (2 Ired. L.) 201.

9 DEL.—State v. Townsend, 5 Har. 487. IND.—Kernan v. State, 11 Ind. 471. IOWA—State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317. MASS.—Com. v. Irvine, 83 Mass. (1 Allen) 587. MICH.—Drennan v. People, 10 Mich. 169. N. Y.—Arnold v. Steeves, 10 Wend. 514. N. C.—State v. Garrett, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359; State v. Belk, 76 N. C. 10; State v. McNich, 90 N. C. 695. OHIO—Wolf v. State, 19 Ohio St. 248. TEX.—Plasters v. State, 1 Tex. App. 673. VT.—State v. Caldwell, 1 Tyler 212; State v. Taylor, 70 Vt. 1, 67 Am. St. Rep. 648, 42 L. R. A. 673, 39 Atl. 447.

Demand for exhibition of warrant can not be made before submitting to apprehension.—State v. Taylor, 70 Vt. 1, 67 Am. St. Rep. 648, 42 L. R. A. 673, 39 Atl. 447.

Gaining admission to house of third person to search for accused, officer not required to exhibit warrant to householder where latter has reasonable notice he is an officer acting under warrant against a person supposed to be in the

special deputy, however, is bound to show his warrant where requested,[10] and so is one not an officer, specially summoned to make an apprehension, unless prevented by the conduct of the accused from so doing; and if the warrant is not in his possession, it is his duty to state the authority under which he is acting.[11]

house.—Com. v. Irvine, 83 Mass. (1 Allen) 587.

Hawkins says that officers need not show the warrant when demanded; but adds that they ought to acquaint the accused with the substance of the writ.—2 Hawk. P. C., c. 13, § 28. See, also, 2 Hale P. C. 166; Rex v. Gordon, 1 East P. C. 315, 352; Rex v. Woolman, 1 Moo. C. C. 334; Rex v. Allen, 7 L. T. N. S. 222.

Prudent course to exhibit writ where demanded.—Mackley's Case, 9 Co. 65, 69, 77 Eng. Repr. 828, 835; Hodges v. Marks, Cro. Jac. 485; Com. v. Fields, 13 Mass. 321.

10 Frost v. Thomas, 24 Wend. 418; State v. Kerby, 24 N. C. (2 Ired. L.) 201; Buxton v. Wilkinson, 18 Vt. 186, 46 **Am. Dec.** 145.

11 Robinson v. State, 93 Ga. 77, 44 **Am. St. Rep.** 127, 9 **Am. Cr. R.** 570, 18 S. E. 1018; Com. v. Fields, 13 Mass. 321; State v. Curtis, 2 N. C. (1 Hayw.) 471; United States v. Jailer, 2 Abb. U. S. 265, 267, Fed. Cas. No. 15464.

Not required to produce warrant, special officer making apprehension is not, unless demanded of him.—State v. Dula, 100 N. C. 423, 6 S. E. 89; State v. Lingerfelt, 109 N. C. 775, 14 **L. R. A.** 605, 14 S. E. 75.

Person deputed to serve warrant must exhibit it, upon demand, or he may be treated as a mere trespasser.—**Leach v Francis, 41 Vt. 670.**

CHAPTER V.

APPREHENSION BY OFFICER—WITH WARRANT.

§ 31. OFFICER NOT PROTECTED BY ILLEGAL WARRANT. It is elsewhere shown[1] that there is a distinction between a warrant that is illegal and one that is irregular.[2] When a warrant is *illegal—e. g.*, when the magistrate has no jurisdiction,[3] or when on its face the offense charged is not the subject of apprehension or arrest, or when the constitutional prerequisite of an "oath or affirmation" has not been complied with;[4] or when the officer holding the warrant is acting out of his jurisdiction,[5] or when the warrant contains no description and the officer apprehends a person with a different given name,[6] then the officer is not protected by the warrant, and acts on his own peril.[7]

1 Kerr's Whart. Crim. Law, §§ 529, 571.

2 **As to form and sufficiency of warrant,** blank warrants, "John Doe" warrants, and defective warrants, see ante, §§ 26-29.

3 **Arrest, out of the jurisdiction of the magistrate** issuing the warrant, is illegal.—State v. Bryant, 65 N. C. 327; State v. Shelton, 79 N. C. 605.

Warrant regular upon face may be executed by officer, although he has knowledge that it is void for want of jurisdiction of officer issuing same.—People v. Warren, 5 Hill (N. Y.) 440. Otherwise where warrant irregular upon face.—Conner v. Com., 3 Bin. (Pa.) 38.

4 State v. Wimbush, 9 S. C. 309.

Warrant void upon its face, defendant under no legal obligation to submit to its execution.—Howard v. State, 121 Ala. 21, 25 So. 1000.

5 People v. Burt, 51 Mich. 199, 16 N. W. 378.

6 West v. Cabell, 153 U. S. 78, 38 L. Ed. 643, 14 Sup. Ct. Rep. 752.

Warrant against M. Reynolds does not warrant arrest of Milton McReynolds, even though writ was intended for the latter.—Harris v. McReynolds, 10 Colo. App. 532, 51 Pac. 1016. Same doctrine in West v. Cabell, 153 U. S. 78, 38 L. Ed. 643, 14 Sup. Ct. Rep. 752.

7 See Kerr's Whart. Crim. Law, § 851; 20 Alb. L. J. 215.

No reasonable ground appearing for apprehending the defendant, to an action of trespass, the officer is liable; and if the defendant kill the officer, there being no such reasonable ground, this is manslaughter, only.[8]

§ 32. WARRANT OMITTING ESSENTIALS IS ILLEGAL. A warrant is illegal, in the sense above specified, which does not state the specific offense with which the party to be apprehended is charged;[1] or which does not aver that

8 See Kerr's Whart. Crim. Law, §§ 541-544; Hale P. C. 465. See, also: GA.—Yates v. State, 127 Ga. 813, 9 Ann. Cas. 620, 56 S. E. 1017. ILL.—Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Rafferty v. People, 72 Ill. 37. MASS.—Com. v. Drew, 4 Mass. 391; Com. v. Carey, 66 Mass. (12 Cush.) 246. N. C.—State v. Belk, 76 N. C. 10. TENN.—Galvin v. State, 46 Tenn. (6 Cold.) 283. TEX.—Alford v. State, 8 Tex. App. 545 (killing officer, inserting name after issuance of warrant; see, also, ante, § 27). ENG.—Rex v. Curvan, 1 Moody C. C. 132.

1 Ex parte Nisbitt, 8 Jur. 1071; Money v. Leach, 1 W. Bl. 555; Brigham v. Este, 19 Mass. (2 Pick.) 120 (warrant contained no count, declaration, or cause of action); Deenham v. Solomon, 16 N. J. L. (1 Har.) 50 (verbal order not sufficient); Patterson v. Parker, 2 Hill (N. Y.) 508.

Compare: Kinney v. Muloch, 17 N. J. L. (2 Har.) 334, holding it no ground of discharge that writ stated no cause of action.

Judge Edmonds, in People v. Phillips, 1 Park. Cr. Rep. (N. Y.) 104, said: "In describing the offense, a mere compliance with the terms of the statute will not suffice, for if a magistrate merely states the facts of the offense, in the words of the act, when the evidence does not warrant the conclusion, he subjects himself to a criminal prosecution.—R. v. Thompson, 2 T. R. 18; R. v. Pearse, 9 East. 358; R. v. Davis, 6 T. R. 178, Avery v. Hoole, Coop. 825." See to this effect, 2 Rob. Jus. 54.

Date of alleged crime subsequent to date of warrant, does not prevent its execution.—Patterson v. Kise, 2 Blackf. (Ind.) 127.

Summons for breach of ordinance requiring license for particular act or business, does not authorize apprehension and detention of defendant.—Wallenweber v. Com., 66 Ky. (3 Bush) 68.

Warrant by justice having no jurisdiction of offense, setting out in language within the ordinary understanding the substantial elements constituting the offense charged, is sufficient.—People v. Prichette, 111 Mich. 461, 69 N. W. 739.

Warrant in larceny must state value of stolen property.—See People v. Belcher, 58 Mich. 325, 25 N. W. 303.

information was duly made thereof by oath before a magistrate having jurisdiction.[2]

It is fatal to the efficacy of a warrant for it to omit to specify the defendant's name otherwise than as "John Doe or Richard Roe,[3] whose other or true name is to the complainant unknown";[4] or if it omit the Christian name.[5]

Merely formal clerical errors[6] will not avoid a warrant if it substantially comply with the requisites specified above; or preliminary defects in the sufficiency of the proof on which it issues.[7]

Filling up of a blank warrant, after it is issued, by an unauthorized person, does not cure the defect.[8] And the warrant must have a seal to it,[9] if required by statute

2 Caudle v. Seymour, 1 G. & D. 454, 1 Q. B. 889.

Must show upon face warrant issued upon evidence submitted, and that proof was to issuing officer's satisfaction.—Hill v. Hunt, 20 N. J. L. (1 Spen.) 476.

3 As to John Doe warrants, see, ante, § 28.

4 COLO.—Allison v. People, 6 Colo. App. 80, 39 Pac. 903. ME.—Harwood v. Siphers, 70 Me. 464. MASS.—Com. v. Crotty, 92 Mass. (10 Allen) 403, 87 **Am. Dec.** 669. TEX.—Alford v. State, 8 Tex. App. 545. FED.—West v. Cabell, 153 U. S. 78, 38 **L. Ed.** 643, 14 Sup. Ct. 752; United States v. Doe, 127 Fed. 982.

5 R. v. Hood, 1 Moody 281.

"Person whose name is unknown but whose person is well known, of Vassalboro, in County of Kennebec," warrant held void in Harwood v. Siphers, 70 Me. 464.

6 Kerr's Whart. Crim. Law, §§ 529, 571. ALA.—Johnson v. State, 73 Ala. 21. MASS.—Com. v. Martin, 98 Mass. 4. N. Y.—People v. Mead, 92 N. Y. 415; Pratt v. Bogardus, 49 Barb. 89. N. C.—State v. Jones, 88 N. C. 671. S. C.—State v. Rowe, 8 Rich. 17. WIS.—State v. Toll, 56 Wis. 577, 14 N. W. 596.

As requiring greater exactness, see State v. Lowder, 85 N. C. 564; State v. Whitaker, 85 N. C. 566.

7 State v. James, 80 N. C. 370.

8 See, ante, § 27; also, Rafferty v. People, 69 Ill. 111, 18 **Am. Rep.** 601.

9 **As to necessity for seal,** see, ante, § 26.

KAN.—Jennings v. State, 13 Kan. 80. ME.—State v. McNally, 34 Me. 210, 56 **Am. Dec.** 650; State v. Drake, 36 Me. 366, 58 **Am. Dec.** 757. N. C.—Welch v. Scott, 27 N. C. (5 Ired.) 72; State v. Worley, 33 N. C. (11 Ired. L.) 242. TENN.—Tackett v. State, 11 Tenn. (3 Yerg.) 392, 24 **Am. Dec.** 582. TEX.—White v. Taylor, 46 Tex. Civ. App. 473, 102 S. W. 747. FED.—Goodrich v. United States,

or local usage, though at common law it seems that the signature of the magistrate is enough,[10] or at all events, a wafer or scroll.[11]

§ 33. NOT NECESSARY FOR OFFICER TO SHOW WARRANT. The manner of executing a writ for the apprehension of a person charged with an offense has already been discussed at some length,[1] and it remains to add here only that it is not necessary at common law for a bailiff or constable to show his warrant in making an arrest, even though it be demanded, provided he state its substance to the party arrested.[2] And, indeed, to show and read such warrant before apprehending might make an apprehension impossible. The defendant, knowing the apprehending party to be an officer, is bound to submit to the apprehension, reserving the right of action against the officer in case the latter be in the wrong.[3] But in Massa-

42 Fed. 392. ENG.—Stockley's Case, 1 East P. C., ch. 5, § 58. **Compare:** Authorities in next footnote.

Complaint and warrant on same paper, seal between them was held to be on the warrant, in State v. Coyle, 33 Me. 427.

10 Davis v. Clements, 2 N. H. 390 (warrant of justice need not be under seal unless so required by statute); Gano v. Hall, 5 Park. Cr. Rep. (N. Y.) 651 (magistrate's warrant without seal is valid under New York statute; but see People v. Holcomb, 3 Park. Cr. Rep. 656); State v. Curtis, 2 N. C. (1 Hayw.) 471 (magistrate's warrant need not be under seal unless statute expressly requires it); State v. Vaughan, Harper (S. C.) 314.

11 State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. Thompson, 40 Mo. 188; Dewling v. Williamson, 9 Watts (Pa.) 311; Reg. v. St. Paul's Cov. Gar., 9 Jur. 442, 7 Q. B. 232.

Scroll seal of magistrate sufficient. See State v. Worley, 33 N. C. (11 Ired. L.) 242.

In New York, by statute, "public seals may be made by a mere stamp on paper."—Whart. on Evid., § 693.

1 See, ante, § 30.

2 Hawk. P. C., ch. 13, § 28; though see State v. Garrett, 60 N. C. (1 Winst.) No. 1144, 84 Am. Dec. 359, and Gen. Stat. Mass., ch. 158, § 1. Infra, § 41.

Some notification is necessary. See Codd v. Cabe, 13 Cox 202.

When the offense is flagrant and obvious on the spot, it need not be stated by the officer.—Shevlin v. Com., 106 Pa. St. 362.

3 See Kerr's Whart. Crim. Law, § 850. DEL.—State v. Townsend, 5 Harr. 487. GA.—Boyd v. State, 17 Ga. 194. MASS.—Com. v. Cooley, 72 Mass. (6 Gray) 350.

chusetts, by statute, the officer is bound, if requested, to exhibit the warrant.[4]

MICH.—Drennan v. People, 10 Mich. 169. N. Y.—Arnold v. Steeves, 10 Wend. (N. Y.) 514. ENG.—R. v. Woolmer, 1 Moody C. C. 334; R. v. Allen, 17 L. T. N. S. 222.

[4] Gen. Stat., ch. 158.

CHAPTER VI.

APPREHENSION BY OFFICER—WITHOUT WARRANT.

§ 34. WHEN PEACE OFFICER MAY ACT WITHOUT WARRANT. Sheriffs, constables,[1] and officers of the police[2] are not only authorized to apprehend public offenders without warrant,[3] but are required to do so, if there be reasonable

1 **A constable,** by virtue of his office, has the right, without a warrant, to enter a house in which there is a noise amounting to a breach of the peace, the door being unfastened, and there apprehend any person making such disturbance in his presence.—Com. v. Tobin, 108 Mass. 426, 11 **Am. Rep.** 375.

"A constable having knowledge that a warrant has been issued for the apprehension of a person charged with a felony, may lawfully apprehend him without having the warrant in his possession."—Drennan v. People, 10 Mich. 169.

2 **A police officer** can not, as such, justify an arrest without warrant out of the limits of the town for which he was appointed.—Martin v. Houck, 14 N. C. 317, 7 **L. R. A.** (N. S.) 576, 54 S. E. 291.

Peace officers may, without warrant, enforce the ordinary laws of police by the apprehension of vagrants, drunken and disorderly persons, and detaining them for the action of the proper police magistrates.—Muscoe v. Com., 86 Va. 443, 8 **Am. Cr. Rep.** 602, 10 S. E. 534.

Georgia Pen. Code, 1895, § 896, on the subject of apprehensions, applies alike to state and municipal apprehending officer.—Porter v. State, 124 Ga. 297, 2 **L. R. A.** (N. S.) 730, 52 S. E. 283.

3 **Superintendent of a convict camp is not a** "sheriff, coroner, constable, or officer of police or other peace officer entrusted with the care and preservation of the public peace," under the North Carolina Code (§ 1126), "and has no authority to apprehend without a warrant."—State v. Stancill, 128 N. C. 606, 13 **Am. Cr. Rep.** 39, 38 S. E. 926.

Where an officer apprehends without a warrant, he must, within a reasonable time thereafter, take the person before a magistrate to have his suspicions judicially disposed of; what is a reasonable time is a question of fact in each

ground for suspicion.[4] The reason for this rule has been said by the supreme judicial court of Massachusetts[5] to be that the public safety and the due apprehension of criminals charged with a heinous offense require that such an apprehension should be made without a warrant by officers of the law. As to the right appertaining to private persons[6] to arrest without a warrant, it is a much more restricted authority and is confined to cases of the actual guilt of the party apprehended; and the apprehension can be justified only by proving such guilt. But as to constables and other peace officers acting officially, the law clothes them with greater authority, and they are held to be justified, if they act in making apprehension upon probable and reasonable ground, and believe the party guilty of felony; this is all that is necessary for them to show in justification of an arrest for the purpose of detaining the party to await further proceedings under a complaint on oath and a warrant therein.

At common law where a felony has been committed and the officer or person making the apprehension has probable grounds to believe the person guilty, he may act without a warrant,[7] even though there may be no reason to fear the escape of such persons in consequence of the delay in procuring a warrant.[8] Some of the cases

particular case.—Harris v. City of Atlanta, 62 Ga. 291; Cochran v. Toher, 14 Minn. 385.

4 This does not authorize state arrest by police officers without military warrant of a deserter from service.—Kurtz v. Moffitt, 115 U. S. 487, 29 L. Ed. 458, 6 Sup. Ct. 148.

5 Rohan v. Swain, 59 Mass. (5 Cush.) 281.

6 See, post, ch. vii.

7 Atchison, T. & S. F. R. Co. v. Hinsdell, 76 Kan. 74, 12 L. R. A. (N. S.) 94, 90 Pac. 800; State v. Shaw, 73 Vt. 149, 13 Am. Cr. Rep. 51, 50 Atl. 863.

Under statute, e. g., Minnesota Gen. Stats., 1894, § 7120, providing that an officer may apprehend without a warrant when a felony has been committed, although not in his presence, is an affirmation of the common-law rule in this regard.—State ex rel. Olson v. Leindecker, 91 Minn. 277, 13 Am. Cr. Rep. 13, 97 N. W. 972.

8 Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Wade v.

hold that an apprehension without a warrant is permissible in cases of felony or breach of the peace, only.[9]

Actual cause for apprehension is held to be a prerequisite in some cases; that is, a crime committed and reasonable ground to believe that the person sought to be apprehended committed the offense. When these conditions exist, the law clothes any person with power to apprehend and hold the party until a warrant can be obtained;[10] but the better opinion, supported by the weight of authority, is to the effect that an officer may apprehend without a warrant any person whom he has reasonable grounds to suspect has committed a felony, whether any felony has, in fact, been committed by the person apprehended, or by another, or not.[11]

Personal knowledge on the part of the apprehending officer of the actual commission of the offense, or as a ground for a reasonable belief that the person apprehended is the guilty party, is not requisite; the officer may act relying upon information received from one

Chaffee, 8 R. I. 224, 5 Am. Rep. 572.

9 Tillman v. Beard, 122 Mich. 475, 46 L. R. A. 215, 13 Am. Cr. Rep. 12, 80 N. W. 248.

10 Simmerman v. State, 16 Neb. 615, 4 Am. Cr. Rep. 91, 21 N. W. 387. See Simmerman v. State, 14 Neb. 568, 17 N. W. 115.

11 GA.—Long v. State, 12 Ga. 293. MASS.—Rohan v. Swain, 59 Mass. (5 Cush.) 281. N. Y.—Burns v. Erben, 40 N. Y. 463. N. C.—Brockway v. Crawford, 49 N. C. (3 Jones L.) 433, 67 Am. Dec. 250. PA.—Wakely v. Hart, 6 Bin. 316. TENN.—Eanes v. State, 25 Tenn. (6 Humph.) 53, 44 Am. Dec. 289. VT.—State v. Taylor, 70 Vt. 167, 67 Am. St. Rep. 648, 42 L. R. A. 673, 39 Atl. 447; State v. Shaw, 73 Vt. 149, 13 Am. Cr. Rep. 51, 50 Atl. 863. ENG.—Beckwith v. Philby, 6 Barn. & C. 635, 13 Eng. C. L. 287; Davis v. Russel, 5 Bing. 354, 130 Eng. Repr. 1098; Ledwith v. Catchpole, Caldecott's Cases, 291; Hobbs v. Branscomb, 3 Camp. 420; Cowley v. Dunbar, 2 Carr. & P. 265; Nicholson v. Hardwick, 5 Carr. & P. 495, 24 Eng. C. L. 673; Samuel v. Payne, 1 Doug. 359, 99 Eng. Repr. 230; Lawrence v. Hedgar, 3 Taunt. 14, 128 Eng. C. R. 6, 12 Rev. Rep. 571.

A sheriff is justified, on his own accord, in pursuing and apprehending persons suspected of felony, without a warrant, even though it should afterward appear that no felony had been committed.—State v. Shaw, 73 Vt. 149, 13 Am. Cr. Rep. 51, 50 Atl. 863.

whom he has reason to rely upon, notwithstanding the fact that the person charged is not guilty, or that no felony has been committed.[12]

Constitutional provision to effect that "no person shall be deprived of life, liberty, or property without due process of law," has been held in some states to prohibit arrest without a warrant, except for felonies, and for breaches of the peace committed in the immediate presence of the apprehending officer;[13] but in other states it is held that under such a constitutional provision apprehensions may be made for misdemeanors generally, when committed in the presence of the officer.[14]

12 Cahill v. People, 106 Ill. 621; Burns v. Erben, 40 N. Y. 463; Farnam v. Feely, 56 N. Y. 451; Halley v. Butler, 5 Barb., N. Y., 490; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Hobbs v. Branscomb, 3 Camp. 420; Samuel v. Payne, 1 Doug. 359, 99 Eng. Repr. 230.

13 See In re Way, 41 Mich. 299, sub nom. In re May, 1 N. W. 1021; Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. Rep. 473, 7 L. R. A. 507, 44 N. W. 579; State v. Hunter, 106 N. C. 796, 8 L. R. A. 529, 11 S. C. 366.

14 See Thompson v. State, 30 Ga. 430; White v. Kent, 11 Ohio St. 550.

Breach of the peace committed in the presence of a marshal of an incorporated village or city, he may without a warrant apprehend the participants therein.—State v. Lewis, 50 Ohio St. 179, 19 L. R. A. 449, 9 Am. Cr. Rep. 49, 33 N. E. 405.

City ordinance providing that every policeman, when an offense had been committed in the town, shall endeavor to detect and apprehend the offender, confers upon policemen power to apprehend, without warrant, for misdemeanors not committed in their presence, which is a power greater than that conferred by the general laws upon constables, and is void. —Muscoe v. Com., 86 Va. 443, 8 Am. Cr. Rep. 602, 10 S. E. 534.

United States Constitution, fifth amendment (9 Fed. Stats. Ann., 1st Ed., pp. 256 et seq.), provides that: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." What crimes are to be classified as "capital or infamous" under this provision has been passed upon and determined by the Supreme Court of the United States, and held not to be a first class of crimes; that is to say, crimes known as capital or infamous by the common law, at the time of the adoption of the federal Constitution, but such crimes as Congress, when it came to establish crimes against the United

§ 35. Offenses in presence of officer. We have already seen[1] that actual knowledge on part of officer apprehending is not requisite. In the case where a felony is committed or attempted[2] in the presence of one or more persons, whether they be peace officers or private citizens, they are required to apprehend the party who committed the felony;[3] and any person, whether present or not, may apprehend the guilty party without a warrant at any time, whether there was sufficient time to obtain a warrant or not.[4] The better view, however, is that the

States, should make capital or infamous by the punishment attached to them. See Ex parte Wilson, 114 U. S. 417, 423, 29 L. Ed. 86, 91, 5 Sup. Ct. Rep. 935; Mackin v. United States, 117 U. S. 348, 351, 29 L. Ed. 909, 911, 6 Sup. Ct. Rep. 777.

As to what constitutes "infamous crimes" is fully treated in Kerr's Whart. Crim. Law, § 27.

1 See, ante, footnote 12 and text going therewith.

2 Reg. v. Hunt, R. & M. 207; Reg. v. Howarth, R. & M. 207; Handcock v. Baker, 2 Bos. & P. 260.

As to "attempts," see Greaves's view, note, to infra, § 48.

3 Fost. 310, 311. DEL.—State v. Brown, 5 Harr. (Del.) 505. ILL.—Main v. McCarty, 15 Ill. 441; Shanley v. Wells, 71 Ill. 78. MICH.—People v. Wilson, 55 Mich. 506, 21 N. W. 905. N. Y.—Phillips v. Trull, 11 John. (N. Y.) 486. OHIO—Wolf v. State, 19 Ohio St. 248. PA.—Com. v. Deacon, 8 Serg. & R. 47. S. C.—State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; State v. Bowen, 17 S. C. 52. TEX.—Staples v. State, 14 Tex. App. 136. ENG.—Galliard v. Laxton, 2 Best & S. 363, 110 Eng. C. L. 363; Reg. v. Mabel, 9 Car. & P. 474, 38 Eng. C. L. 280; Derecourt v. Corbishley, 5 El. & Bl. 188, 85 Eng. C. L. 187.

"In all other cases, however, the authorities are uniform, a constable or policeman has no authority to apprehend without a warrant." —Shanley v. Wells, 71 Ill. 78, citing Pow v. Becker, 3 Ind. 475; Com. v. Carey, 66 Mass. (12 Cush.) 246; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; Fox v. Gaunt, 3 Barn. & A. 798, 23 Eng. C. L. 349; Cook v. Nethercote, 6 Carr. & P. 741, 25 Eng. C. L. 66; Coupey v. Henley, 2 Esp. 540.

Under Minnesota statute (Gen. Stats., 1894, § 7120) an apprehension may be made by an officer without a warrant when a public offense has been committed or attempted in his presence.—State ex rel. Olson v. Leindecker, 91 Minn. 277, 13 Am. Cr. Rep. 13, 97 N. W. 972.

4 Burke v. Bell, 36 Me. 317; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; Burns v. Erben, 40 N. Y. 463; Farrell v. Warren, 3 Wend. (N. Y.) 53; Holley v. Mix, 3 Wend. (N. Y.) 353, 20 Am. Dec. 702.

right to apprehend for offenses committed in the officer's presence [5] is limited to felonies, breaches of the peace,[6] and to such misdemeanors as can not be stopped or redressed, except by immediate apprehension.[7]

§ 36. APPREHENSION FOR PAST OFFENSES. In those cases where the offense is past, the rule is different and an officer may not apprehend the offender without a warrant,[1] except in outrageous crimes of the felony type.[2]

[5] **Whatever is in sight and reach** is in presence.—People v. Bartz, 53 Mich. 493, 19 N. W. 161.

[6] Com. v. Kennedy, 136 Mass. 152. See Quinn v. Heisel, 40 Mich. 576; People v. Bartz, 53 Mich. 493, 19 N. W. 161; Reg. v. Hunt, R. & M. 93; Reg. v. Howarth, R. & M. 207.

As to Texas limitation, see Johnson v. State, 5 Tex. App. 43.

Breach of peace must be in the "immediate presence."—See Sternack v. Brooks, 7 Daly (N. Y.) 142.

That the breach of peace must substantively exist, see Quinn v. Heisel, 40 Mich. 576.

Shouting and making a noise at night, a person may be apprehended without a warrant.—State v. Russell, 1 Houst. Cr. Cas. (Del.) 122.

A policeman who, at a late hour of the night, hears a pistol shot within two blocks of his beat, and immediately thereafter discovers a man running from the direction from which the shot occurred, has the right to apprehend the fleeing party without a warrant.—Brooks v. State, 114 Ga. 39, 13 **Am. Cr. Rep.** 47, 39 S. E. 877.

[7] Reg. v. Spencer, 3 Foster & F. 859; Reg. v. Lockley, 4 F. & F. 155; State v. Crocker, 1 Houst. (Del.) 122; People v. Haley, 48 Mich. 495, 12 N. W. 671; State v. Bacon, 17 S. C. 58.

In Danovan v. Jones, 36 N. H. 246, it was held that a person insisting on putting a nuisance on a road could be arrested without warrant.

In State v. Sims, 16 S. C. 486, it was held that the right is extended to an assault committed immediately before the arrest, though not in the officer's presence.

[1] Reg. v. Walker, 1 Dears. C. C. 358, 13 **Am. Cr. Rep.** 24.

In order to apprehend without a warrant for a past offense, whether a misdemeanor or felony, the officer must have grounds for reasonable suspicion such as would justify him at common law to apprehend for past felony.—State v. Grant, 76 Mo. 236.

Under statute requiring conductor of train on which a passenger has been guilty of uttering obscene language in the presence of other passengers, or of behaving in a boisterous manner to their annoyance, to notify a peace officer at the first stopping place, authorizes the arrest of such person by such officer without warrant.—Com. v. Marcum, 135 Ky. 1, 24 **L. R. A.** (N. S.) 1194, 122 S. W. 215.

[2] **As to apprehension generally,** see Kerr's Whart. Crim. Law,

In the case of such crimes, however, it is the duty of the officer to begin immediately after notice the pursuit of the person charged with the offense, provided only that there be at the time reasonable ground of suspicion.[3]

§ 37. APPREHENSION FOR PAST MISDEMEANORS. The general rule of law is that in case of past and completed misdemeanors, an officer may not, any more than a private person, lawfully apprehend the offender without a warrant.[1] Thus, for instance, in the case of a breach of the peace, committed in the absence of the marshal of an incorporated village or city, and he does not appear until after the affray has ended, public order been restored, and the guilty parties have departed from the

§§ 531 and 556; Reg. v. Marsden, L. R. 1 C. C. R. 131; Reg. v. Chapman, 12 Cox C. C. 4; State v. Oliver, 1 Houst. (Del.) 585; Tiner v. State, 44 Tex. 128.

As to Massachusetts statute of 1876, see Phillips v. Fadden, 125 Mass. 198.

By the English practice, the officer is not limited, even in misdemeanors, to the actual moment of the commission of the misdemeanor. He may arrest after the misdemeanor (e. g., an assault) is committed, if all danger of continuance of the misdemeanor has not ceased.—Reg. v. Light, 7 Cox C. C. 389, Dears. & B. 332. See Shanley v. Wells, 71 Ill. 78.

"By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate." — Gray, J., in Kurtz v. Moffitt, 115 U. S. 487, 29 L. Ed. 458, 6 Sup. Ct. 148. See Shanley v. Wells, 71 Ill. 78; People v. Cahill, 106 Ill. 621; Com. v. Carey, 66 Mass. (12 Cush.) 246; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; State v. Grant, 76 Mo. 236.

As limiting power, see Danovan v. Jones, 36 N. H. 246. See article in Cent. L. J., Oct. 28, 1880, p. 321; 4 Crim. Law Mag. 193.

Offenses against license laws, arrests can not be made without warrant.—Meyer v. Clark, 41 N. Y. Sup. Ct. 105.

Constable may be resisted for attempts to arrest without warrant except in the cases above mentioned.—Reg. v. Spencer, 3 Foster & F. 857; Reg. v. Lockley, 4 Foster & F. 155; Galliard v. Laxton, 2 B. & S. 363.

3 Butolph v. Blust, 5 Lans. (N. Y.) 84. See State v. Russell, 1 Houst. (Del.) 122.

1 Pow v. Beckner, 3 Ind. 475; Muscoe v. Com., 86 Va. 443, 8 Am. Cr. Rep. 602, 10 S. E. 534; Reg. v. Walker, 1 Dears. C. C. 358, 13 Am. Cr. Rep. 24.

vicinity, and all the information he has of the affray and of the parties participating in it, is the statements of bystanders who witnessed it, he has no authority in law to pursue the persons charged with the offense without first obtaining a legal warrant therefor;[2] or when a person who, during the early part or middle of the day was drunk and noisy, but who went home and slept off the effect of the liquor, he was held not to be liable to apprehension for the public offense when he appeared in the streets on the evening of the same day.[3]

Why, if the misdemeanor is completed, and the offender is not likely to escape, should the check and safeguard of a warrant be waived? Constables and other minor officials are apt enough to abuse their powers; and the policy of the law not only requires that they should be kept under strict control,[4] but that in prosecutions for private misdemeanors there should be responsible private prosecutors. In conformity with this view, it was rightly held in New York, in 1871, that neither a justice of the peace nor a constable can, at common law, arrest without warrant, a person committing an illegal

2 See: ILL.—Newton v. Locklin, 77 Ill. 103. IND.—Pow v. Beckner, 3 Ind. 475. ME.—Palmer v. Maine Cent. R. Co., 92 Me. 408, 69 Am. St. Rep. 513, 44 L. R. A. 675, 42 Atl. 800. MASS.—Com. v. Carey, 66 Mass. (12 Cush.) 246. MICH.—Quinn v. Heisel, 40 Mich. 576; In re Way, 41 Mich. 299, sub nom. In re May, 1 N. W. 1021; People v. Haley, 48 Mich. 495, 12 N. W. 671. MO.—Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97. N. J.—Webb v. State, 51 N. J. L. 189, 8 Am. Cr. Rep. 41, 17 Atl. 113. N. Y.—Phillips v. Trull, 11 John. (N. Y.) 486. OHIO—State v. Lewis, 50 Ohio S. 179, 19 L. R. A. 449, 9 Am. Cr. Rep. 49, 33 N. E. 405 ORE.—State ex rel. Livingston v. Williams, 45 Ore. 314, 67 L. R. A. 166, 77 Pac. 965 (mandamus will not lie to compel taking into custody for a past misdemeanor without warrant). S. C.—Percival v. Bailey, 70 S. C. 74, 49 S. E. 7. VA.—Muscoe v. Com., 86 Va. 443, 8 Am. Cr. Rep. 602, 10 S. E. 534. ENG.—Cook v. Nethercote, 6 Carr. & P. 741, 25 Eng. C. L.

3 Newton v. Locklin, 77 Ill. 103.

4 Kerr's Whart. Crim. Law, § 85. See Cent. Law Jour., Oct. 22, 1882, p. 321. And see 2 Hawk. P. C., ch. 12, § 80; Reg. v. Curran, Ry. & M. 132; Bowditch v. Battin, 5 Exch. 387; Com. v. Carey, 66 Mass. (12 Cush.) 246; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; Quinn v. Heisel, 40 Mich. 576.

act in his presence, unless such act be a felony or involve a breach of the peace; and that cruelty to an animal, though a statutory misdemeanor, is not such an offense as authorizes arrest without warrant.[5] Nor can a police officer who arrests without proper cause, and is resisted, treat this resistance as a substantive offense which will justify an arrest. It is, however, within the power of a municipal corporation to authorize its police officers to arrest without warrant for breach of health or police ordinances.[6] And when an arrest is made without warrant, it is not essential that the officer should inform the accused of the charge, and of the officer's official position, when both charge and officer are known to the accused.[7]

§ 38. Reasonable suspicion convertible with probable cause. An officer apprehending without warrant a supposed felony must act in good faith and upon reasonable grounds of probable suspicions[1] that the person apprehended is the actual felon.[2]

What is reasonable ground of suspicion? The question as to what constitutes reasonable ground of suspicion justifying an officer in apprehending without a warrant must be solved by the circumstances of each particular

5 Butolph v. Blust, 5 Lans. (N. Y.) 84. See also, Ross v. Leggatt, 61 Mich. 445, 1 **Am. St. Rep.** 608, 28 N. W. 695; Boyleston v. Kerr, 2 Daly (N. Y.) 220.

6 Boyan v. Bates, 15 Ill. 87; Main v. McCarty, 15 Ill. 422; Mitchell v. Simon, 34 Md. 176; Roddy v. Finnegan, 43 Md. 490; Com. v. Hastings, 50 Mass. (9 Met.) 251; Roberts v. State, 14 Mo. 158; Thomas v. Ashland, 12 Ohio St. 127.

As to vagrants, see infra, § 121.

7 Wolf v. State, 19 Ohio St. 218. See Kerr's Whart. Crim. Law, § 555.

1 Palmer v. Maine Cent. R. Co., 92 Me. 399, 69 **Am. St. Rep.** 513, 44 **L. R. A.** 673, 42 Atl. 800; Diers v. Mallon, 46 Neb. 121, 50 **Am. St. Rep.** 598, 64 N. W. 722.

Reasonable suspicion is necessary to authorize officer to act without warrant.—Ralls County v. Stephens, 104 Mo. App. 115, 78 S. W. 291.

2 State v. Cushenberry, 157 Mo. 168, 57 S. W. 737; State v. Evans, 161 Mo. 95, 84 **Am. St. Rep.** 669, 61 S. W. 590; Eanes v. State, 25 Tenn. (6 Humph.) 53, 44 **Am. Dec.** 289.

See Newman v. New York L. E. & W. R. Co., 54 Hun (N. Y.) 335, 7 N. Y. Supp. 560.

case; and where the officer is vigilant and endeavors in good faith to discharge his duties to the community, he should and will be protected in the act.[3] Information furnished by another that an offense has been committed and that the person apprehended is the perepetrator thereof,[4] may or may not be sufficient to justify an apprehension without a warrant.[5]

The fact that an indictment is found against an individual is in itself sufficient justification for an officer to

[3] See: ALA.—Floyd v. State, 79 Ala. 39. GA.—Johnson v. State, 30 Ga. 426; Croom v. State, 85 Ga. 718, 21 Am. St. Rep. 179, 11 S. E. 1035. ILL.—Bryan v. Bates, 15 Ill. 87; Marsh v. Smith, 49 Ill. 396; Cahill v. People, 106 Ill. 621. IND.—Scircle v. Neeves, 47 Ind. 289; Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Simmons v. Vandyke, 138 Ind. 380, 46 Am. St. Rep. 411, 26 L. R. A. 33, 37 N. E. 973. MICH. — Drennen v. People, 10 Mich. 169; Quinn v. Heisel, 40 Mich. 576; Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166; Filer v. Smith, 96 Mich. 347, 35 Am. St. Rep. 603, 55 N. W. 599. MO.—State v. Underwood, 75 Mo. 230; State v. Grant, 76 Mo. 236. N. Y.—Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; Tailor v. Strong, 3 Wend 384; Fulton v. Staats, 41 N. Y. 498; Farnam v. Feely, 56 N. Y. 451. N. C.—Brockway v. Crawford, 48 N. C. (3 Jones L.) 432; Neal v. Joyner, 89 N. C. 287. OHIO—Ballard v. State, 43 Ohio St. 340, 1 N. E. 76. PA.—Russel v. Shuster, 8 Watts & S. 308. R. I.—Wade v. Chaffee, 8 R. I. 224. S. C.—State v. Sims, 16 S. C. 486; State v. Bowen, 17 S. C. 58. TENN.—Touhey v. King, 77 Tenn. (9 Lea) 422. VT.—In re Powers, 25 Vt. 261. VA.—Hill v. Smith, 107 Va. 848, 59 S. E. 475. WIS.—Kennan v. State, 8 Wis. 132.

[4] Doering v. State, 49 Ind. 56, 19 Am. Rep. 669; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722.

Telegraphic information sufficient to warrant apprehending without warrant.—In re Henry, 29 How. Pr. (N. Y.) 158.

[5] Apprehension for escape without warrant not justified, when pursuit not immediate and fresh. —Nashville R. & Light Co. v. Marlin, 116 Tenn. 698, 99 S. W. 367.

No reason to believe accused would escape, officer may not act upon information without warrant. —Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291.

Punishment attached being simply a fine or imprisonment in jail, the officer may not act for a past offense without a warrant.—Bright v. Patton, 5 Mack. (D. C.) 534, 60 Am. Rep. 396.

Undersheriff may not apprehend without warrant for misdemeanor charged, where sheriff is in distant place with warrant.—McCullough v. Greenfield, 133 Mich. 463, 1 Ann. Cas. 924, 62 L. R. A. 906, 95 N. W. 532.

arrest him, though without warrant.[6] But the question before us goes beyond this, and may be treated as convertible with that of probable cause, as laid down in civil actions of malicious prosecution. Has the officer good grounds to believe a felony has been, or is about to be committed? If so, it is his duty to arrest the offender, nor has the latter a cause of action against the officer, if the officer acted without malice, and upon such probable cause.[7] Thus in a remarkable English case, a constable was held not to be justified in shooting at a man whom he had seen stealing wood growing in a copse (which is, when a first offense, only a misdemeanor, though for a second offense, after conviction, a felony), although the constable had no means of arresting the culprit without firing, and although the latter had been previously convicted of the same offense, the constable not being aware of such prior conviction. The question here was whether the constable had to his own mind probable cause; and as he had not, the attempt to arrest without warrant was held illegal.[8] Mere *manner* in a party when accused of crime is not probable cause;[9] nor are the private suspicions of the arresting officer.[10]

6 Kerr's Whart. Crim. Law, §§ 529, 569.

Officer must follow the statute as to the magistrate to whom the defendant is to be taken; and in default of so doing is a trespasser. —Papineau v. Bacon, 110 Mass. 319.

7 MASS.—Com. v. Carey, 66 Mass. (12 Cush.) 246; Com. v. Presby, 80 Mass. (14 Gray) 65. MO.—State v. Underwood, 75 Mo. 230. N. Y.—Burns v. Erben, 40 N. Y. 463. N. C.—Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291. PA.—Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645. TENN.—Eanes v. State, 25 Tenn. (6 Humph.) 53, 44 Am. Dec. 289. ENG.—Hogg v. Ward, 3 H. & N. 417; Reg. v. Woolmer, 1 Moody 634; Davis v. Russell, 2 Moody P. C. 607.

Belief accused will escape if not immediately apprehended justifies officer in acting without warrant. —Martin v. Houck, 141 N. C. 317, 7 L. R. A. (N. S.) 576, 54 S. E. 291.

8 People v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Reg. v. Dadson, T. & M. 385, 2 Den. C. C. 35. See Nicholson v. Hardwick, 5 Car. & P. 495, 24 Eng. C. L. 673.

9 Summerville v. Richards, 37 Mich. 299.

10 Hale P. C. 90; 4 Crim. Law Mag. 196; People v. Burt, 51 Mich. 199, 16 N. W. 378.

CHAPTER VII.

APPREHENSION—BY PERSONS NOT OFFICERS.

1. Acting on Own Initiative.

1. Acting on Own Initiative.

§ 39. Apprehension for a misdemeanor. The general rule of law, applicable to private persons as well as to officers, is that an apprehension for a misdemeanor can not be made without a warrant unless the offense for which the apprehension was made was committed in the presence of the apprehending person, or, having committed the offense the apprehended person was endeavoring to escape; or there was likely to be a failure of justice for want of an officer to issue a warrant.[1]

§ 40. Apprehension for a felony. A private citizen has the right to apprehend a felon whether he is present when the felony was committed or not;[1] when he is

[1] Franklin v. Amerson, 118 Ga. 860, 13 Am. Cr. Rep. 1, 45 S. E. 698.

[1] Davis v. United States, 16 App. D. C. 442.

not present it devolves on him to show that the felony for which the apprehension was made had been committed,[2] for a private citizen can not justify an apprehension without warrant for the alleged commission of a felony, unless it appears that a felony was in fact committed.[3] Hence no felony having in fact been committed and a private person having no information that such an offense has been committed, is not authorized to apprehend without a warrant.[4]

In those cases where a felony has been committed so recently that it is yet fresh,[5] and there is good cause to believe[6] that it was committed by the particular party, a *private person* may apprehend such party and detain him until a warrant can be procured;[7] and if the offender is escaping or attempting to escape, a private person may apprehend upon reasonable and probable grounds of suspicion.[8]

Duty to make known purpose by a private person in attempting to apprehend a felon without a warrant; he must also state for what offense the apprehension is attempted. Unless both these requirements are complied with the accused person has the right to resist.[9]

2 Neal v. Joyner, 89 N. C. 289, approved in State v. Stancill, 128 N. C. 606, 13 **Am. Cr. Rep.** 39, 38 S. E. 926.

3 Martin v. Houck, 141 N. C. 317, 7 **L. R. A.** (N. S.) 576, 54 S. E. 291.

4 Spradley v. State, 80 Miss. 82, 13 **Am. Cr. Rep.** 36, 31 So. 534.

5 Kennedy v. State, 107 Ind. 144, 57 **Am. Rep.** 99, 7 **Am. Cr. Rep.** 422, 6 N. E. 305; Com. v. Grether, 204 Pa. 203, 53 Atl. 753; Com. v. Long, 17 Pa. Sup. Ct. 641.

6 **A private person** may apprehend, under the statute of Mississippi, any one who he has reasonable grounds to suspect and believe is the author of the felony that has been committed.—Spradley v. State, 80 Miss. 82, 13 **Am. Cr. Rep.** 36, 31 So. 534.

7 Kennedy v. State, 107 Ind. 144, 57 **Am. Rep.** 99, 7 **Am. Cr. Rep.** 422, 6 N. E. 305; Simmerman v. State, 16 Neb. 615, 4 **Am. Cr. Rep.** 91, 21 N. W. 387.

8 Franklin v. Amerson, 118 Ga. 860, 13 **Am. Cr. Rep.** 1, 45 S. E. 698.

Pursuit and recapture, by private person, of one charged with crime, who has been lawfully apprehended by him.—McCaslin v. McCord, 116 Tenn. 690, 8 **Ann. Cas.** 245, 94 S. W. 79.

9 Neal v. Joyner, 89 N. C. 289.

2. *Persons Called on by Officers, Pursuers, Etc.*

§ 41. PEACE OFFICER MAY REQUIRE AID FROM PRIVATE PERSONS. At the outset it must be noticed that a constable, sheriff, or police officer[1] has the right to call in the aid of private individuals,[2] either to apprehend persons charged with past felony, or to prevent impending violation of the law. To refuse to render such assistance is an indictable offense.[3] And the warrant to the officer protects his assistants.[4]

§ 42. OFFICERS MAY HAVE SPECIAL ASSISTANTS. It has been said that private persons thus acting must be either actually or constructively under an officer's command.[1] But the officer may have special private assistants temporarily in charge, especially when he goes for further aid.[2]

§ 43. PURSUERS OF FELON ARE PROTECTED. By the common law, when a felony has been committed, apprehension may be attempted by pursuers, the country being raised, who start with hue and cry after the felon. In such case, though there be no warrant of arrest, nor any constable in the pursuit, yet, the felony being proved, it is murder for one of the defendants to kill one of the pursuers.[1]

1 **Persons assisting police officer** in making an arrest without a warrant out of his jurisdiction can not justify under his authority, since he has none.—Martin v. Houck, 141 N. C. 317, 7 **L. R. A.** (N. S.) 576, 54 S. E. 291.

2 **As to how far the officer must be present in command** of his unofficial assistants, see Coyles v. Hurtin, 10 John. (N. Y.) 85.

3 Infra, § 47; Kerr's Whart. Crim. Law, §§ 529-571, 1871; Reg. v. Sherlock, L. R. 1 C. C. 20.

4 State v. James, 80 N. C. 370.

1 Mitchell v. State, 12 Ark. (7 Eng.) 50, 54 **Am. Dec.** 253; People v. Moore, 2 Douglass (Mich.) 1; State v. Shaw, 25 N. C. (3 Ired.) 20. See Reg. v. Patience, 7 Car. & P. 775, 32 Eng. C. L.

No defense to action for false imprisonment that defendant acted in concert with an officer.—Staples v. State, 14 Tex. App. 136; see Coffin v. Varlia, 8 Tex. Cr. App. 417, 27 S. W. 956.

2 Coyles v. Hurtin, 10 John. (N. Y.) 85; 1 Chitty C. L. 16.

1 Kerr's Whart. Crim. Law, § 560; Brooks v. Com., 61 Pa. St. 352, 100 **Am. Dec.** 645; Galvin v. State, 46 Tenn. (Coldw.) 283; Jackson's Case, 1 East P. C. 298.

3. Power of Private Persons as to Apprehensions.

§ 44. PRIVATE PERSON MAY INTERFERE ON PROBABLE CAUSE. We have already seen[1] that a private person may arrest without warrant or official authority persons concerned, in his presence, in riot, or felony, or other heinous crime; and, in cases of crimes of the type of felony, if he has reasonable ground to suspect another of being a guilty party, he may, if acting without malice, and in good faith, arrest such other, in order to bring the case to a magistrate; and for such arrest he can not be made responsible, though the arrested person be shown to have been innocent.[2] It has been said, however, that in order to excuse such arrest, and to protect the arresting person, it must appear that the offense was in fact committed, and that there was reasonable ground to suspect the arrested person;[3] though if there be probable cause of the commission of the offense, this would seem enough. But when the question arises whether it is murder for an innocent person to kill the person arresting him on an untrue charge (though the person arresting have probable ground), we are to consider the hot blood naturally aroused in an innocent person believing himself to be unjustly arrested. In such case the killing would

1 See, ante, §§ 39 and 40.

2 ILL.—Smith v. Donelly, 66 Ill. 464. N. J.—Reuck v. McGregor, 32 N. J. L. (3 Vr.) 70. N. Y.—Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; Ruloff v. People, 45 N. Y. 213. N. C.—State v. Roane, 13 N. C. (2 Dev.) 58; Brockway v. Crawford, 56 N. C. (3 Jones) 434. PA.—Wakely v. Hart, 6 Binn. 316; Com. v. Deacon, 8 Serg. & R. 47; Brooks v. Com., 67 Pa. St. 352. TENN.—Wilson v. State, 79 Tenn. (11 Lea) 310; Whart. Crim. Law, 9th Ed., §§ 405-440.

A fugitive felon from another state may be arrested without warrant. See Savina v. State, 63 Ga. 513; infra, § 29.

In Texas the right is limited to offenses in presence of the party arresting.—Alford v. State, 8 Tex. App. 545.

3 Burns v. Erben, 40 N. Y. 463; Hawley v. Butler, 54 Barb. (N. Y.) 490; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645; Adams v. Moore, 2 Selw. N. P. 934.

An indictment found is probable cause. See 1 East P. C. 301; Krans, Ex parte, 1 Barn. & C. 261, 8 Eng. C. L. 110.

be but manslaughter.[4] But a private person so interfering should give notice of his object, lest his purpose be mistaken,[5] though this notice may be implied from the circumstances.[6]

§ 45. FORCE MAY BE USED SUCH AS IS NECESSARY TO PREVENT PERPETRATION OF FELONY. Certainly a person endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose,[1] and resist all attempts to inflict bodily injury upon himself, and may lawfully, according to the law, as expressed in New York in 1870, detain the felons and hand them over to the officers of the law. The law, it is said, will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place his life at the mercy of the felon.[2] Hence the felon may be arrested after the commission of the offense, if he can be in no other way secured.[3] But an arrest can not be justified on the ground of conjecture.[4]

§ 46. MAY APPREHEND CONVICTED FELON AFTER ESCAPE. It is also ruled that a private person may apprehend a felon who, after conviction upon his plea of guilty, has, with-

4 Kerr's Whart. Crim. Law, §§ 560, 561.

5 Foster 311; Long v. State, 12 Ga. 293; State v. Bryant, 65 N. C. 327; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645.

6 Wolf v. State, 19 Ohio St. 248. See R. v. Howarth, Ry. & Moody, 21 Eng. C. L.

1 2 Hale P. C. 77; 2 Hawk. P. C. 120; Ruloff v. People, 45 N. Y. 213; Keenan v. State, 8 Wis. 132.

To refuse to interfere to prevent the execution of a felony may even subject the party refusing to indictment. See Kerr's Whart. Crim. Law, §§ 281 et seq.

2 Kerr's Whart. Crim. Law, § 626. See Dill v. State, 25 Ala. 15; Cary v. State, 76 Ala. 78; Ryan v. Donnelly, 71 Ill. 100; Ruloff v. People, 45 N. Y. 213; State v. James, 80 N. C. 370; Com. v. Deacon, 8 Serg. & R. (Pa.) 47.

3 Simmerman v. State, 16 Neb. 615, 21 N. W. 387. See, supra, §§ 34-37.

4 Hobbs v. Branscomb, 3 Camp. 420; Davis v. Russell, 5 Bing. 354, 15 Eng. C. L. 618, 3 Moody & P. 590.

out actual breaking or force, escaped from the place of imprisonment to which he was sentenced.[1]

4. Prevention of Offenses.

§ 47. MAY INTERFERE TO PREVENT RIOT. Is, however, a private person justified in interfering to prevent or suppress a misdemeanor? This question has been not infrequently considered in cases of riotous homicide; and the law undoubtedly is, that every good citizen, when a breach of the peace is threatened, is bound to intervene, and to render his assistance to the constituted authorities; and when the riot is raging he is justified in arresting any persons concerned in it, first notifying them that his object is the preservation of the peace.[1] When a magistrate or duly authorized public officer is on the spot, citizens engaged in the preservation of the peace should obey his orders; and a mere oral direction from him will authorize them to arrest without warrant.[2] When, however, the riot has ceased, and order is restored, the right of arrest without warrant by private individuals ceases.[3]

§ 48. —— AND SO AS TO OTHER OFFENSES. In respect to other misdemeanors, the rule is that while it is not the *duty* of non-official persons to arrest offenders, yet a *right* so to arrest exists, when the act can not be otherwise stopped. Thus it has been held that a private person may without warrant arrest a notorious cheat, or persons using false weights or tokens.[1] But this is supposing

1 State v. Holmes, 48 N. H. 377.

Attempted escape or escape of person in custody on charge of having committed a felony, he may be apprehended by a private person. See, ante, § 39 and footnote 8.

1 Kerr's Whart. Crim. Law, §§ 1860, 1871; Pond v. People, 8 Mich. 150; Phillips v. Trull, 11 John. (N. Y.) 486; Resp. v. Montgomery, 1 Yeates (Pa.) 419; Reg. v. Wigan, 1 W. Bl. 47; Price v. Seeley, 10 Cl. & F. 28.

2 See Kerr's Whart. Crim. Law, § 1871; State v. Shaw, 31 N. C. (9 Ired. L.) 20.

3 See Kerr's Whart. Crim. Law, § 537.

1 2 Hawk. P. C., ch. 12. § 301.

there is no opportunity to obtain a warrant. If there be, the claim of a private person to arrest without warrant must be denied, as this claim is based exclusively on the failure of justice that would otherwise occur. But this rule is not to be stretched so as to preclude a private person from detaining an offender attempting a crime until an officer be obtained.[2]

2 Com. v. Carey, 66 Mass. (12 Cush.) 246; Wooding v. Oxley, 9 Car. & P. 1, 38 Eng. C. L. 1; Grant v. Moser, 5 Man. & G. 125, 44 Eng. C. L. 74.

See Mr. Greaves's note, published in Cox's Crim. Consolid. Acts, p. lxii., where he argues that as an attempt to commit a felony is only a misdemeanor, the right of a private person to arrest in cases of such attempts, is a right to arrest for a misdemeanor, citing Fox v. Gaunt, 3 Barn. & Ad. 798, 23 Eng. C. L. 349. But see, supra, §§ 34-37.

For a full statement of authorities, see Kerr's Whart. Crim. Law, § 566.

CHAPTER VIII.

APPREHENSION—BREAKING DOORS, AND SEARCH-WARRANTS.

1. Right to Search in General.

2. Its Exercise by Private Persons.

3. Its Exercise by Constables or Peace Officers.

4. What Is "Suspicion."

5. Search-Warrants—Their Issuance and Effect.

6. Constitutionality of Search-Warrants.

7. Illegality of Apprehension as Ground for Release.

1. Right to Search in General.

§ 49. HOUSE MAY BE BROKEN OPEN TO EXECUTE WARRANT IN FELONIES, ETC. The first point to be here noticed is the right, when a warrant has duly issued for the apprehension of a person, to break open the door of his house.

The law in this respect is, that this may be done, if the offender can not otherwise be taken, in cases of felony, of imminent breach of the peace,[1] or of the reception of stolen goods; and in such cases a warrant is a justification, if there be no malice.[2]

Admittance into the house must, however, be first asked and refused;[3] but the officer can not be treated as a trespasser because he failed to notify the owner who the person to be arrested was, no inquiry having been made in relation thereto.[4]

1 **Disorderly drinking or noise in a house at night,** at an unreasonable hour, a constable may break open the door (2 Hale P. C. 95); but the correctness of this doctrine is questioned in McLennon v. Richardson, 81 Mass. (15 Gray) 74, 77 **Am. Dec.** 353, in which Mr. Justice Bigelow remarks: "No authority is given for this statement, nor, so far as we know, has it ever been recognized as the law in any adjudicated case," and remarks that the authority of a constable to break open doors and apprehend without a warrant is confined to cases where treason or felony has been committed, or there is an affray or a breach of the peace in progress. See Delafaill v. **State,** 54 N. J. L. 381, 16 **L. R. A.** 500, 24 Atl. 557; Com. v. Krubec, 8 Pa. Dist. Rep. 523, 23 Pa. Co. Ct. 38.

2 4 Bl. Com. 290; Foster, 320; 1 East P. C. 322; 2 Hale P. C. 117; 2 Hawk. P. C., ch. 13, § 11.

3 **Officer should explain purpose and demand admittance** before breaking.—Bernard v. Bartlett, 64 Mass. (10 Cush.) 501, 57 **Am. Dec.** 123.

Doctrine that a man's house is his castle, which can not be invaded in the service of process, has always been subject to the exception that the liberty or privilege of the house did not exist as against the king. It had no application, therefore, to the criminal process. Even in case of a misdemeanor, while it has been held in some cases that, before breaking open the outer door, the officer should demand admission, it is fully recognized in all the cases, that, after such demand and its refusal, the officer may lawfully enter by force and serve his process, even if it be against the occupant of the house.—Com. v. Reynolds, 120 Mass. 190, 21 **Am. Rep.** 510. See Kneas v. Fitler, 2 Serg. & R. (Pa.) 263; Launock v. Brown, 2 Barn. & Ald. 592; Semayne's Case, 5 Co. Rep. 91, 77 Eng. Repr. 194; Burdett v. Abbott, 14 East 1, 163; Curtis's Case, Fost. 135.

4 CONN.—Kelsey v. Wright, 1 Root 83. ILL.—Cahill v. People, 106 Ill. 621 (to retake escaped prisoner). KY.—Hawkins v. Com., 53 Ky. (14 B. Mon.) 395, 61 **Am. Dec.** 147. MASS.—Com. v. McGahey, 77 Mass. (11 Gray) 194; Jacobs v. Measures, 79 Mass. (13 Gray) 74; Com. v. Reynolds, 120 Mass. 190, 21 **Am. Rep.** 510.

Third person sought to be apprehended, officer may not break doors of house to apprehend such stranger, whom he believes to be secreted therein, but who is not therein.[5]

In cases of misdemeanors, unaccompanied with breach of the peace, this power, according to the old law, can not be exercised.[6]

Probable immediate danger of a felony, or breach of the peace, or other grave offense existing, the officer, giving notice of his character, may enter without warrant.[7]

2. Its Exercise by Private Persons.

§ 50. IN FELONIES THIS MAY BE DONE BY EVEN PRIVATE PERSON WITHOUT WARRANT. When a felony has been committed, or there is good reason to believe it to have been committed, then, if the offender take refuge in his own house, even a private individual may, without warrant, break into the house and apprehend the offender.[1] In case of the party apprehended proving innocent, however, an action of trespass may be sustained against the party so breaking open the doors without warrant, there being no probable cause.

N. H.—State v. Smith, 1 N. H. 346. N. C.—State v. Mooring, 115 N. C. 709, 20 S. E. 182. CANADA—Vantassel v. Trask, 27 N. S. 329.

Otherwise where suspect not in the house at the time.—Kelsey v. Wright, 1 Root (Conn.) 83; Hawkins v. Com., 53 Ky. (14 B. Mon.) 395, 61 **Am. Dec.** 147; State v. Smith, 1 N. H. 346.

5 Blatt v. McBarron, 161 Mass. 21, 42 **Am. St. Rep.** 385, 36 N. E. 468. See Bailey v. Ragatz, 50 Wis. 554, 36 **Am. Rep.** 862.

House owned and inhabited by another may be lawfully entered and searched to effect accused's apprehension.—Hawkins v. Com., 53 Ky. (14 B. Mon.) 395, 61 **Am. Dec.** 147; Com. v. Irwin, 83 Mass. (1 Allen) 587; Com. v. Reynolds, 120 Mass. 190, 21 **Am. Rep.** 510.

6 **As to practice in issuing warrant,** see Elsee v. Smith, 1 Dow. & R. 97, 2 Chit. 304, 18 Eng. C. L. 648.

7 Kerr's Whart. Crim. Law, § 566.

1 **Private person may not break door** to apprehend (McCaslin v. McCord, 116 Tenn. 690, 8 **Ann. Cas.** 245, 94 S. W. 79. See Handcock v. Baker, 2 Bos. & P. 260, 5 **Rev. Rep.** 587; Rockwell v. Murray, 6 N. C. Q. B. 412), to prevent commission of a felony (Handcock v. Baker, 2 Bos. & P. 260, 5 **Rev. Rep.** 587), or in following a person who has

Probability of the commission of a felony must be very strong to justify this extreme remedy being used by a private person. Mere suspicion will not justify its being employed by such.[2]

After indictment found, as will be seen later,[3] no place is a sanctuary for the offender.

3. Its Exercise by Constables or Peace Officers.

§ 51. PEACE OFFICER MAY ON REASONABLE SUSPICION BREAK OPEN DOORS WITHOUT WARRANT. A constable or peace officer may, on reasonable suspicion and without warrant, break open doors; and he has this additional protection, that it is his duty in the case of a felony being committed, so to act.[1] Certainly, if he has reason to believe a felony or an affray is impending, he has a right to break into a house to prevent it.[2]

Demanding admission in cases of felony as a prerequisite, has been doubted.[3] It is always best, however, to take this precaution; and in misdemeanors it has been considered requisite.

In case of escape, doors may be broken open to reapprehend a person who has escaped.[4]

committed a felony in his presence.—Brooks v. Com., 61 Pa. St. 362, 100 Am. Dec. 645.

Upon mere suspicion of felony committed, a private person may not break open a house for the purpose of apprehending the supposed felon.—Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645. See Ryan v. Donnelly, 71 Ill. 100.

Upon fresh pursuit of a felon a private person may break doors of house in which he takes refuge (Brooks v. Com., 61 Pa. St. 632), but mere suspicion that person sought is concealed within a house will not justify a private person in breaking in the doors or otherwise forcing an entrance.—State v. Bryant, 65 N. C. 327; Brooks v. Com., supra.

2 4 Bl. Com. 292; 2 Hale P. C. 82, 83.

3 Infra, § 55.

1 Hale P. C. 583.

2 **May break doors to apprehend person who has escaped from arrest.**—Com. v. McGahey, 77 Mass. (11 Gray) 194.

3 As to duty to demand admission, see, ante, § 49, footnote 3.

4 Cahill v. Rufe, 106 Ill. 621.

4. What is "Suspicion."

§ 52. PRIVATE PERSON REQUIRES STRONGER GROUNDS FOR INTERFERENCE. It should be kept in mind that a "bare suspicion" is to be distinguished from what is called by Blackstone a "probable suspicion."[1] To act officiously and intrusively on "bare suspicion" implies recklessness if not malice; and even a peace officer (a fortiori a private individual) can not shelter himself from the consequences if he break into the house of a private person on such bare suspicion. Here, again, we strike at the reason of the distinction between a peace officer and a private person in such respects. There are degrees of suspicion which would justify a peace officer in thus interfering which would by no means justify a private person. It is the duty of the former to ferret out crime; such duty is not assigned to the latter. What, therefore, in the peace officer is a meritorious though distasteful service, in the performance of which the law would save him harmless, may be in the private person an officious impertinence, for which damages in a civil action will be awarded.

5. Search-Warrants—Their Issuance and Effect.

§ 53. NATURE AND FUNCTION. A proceeding for a search-warrant may be a substantive criminal proceeding, but it is not necessarily so.[1] The police power of the state extends to the search for seizure, and the destruction of any and all property which is the subject of crime, or is the means of perpetrating a crime.[2]

1 See, supra, §§ 34-37.

1 Ancillary to a criminal prosecution for larceny, embezzlement, and the like, although the warrant is issued at a subsequent stage of the proceedings, and upon a separate complaint.—Cole v. Curtis, 16 Minn. 182.

2 Fulton v. State, 171 Ala. 572, 54 So. 688; State v. Arlen, 71 Iowa 216, 32 N. W. 267.

Private residence can not be searched, or entered by an officer with a search warrant, unless it, or some part of it, be used as a store, shop, hotel, boarding house, or place of storage, or unless such

The function of a search-warrant is to cause a search to be made by an officer, at a particular place, for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate.[3] Where the facts in the sworn application for the search-warrant also constitute a crime, the magistrate may issue a separate warrant of arrest.[4]

§ 54. SEARCH-WARRANT MAY BE ISSUED ON OATH. Search-warrants may be granted by justices of the peace on oath made before them that certain goods feloniously acquired are probably in the defendant's possession, or that certain articles, necessary to the course of public justice, are secreted in such a way as to make such a procedure essential to obtain them.[1] When legal in form, such warrant is a justification to the officer using it, though it was granted on evidence that subsequently appeared inadequate, and though there were other latent defects in its concoction. But a prosecutor who, maliciously and without probable cause, resorts to such instruments is liable for damages in an action of malicious prosecution.[2] And a warrant must accurately specify the building to be searched.[3]

residence is a place of public resort, under the provisions of §§ 3615, 3616, Oklahoma Revised Laws of 1910.—Duncan v. State, 11 Okla. Cr. App. 217, 144 Pac. 629.

3 Boeger v. Langenberg, 97 Mo. 390, 10 **Am. St. Rep.** 322, 11 S. W. 223.

At common law the writ was used simply for the purpose of preparing evidence against felons and to recover property stolen.—People ex rel. Robert Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794, affirming 154 App. Div. (N. Y.) 674, 139 N. Y. Supp. 440.

4 **Insertion of order of arrest in search-warrant** would be a mere irregularity not affecting the legality of the process.—Boeger v. Langenberg, 97 Mo. 390, 10 **Am. St. Rep.** 322, 11 S. W. 223. **Compare:** Frisbie v. Butler, Kirby (Conn.) 213.

1 See Elsee v. Smith, 1 Dow. & R. 97, 2 Chit. 304, 18 Eng. C. L. 648.

2 2 Hale P. C. 151.

3 IOWA—Santo v. State, 2 Iowa 165, 63 **Am. Dec.** 487. KY.—Reed v. Rice, 25 Ky. (2 J. J. Marsh.) 45, 19 **Am. Dec.** 122. ME.—Flaherty v. Longley, 62 Me. 420. MASS.—Com. v. Intox. Liquors, 109 Mass. 371-373; Com. v. Intox. Liquors, 118 Mass. 145. N. H.—State v.

§ 55. HOUSE OF THIRD PERSONS MAY BE BROKEN OPEN TO SECURE OFFENDER OR STOLEN GOODS. The general rule of law is that a search-warrant authorizing the search of one man's house will not authorize the officer to search the house of another person;[1] yet it has been held that the houses of third persons may be broken into, after the usual demand, to secure the offender, or his alleged spoils; though the probable cause necessary to justify such an invasion of private rights should be of a higher degree than that which is sufficient to justify a breaking into the offender's own house.

After indictment found, however, the defendant may be pursued and seized wherever he takes refuge; no house being a sanctuary to him.[2]

§ 56. KEYS OUGHT TO BE FIRST DEMANDED. In executing search-warrants, it is proper, before breaking open boxes or trunks, to demand the keys. Not until these have been refused is it lawful to force a lock.[1] But the right to such a preliminary demand, on the part of the owner or custodian, is considered as waived, when there is no person left in charge on whom the demand could be made.[2]

§ 57. WARRANT MUST BE STRICTLY FOLLOWED. The general rule is that the officer, in executing a search-warrant, must strictly follow the terms of the warrant under which he acts; yet in a case where the search-warrant directed the officer to search certain persons for lottery tickets, and if lottery tickets were found to bring the persons before the justice, after a search of the per-

Whiskey, 54 N. H. 164. R. I.—Re Liquors of Hogan, 16 R. I. 542, 18 Atl. 279.

To open letters, a warrant in the nature of a search warrant is required.—Jackson, Ex parte, 96 U. S. 727, 24 L. Ed. 877.

1 See Tuell v. Wrink, 6 Blackf. (Ind.) 249; Larthet v. Forgary, 2 La. Ann. 524, 46 Am. Dec. 554; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151.

2 2 Hale P. C. 117; 5 Co. 91; 4 Inst. 131; 2 Hawk. P. C., ch. 14, § 3.

1 2 Hale P. C. 157, and see Entick v. Carrington, 19 St. Tr. 1067.

2 Androscoggin v. Richard, 41 Me. 234.

sons designated the officer discovered in the room where the search was made, but not on the persons of the parties named, a bunch of lottery tickets, which he carried away for purposes of use as evidence against such persons in a future prosecution, the court held this action of the officer was proper, and authorized by the warrant.[1]

Search of particular building authorized by the warrant, no other building can be searched under such warrant.[2] So, when the officer is directed to seize a particular article, he can under the warrant seize no other article without being exposed to an action of trespass, unless such other article appear necessary to substantiate the proof of the felony.[3]

Searching the person in this respect, will be hereafter specifically discussed.[4]

6. *Constitutionality of Search-Warrants.*

§ 58. SEARCH-WARRANTS LIMITED BY CONSTITUTION. Search-warrants, by the constitutions and bills of rights of the several states of the American Union, are strictly limited, it being generally provided that they can not issue except upon oath setting forth probable cause; and in some instances it being required that they should spe-

1 Collins v. Lean, 68 Cal. 284, 9 Pac. 173.

2 State v. Thompson, 44 Iowa 399; Reed v. Rice, 25 Ky. (2 J. J. Marsh.) 44, 10 Am. Dec. 122; Larthet v. Forgay, 2 La. Ann. 524, 46 Am. Dec. 554; State v. Spencer, 38 Me. 30; McGlinchy v. Barrows, 41 Me. 74; Jones v. Fletcher, 41 Me. 254; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; Dwinnells v. Boynton, 85 Mass. (3 Allen) 310.

Apartment described in warrant, officer not authorized to search a different apartment under same roof, occupied by another family.—Larthet v. Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

House of T. S. & Co. authorized by warrant, officer not authorized to search house of T. S.—Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151.

3 Crozier v. Cundy, 9 Dow. & R. 224, 6 Barn. & C. 232, 13 Eng. C. L. 115.

4 Infra, § 98.

cify the place, person, or things to be searched. But this is in substance what is required at common law.[1]

7. Illegality of Apprehension as Ground for Release.

§ 59. THAT ARREST WAS ILLEGAL IS IRRELEVANT ON THE ISSUE OF GUILT. Where a party, who has been illegally apprehended is brought on habeas corpus before a judge, having the power of a committing magistrate, or when such a party sets up his illegal arrest as a defense, the question of the legality of the apprehension is not at issue, the only question being whether the party charged should be tried on the merits.[1]

Kidnapping. Nor is it any ground for relief that the party had been kidnapped in a foreign country (though he might be surrendered by the executive on demand of the sovereign of such country), the courts, on the question whether he should be held to trial, or, if tried, should be subjected to sentence, having nothing to do with the mode of his arrest.[2] Civil service, however, against a

1 Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Santo v. State, 2 Iowa 165, 63 Am. Dec. 487; see State v. Spencer, 38 Me. 30; Com. v. Dana, 43 Mass. (2 Met.) 329; Downing v. Porter, 74 Mass. (8 Gray) 539; Robinson v. Richardson, 79 Mass. (13 Gray) 454; Dwinnells v. Boynton, 85 Mass. (3 Allen) 310; Com. v. Cert. Intox. Liquors, 88 Mass. (6 Allen) 596; Com. v. Cert. Intox. Liquors, 95 Mass. (13 Allen) 52; Com. v. Ducey, 126 Mass. 269; Allen v. Colby, 47 N. H. 544.

In Moore v. Coxe, 10 Weekly Notes 135, it was ruled by the Supreme Court of Pennsylvania that as the limitation in the federal Constitution applied only to federal process, under the Constitution of Pennsylvania "jewelry and other personal effects" is a sufficient description.

1 Krans, Ex parte, 1 Barn & C. 258, 8 Eng. C. L. 110; Reg. v. Marks, 3 East 157; Reg. v. Weil, 9 Q. B. D. 701.

2 ALA.—Morrell v. Quarrels, 35 Ala. 544. IOWA—State v. Ross, 21 Iowa 469; State v. Kealy, 89 Iowa 94, 56 N. W. 283. MO.—State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704; State v. Brooks, 92 Mo. 562, 5 S. W. 257, 330. N. J.—Fetter, In re, 23 N. J. L. (3 Zab.) 311, 57 Am. Dec. 382. N. Y.—Balbo v. People, 80 N. Y. 484; People v. Rowe, 4 Park. Cr. Rep. 253. N. C.—State v. Glover, 112 N. C. 896, 17 S. E. 525. PA.—Com. ex rel. Norton v. Shaw (Pa. Co. Ct.), 6 Cr. L. Mag. 245. VT.—State v. Brewster, 7 Vt. 118. WIS.—State

party so kidnapped into the jurisdiction will be set aside.[3] And, in independent proceedings, criminal and civil, his remedy against those who unlawfully arrested him remains open.

v. Stewart, 60 Wis. 587, 50 **Am. Rep.** 388, 19 N. W. 429; Baker v. State, 88 Wis. 140, 59 N. W. 570. FED.—Ker v. People, 110 Ill. 651, 51 **Am. Rep.** 706, 4 **Am. Cr. Rep.** 211, affirmed 18 Fed. 167, 119 U. S. 436, 30 **L. Ed.** 421, 7 Sup. Ct. Rep. 225; United States v. Lawrence, 13 Blatch. C. C. 306, Fed. Cas. No. 1848; Mahone, In re, 34 Fed. 525; Noyes, In re (N. J. U. S. Dist. Ct.), 17 Alb. L. J. 407.

Scott's Case, 9 Barn. & C. 446, 17 Eng. C. L. 204; Reg. v. Richards, 5 Q. B. (5 Ad. & E.) 926; Reg. v. House, 2 Manitoba 68, 6 Cr. L. Mag. 500.

Policeman arresting without warrant — Felony abroad. — "I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that (abroad) which would be a felony if committed in this country."—Brett, J., Reg. v. Weil, 9 Q. B. D. 706.

[3] Whart. on Ev., § 384; Wanzer v. Bright, 52 Ill. 35; Adriance v. Legreve, 59 N. Y. 110, 14 Abb. Pr. (N. S.) 343, 17 **Am. Rep.** 317; Compton v. Wilder, 40 Ohio St. 139, 48 **Am. Rep.** 664; Fly v. Oatley, 6 Wis. 42; Townsend v. Smith, 47 Wis. 623, 32 **Am. Rep.** 793, 3 N. W. 439; Wells v. Gurney, 8 Barn. & C. 769, 15 Eng. C. L. 378.

CHAPTER IX.

EXTRADITION—AS BETWEEN THE SEVERAL UNITED STATES.

§ 60. In general. The federal authority is paramount in the matter of extradition of accused persons between the several states of the Union. The right of extradition, and the procedure therefor, are based entirely on the federal constitution and the acts of congress.[1] The power of congress to legislate on the subject is paramount, and the acts of congress are the paramount law on the subject,[2] upon which acts the governors of the various states

1 Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166; People ex rel. Barlow v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483. See, however, Hartman v. Avelene, 63 Ind. 344, 30 Am. Rep. 217.

2 Ex parte McKean, 3 Hughes 23, Fed. Cas. No. 8848.

and their agents must rely, and to which they must conform.[3]

Legislation by the states in aid of acts of congress on the subject is not objectionable, and such acts may very properly provide as to the means by which a fugitive from justice within the borders of a particular state may be apprehended, and may also provide proper and adequate facilities and means for accomplishing an extradition of a fugitive from justice;[4] and where a state has passed a statute prescribing the proceedings to be followed, the officer or person apprehending an alleged fugitive is bound thereby and must conform to the proceedings therein provided;[5] but the state law must be construed in connection with the act of congress, of which it is part.[6]

§ 61. UNDER FEDERAL CONSTITUTION AND STATUTE FUGITIVES MAY BE APPREHENDED WHEN FLEEING FROM STATE TO STATE. By the second section of the fourth article of the constitution of the United States, "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, and be removed to the state having jurisdiction."

By the act of February 12, 1793,[1] "Section 1, whenever the executive authority of any state in the Union, or of

3 State ex rel. McNichols v. Justus, 84 Minn. 237, 55 L. R. A. 325, 87 N. W. 770; Ex parte Smith, 3 McL. 121, Fed. Cas. No. 12968.

Demanding state must produce indictment, or a duly authenticated copy thereof, before the executive of the state from whom the fugitive is demanded; this requirement of the act of Congress is imperative, since it is expressed in terms of unmistakable import in the law.—State ex rel. McNichols v. Justus, supra.

Information may be substituted for an indictment. See, post, § 61, footnote 2.

4 See Ex parte Ammons, 34 Ohio St. 518; Com. v. Johnston, 12 Pa. Co. Ct. 263; Ex parte Butler (Luzerne Common Pleas, Pa.), 18 Alb. L. J. 369.

5 State v. Shelton, 79 N. C. 605.

6 Ex parte McKean, 3 Hughes 23, Fed. Cas. No. 8848.

1 U. S. Rev. Stat., § 5278; 3 Fed. Stats. Ann. (1st ed.), p. 78; 3 Fed. Stats. Ann. (2d. ed.), p. 295.

either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime,[2] certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

"Sec. 2. Any agent appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty, or rescue the fugitive from such agent, while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."[3] By a subsequent statute, the

2 Although the act of Congress requires the executive of the demanding state to produce to the Governor of the state on which the demand is made "a copy of an indictment found or affidavit made," this has been held not to exclude an information as to the basis of a demand.—State v. Hufford, 28 Iowa 391; In re Hooper, 52 Wis. 702, 58 N. W. 741.

3 History of this statute will be found in Spear on Extradition, 226 et seq.; Rorer on Inter-State

chief justice of the District of Columbia has in this respect the functions of a governor of a state.[4] It is no defense that the defendant was induced by strategem to come to a place where he could be arrested.[5]

Law, 218, and in article in 13 Am. Law. Rev. 181; 3 Crim. Law Mag. 788; 31 Alb. L. J. 4. See, generally, Ex parte White, 49 Cal. 442; Ex parte Cubreth, 49 Cal. 436; Ex parte Rosenblat, 51 Cal. 285; People v. Brady, 56 N. Y. 184; In re Briscoe, 51 How. Pr. (N. Y.) 422; Work v. Carrington, 34 Ohio St. 64, 32 Am. Rep. 345; Hibler v. State, 43 Tex. 197.

Cherokee Nation, being neither a "state" nor a "territory" within the meaning of the federal Constitution or of the act of Congress above set out, a state Governor had no authority to issue a warrant and follow a fugitive from justice into that territory. — Ex parte Morgan, 20 Fed. 298.

District of Columbia, not being a "state," does not come within the constitutional and statutory provisions above discussed; but is governed entirely by the act of March 3, 1801 (2 Stats. at L., ch. 24), and it has been held that although the statute does not specifically provide for a return to the district of fugitives from justice, yet they may be surrendered under Rev. Stats., § 1014 (2 Fed. Stats. Ann., 1st Ed., p. 321). See Matter of Dana, 7 Ben. 1, Fed. Cas. No. 3554; In re Buell, 3 Dill. 116, Fed. Cas. No. 2102.

Territories, equally with the states of the union, are bound by the federal Constitution and the act of Congress above set out.— Matter of Romaine, 23 Cal. 585; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. Rep. 1148; Ex parte Morgan, 20 Fed. 298.

That the act of Congress is constitutional in respect to territories, see Morgan, Ex parte, 20 Fed. 298.

International extradition. — Rulings in cases of, not necessarily in point.—"The supposed analogy between a surrender under a treaty providing for extradition, and the surrender here in question, has been earnestly pressed upon our attention. There, the act is done by the authorities of the nation—in behalf of the nation—pursuant to a national obligation. That obligation rests alike upon the people of all the states. A national exigency might require prompt affirmative action. In making the order of surrender, all the states, through their constituted agent, the general government, are represented and concur, and it may well be said to be the act of each and all of them. Not so here."—Swayne, J., Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287, affirming 36 Conn. 242, 4 Am. Rep. 58.

[4] See In re Buell, 3 Dill. C. C. 116, Fed. Cas. No. 2102; In re Perry (D. C.), 2 Crim. Law Mag. 84.

[5] Ex parte Brown, 28 Fed. 653. See, supra, § 59.

§ 62. APPREHENSION MAY BE HAD IN ANTICIPATION OF REQUISITION. In several states statutes have been passed authorizing the arrest of fugitives in advance of the reception of a requisition.[1] In other states the practice is to sustain, on grounds of comity, such arrests, although there be no local enabling statute.[2]

But in either case, where, instead of an indictment, an affidavit is taken as the basis of application, in proceedings in anticipation of demand, it must be as explicit and full as would justify a magistrate in issuing a warrant of arrest. It must specify the crime, aver its commission and indictability in the requiring state, and state that the party required is a fugitive.[3]

1 **Telegram not sufficient to warrant apprehension and detention to await arrival of extradition papers.**—Simmons v. Vandyke, 138 Ind. 383, 46 **Am. St. Rep.** 413, 26 **L. R. A.** 33, 37 N. E. 973.

2 Hurd Hab. Corp., § 636. CAL.—Ex parte Cubreth, 49 Cal. 436; Ex parte Rosenblat, 51 Cal. 285. DEL.—State v. Buzine, 4 Harr. 572. GA.—State v. Howell, R. M. Charlt. 120. N. J.—In re Fetter, 23 N. J. L. (3 Zab.) 311, 57 **Am. Dec.** 382. N. Y.—People v. Schenck, 2 John. 470 (this decision, however, is qualified, in People v. Wright, 2 Cai. 213); In re Leland, 7 Abb. Pr. N. S. 64; In re Heyward, 1 Sandf. 701. PA.—Com. v. Deacon, 10 Serg. & R. 125 (where the practice was put on the ground of comity independent of statute.) FED.—Ex parte Ross, 2 Bond 252, Fed. Cas. No. 12069.

Contra: Tullis v. Fleming, 69 Ind. 15; People v. Wright, 2 Cai. (N. Y.) 213.

Constitutionality.—That such statutes are constitutional, see Kutz v. State, 22 Fla. 36, 1 **Am. St. Rep.** 173; Com. v. Tracy, 46 Mass. (5 Met.) 536; Com. v. Hall, 75 Mass. (9 Gray) 262, 69 **Am. Dec.** 285; Smith, Ex parte, 3 McL. 121, Fed. Cas. No. 12968.

Arrest by private person.—That an arrest of such a fugitive may be made by a private person without warrant, see Morrell v. Quarrels, 35 Ala. 544; Savina v. State, 63 Ga. 513. See 3 Crim. Law Mag. 798.

As to "fleeing" from justice, see Roberts v. Reilly, 116 U. S. 80, 29 **L. Ed.** 544, 6 Sup. Ct. 291, affirming 24 Fed. 132; Brown, Ex parte, 28 Fed. 653. Infra, § 64.

3 CAL.—In re Romaine, 23 Cal. 585; White, Ex parte, 49 Cal. 442. IND.—Degant v. Michael, 2 Ind. 396; Pfitzer's Case, 28 Ind. 450. MO.—State v. Swope, 72 Mo. 399. N. J.—Fetter's Case, 23 N. J. L. (3 Zab.) 311, 57 **Am. Dec.** 382. N. Y.—People v. Brady, 56 N. Y. 184; Solomon's Case, 1 Abb. Pr. N. S. 347; Rutter's Case, 7 Abb. Pr. N. S. 67; Heyward, In re, 1 Sandf. 701. FED.—Ex parte Smith,

In any view, there can be no technical surrender without a formal requisition.[4]

§ 63. SUFFICIENT IF OFFENSE IS PENAL IN DEMANDING STATE. It is sufficient, to sustain a requisition, that the offense is one that is indictable in the state in which it was alleged to have been committed, and from which the requisition proceeds. Nor is it necessary that it should be an offense at common law. It is sufficient if it be such by statute. The constitutional provision includes every offense punishable in the state making the requisition.[1] In matters of formal pleading the indictment is to be con-

3 McL. C. C. 121, Fed. Cas. No. 12960.

As to arrests without warrants, see supra, § 59.

4 Botts v. Williams, 56 Ky. (17 B. Monr.) 687. The practice, however, of permitting extra-territorial arrests, and even of captures and removals, has been permitted in several states.

"It was formerly the practice," says Gibson, C. J., in Dow's Case, 18 Pa. St. 37, "of the executive of this state to act in the matter by the instrumentality of the judiciary; and though I have issued many warrants, none of them has ever been followed by an arrest. The consequence of the inefficiency of the constitutional provision has been, that extra-territorial arrests have been winked at in every state; but an arrest at sufferance would be useless if its illegality could be set up by the culprit." See supra, § 59.

1 GA.—Johnston v. Riley, 13 Ga. 97. IND.—Morton v. Skinner, 48 Ind. 123. ME.—Opinion of Judges in Maine, 24 Am. Jurist 233, 18 Alb. L. J. 156. MASS.—Com. v. Green, 17 Mass. 515; Brown's Case, 112 Mass. 409, 17 Am. Rep. 114; Davis's Cases, 122 Mass. 324. N. J.—In matter of Fetter, 23 N. J. L. (3 Zabr.) 311, 57 Am. Dec. 382; In matter of Voorhees, 32 N. J. L. (3 Vr.) 141. N. Y.—Clarke's Case, 9 Wend. 212; People v. Brady, 56 N. Y. 182. N. C.—In re Hughes, 61 N. C. (Phil. L.) 57. OHIO—Wilcox v. Nolze, 34 Ohio St. 520. WIS.—State v. Stewart, 60 Wis. 584, 19 N. W. 429. FED.—Kentucky v. Dennison, 65 U. S. (24 How.) 66, 16 L. Ed. 717; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287, affirming 36 Conn. 242, 4 Am. Rep. 58; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148; Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291, affirming 24 Fed. 132; Opinions of Governor Mifflin and Attorney-General Randolph, 20 State Papers U. S. 39, 13 Am. L. Rev. 192.

As denying the position in the text, see Governor Seward's Opinion, ii. Seward's Works, 452. With the latter opinion coincides the action of Governor Dennison in Lago's Case, 18 Alb. L. J. 149; Spear on Extrad. 234.

strued according to the rules of the demanding state, and is to be determined by the courts of such state.[2]

§ 64. Requisition must be duly proved and lies for fugitives only. In the requisition the governor must certify that the copy of the indictment or affidavit required by the statute is true, and that the fugitive claimed is charged with the crime therein specified. Either in the requisition or in a separate warrant the name is given of the person to whom the fugitive is to be delivered. It is sometimes argued that unless the party demanded was in the demanding state at the time of the commission of the offense no requisition would lie. If this rule rests on the ground that the place of the commission of a crime is the place where the offender was at the time, it can not be sustained. Many crimes, as we have elsewhere seen, may be committed by a person at the time in another state; and such person may be made responsible in the state of commission.[1] But the rule may be placed on another ground which is unassailable. The constitution provides only for the extradition of persons who "flee" from justice. None can be, therefore, demanded who has not "fled" from or left the demanding state "in flight."[2]

2 People v. Byrnes, 33 Hun (N. Y.) 98; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148; Ex parte Roberts, 24 Fed. 132.

1 Kerr's Whart. Crim. Law, § 323.

2 ALA.—In re Mohr, 73 Ala. 503, 49 Am. Rep. 63. IOWA.—Jones v. Leonard, 50 Iowa 106, 32 Am. Rep. 116. N. J.—In re Voorhees, 32 N. J. L (3 Vr.) 141. N. Y.—In re Adams, 7 N. Y. 386. N. C.—In re Hughes, 61 N. C. (Phil. L.) 57. OHIO—Wilcox v. Nolze, 34 Ohio St. 520. VT.—In re Greenough, 31 Vt. 279. FED.—In re Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148; People v. Sennott, 20 Alb. L. J. 230, 3 Cr. L. Mag. 807; Jackson's Case, 12 Am. L. Rev. 602; Gaffigan's Case, cited Spear on Extradition, 2nd Ed., § 385.

To this effect is a Pennsylvania statute of 1878.

In Jones v. Leonard, 50 Iowa 106, 32 Am. Rep. 116, the court held that "a citizen and resident of one state charged in a requisition with constructive commission of crime in another state from which in fact he has never fled, is not a fugitive from justice, and the determination of the governor as to the sufficiency of the facts alleged is not conclusive."

The fact that accused had no belief that he had committed crime before he left the demanding state, does not prevent him from being an extraditable fugitive from justice.[3]

Not corporeally present in the demanding state at the time of the commission of the offense for which he is sought to be extradited, it seems that he is not a fugitive and can not be extradited for such offense;[4] and where accused was merely constructively present in the demanding state at the time of the commission of the crime, he can not be deemed a fugitive from justice.[5]

Flight after indictment found is not necessary to con-

Fleeing must be specifically asserted and proved.—See Jackson, In re, 2 Flip. C. C. 183, Fed. Cas. No. 7125; Hall's Case, 6 Pa. L. J. 412.

3 Appleyard v. Massachusetts, 203 U. S. 222, 51 **L. Ed.** 161, 27 Sup. Ct. Rep. 122, 7 **Ann. Cas.** 1073.

Leaving the state without waiting to abide the consequences of his act, constitutes a person a fugitive from justice, where that act is an extraditable criminal offense. D. C.—Hayes v. Palmer, 21 App. Cas. 450. MO.—State v. Washington, 48 Mo. 240. N. H.—State v. Clough, 71 N. H. 594, 53 Atl. 1086. N. J.—In re Voorhees, 32 N. J. L. (3 Vr.) 141. N. Y.—People v. Gardner, 2 Johns. 477; Matter of Haywood, 1 Sandf. 701. OHIO—Johnson v. Ammons, 6 Ohio Dec. Repr. 747, 7 Am. L. Rec. 662. PA.—Simmons v. Com., 5 Bin. 617; Com. v. Trach, 3 Pa. Co. Ct. 65. TEX.—Hibler v. State, 43 Tex. 201. VT.—In re Greenough, 31 Vt. 279. FED.—Roberts v. Reilly, 116 U. S. 80, 97, 29 **L. Ed.** 544, 549, 6 Sup. Ct. Rep. 291; Streep v. United States, 160 U. S. 128, 40 **L. Ed.** 365, 16 Sup. Ct. Rep. 244; Ex parte Brown, 28 Fed. 653; In re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; In re Bloch, 87 Fed. 981; In re Strauss, 63 C. C. A. 90, 126 Fed. 327.

4 Hyatt v. New York, 188 U. S. 691, 47 **L. Ed.** 657, 23 Sup. Ct. Rep. 456, affirming 172 N. Y. 176, 17 N. Y. Cr. Rep. 79, 92 **Am. St. Rep.** 700, 60 **L. R. A.** 774, 64 N. E. 825. See Hartman v. Aveline, 63 Ind. 344, 30 **Am. Rep.** 217; In re Fetter, 23 N. J. L. (3 Zab.) 311, 57 **Am. Dec.** 382; In re Mitchell, 4 N. Y. Cr. Rep. 506; State v. Jackson, 36 Fed. 258, 1 **L. R. A.** 370; United States v. Fowkes, 49 Fed. 50; In re Jackson, 2 Flipp. 183, Fed. Cas. No. 7125.

5 State v. Hall, 115 N. C. 811, 44 **Am. St. Rep.** 501, 22 **L. R. A.** 289, 20 S. E. 729. See Hartman v. Aveline, 63 Ind. 344, 30 **Am. Rep.** 217; Jones v. Leonard, 50 Iowa 106, 32 **Am. Rep.** 116; Matter of Mitchell, 4 N. Y. Cr. Rep. 596; Wilcox v. Holze, 34 Ohio St. 520; Tennessee v. Jackson, 36 Fed. 258.

stitute an accused person a fugitive.[6] It is enough if the party left after the commission of the crime.[7] That he was at the time domiciled in the asylum state is no defense.[8] But the law is that he must have "fled," or left, the state after the crime. It is not enough if he was called away by public duty: *e. g.*, attendance on congress.[9]

The inference to be drawn from a commission of a crime in one state and then a presence in another is not conclusive as to fleeing.[10]

§ 65. FEDERAL COURTS CAN NOT COMPEL GOVERNOR TO SURRENDER. We have elsewhere seen that it is a question of grave moment, whether the federal legislature can impose upon state magistrates any duties not assigned to them by the Constitution.[1] In most states, however, the diffi-

6 **Having committed the crime** and left the state for the purpose of avoiding a prosecution therefor anticipated or begun, is not necessary to constitute a person a fugitive within the meaning of the federal statute; the simple fact that he has within the state committed a criminal offense, has thereafter left the jurisdiction of the state, and when prosecution is begun he is found within another state, this is sufficient to make him subject to extradition.—Ex parte Deckson, 4 Ind. Ter. 481, 69 S. W. 943; Roberts v. Reilly, 116 U. S. 80, 97, 29 **L. Ed.** 544, 549, 6 Sup. Ct. Rep. 291.

7 Hurd on Habeas Corpus 606; Mohr, Ex parte, 73 Ala. 503, 49 **Am. Rep.** 63, 5 Cr. L. Rep. 539; Leary's Case, 6 Abb. (N. Y.) N. C. 43; Roberts v. Reilly, 116 U. S. 80, 29 **L. Ed.** 544, 6 Sup. Ct. 291, affirming 24 Fed. 132; United States v. O'Brian, 3 Dill. C. C. 381, Fed. Cas. No. 15908; Brown, Ex parte, 28 Fed. 653. See remarks of Withry, J., quoted 13 Am. Law Rev. 205.

8 Kingsbury's Case, 106 Mass. 223.

9 Patterson's Case, cited 18 Alb. L. J. 190.

Decoying fugitive across border —In Brown's Case, 8 Crim. Law Mag. 313, it was ruled by Governor Hill that the fact that a fugitive from justice in Pennsylvania was inveigled from Canada into New York, coming, however, voluntarily, was no reason why the Governor of New York should refuse to deliver him on a demand from the Governor of Pennsylvania.

10 See cases in prior notes to this section. Spear on Extrad., 2d ed., 393.

1 Kerr's Whart. Crim. Law, § 306. See Johnston v. Riley, 13 Ga. 97; Voorhees, In re, 32 N. J. L. (3 Vr.) 146; People v. Brady, 56 N. Y. 182; In re Hughes, 61 N. C. (Phil. L.) 57; Kentucky v. Dennison, 65 U. S. (24 How.) 66, 16 **L. Ed.** 717; Tay-

culty is obviated by statutes making the performance of the duty obligatory on the executive;[2] in other states it is accepted as one of those discretionary courtesies that it is usual for one sovereign to render to another. Were this not the uniform practice, it would be the duty of congress, as it is indubitably within its power, to provide a distinctively federal agency for the enforcing of the constitutional provision.[3]

§ 66. No objection that fugitive is amenable to asylum state. It has been said that the executive of the asylum state is not bound to deliver a person amenable to the penal law of such state.[1] But the better opinion is that the mere fact that the offender is so amenable (no proceedings against him having been commenced) is no bar to a requisition.[2] On the other hand, if a prosecution has already commenced in the asylum state, then this state has jurisdiction of the person of the fugitive for this particular purpose, and the proceedings should go on until their judicial determination.[3] If the offense is the same as that for which the requisition has issued, then the first state commencing proceedings, if both have jurisdiction, has precedence.[4]

lor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287, affirming 36 Conn. 242, 4 Am. Rep. 58.

2 For an analysis of these statutes see 13 Am. Law Rev. 235 et seq.

3 Kentucky v. Dennison, 65 U. S. (24 How.) 66, 16 L. Ed. 717.

1 In re Briscoe, 51 How. Pr. (N. Y.) 422; State v. Allen, 24 Tenn. (2 Humph.) 258; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287, affirming 36 Conn. 242, 4 Am. Rep. 58.

2 Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; Ex parte Sheldon, 34 Ohio St. 319; Compton v. Wilder, 3 Ohio L. J. 642, affirming 40 Ohio St. 130 (cited supra, § 61); Briscoe, In re, 51 How. Pr. (N. Y.) 422. See Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. 291.

3 Troutman's Case, 24 N. J. L. (4 Zab.) 634; In re Briscoe, 51 How. Pr. (N. Y.) 422; Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; State v. Allen, 21 Tenn. (2 Humph.) 258; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287, affirming 36 Conn. 242, 4 Am. Rep. 58. See 13 Am. Law Rev. 227.

4 See Kerr's Whart. Crim. Law, § 343.

§ 67. Governor of asylum state can not impeach requisition. We have already observed that there is nothing in the Constitution of the United States to require a governor of a state to issue his warrant for the arrest of a fugitive; and that if he does so, it is either in obedience to local law or in the exercise of a discretion which the courts can not compel. It is otherwise, however, when the governor accepts the office proposed to him by the statute, for in this case he is bound to execute the commission he undertakes. It is, indeed, a prerequisite to his action, that it should be proved to his satisfaction that the person against whom he is asked to issue a warrant is the same as the one charged in the requisition, that such person is a fugitive from the demanding state, and that the affidavit was authenticated by the demanding governor.[1] But beyond this he can not go. If the requisition is duly backed by indictment or affidavit, a certified copy of which is attached, he has no right to inquire whether the person demanded was guilty of the offense charged,[2] or whether the object of the requisition was other than it apparently seemed. The only cases in which the requisition, if regular and duly backed, can be assailed, are those in which judgments of sister states, under an analogous provision of the Constitution, can be assailed. It may be shown that the requisition fails from want of jurisdiction,[3] or was fraudulently obtained, and hence void, or was of a character such as stripped it of conclusiveness. But when once its genuineness and its technical conformity to law are ascertained, its averments can not be disputed.[4] A requisition can no more be impeached on the

1 Ex parte Powell, 20 Fla. 806.

2 Infra, § 69. See In re Clark, 9 Wend. (N. Y.) 212; Leary's Case, 6 Abb. N. C. (N. Y.) 43, 10 Ben. 197, Fed. Cas. No. 8162, modifying People v. Brady, 56 N. Y. 182. See article in 31 Alb. L. J. 24.

3 Supra, § 64.

4 In re Voorhees, 32 N. J. L. (3 Vr.) 141; People ex rel. Barlow v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; In re Leary, 6 Abb. N. C. (N. Y.) 43, 10 Ben. 197, Fed. Cas. No. 8162; Ex parte Swearingen, 13 S. C. 74.

ground that improper collateral motives co-operated in obtaining it, than can a judgment of a sister state be impeached on the same grounds, supposing there was no fraudulent imposition on or by the executive issuing it.[5] If there was jurisdiction—if the governor in the one case, or the judgment court in the other, were not fraudulently imposed upon—then the averments of the record in either case can not be assailed in the state in which execution is sought.[6] But the requisition must be accompanied by

Compare: Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217.

[5] Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345. See 31 Alb. Law J. 24.

[6] "Executive has no general power to issue warrants of arrest, and when he proceeds to do so in these cases, his whole authority comes from the Constitution and the act of Congress, and he must keep within it."—Judge Cooley, in Princeton Rev., Jan., 1879, p. 165.

It may be added, that if he accepts the commission he must hold to it. He can not accept it, and then, on the ground that he is the executive of a sovereign state (he undertaking at the time to act as a federal commissioner), dispute its facts.

In opposition to the text may be noticed Kimpton's Case, Aug. 1878 (18 Alb. L. J. 298; Spear on Ex. 434), in which the Governor of Massachusetts, on the advice of the Attorney-General, held that he was justified in refusing a warrant on the grounds that the prosecution had been long delayed, and that an offer had been made to the defendant to enter a nolle prosequi in case he would turn state's evidence. But this can not be sustained, as the Governor of Massachusetts could no more inquire into the motives of the Governor of South Carolina than can a state court when acting on a judgment of a sister state, under the parallel constitutional provision as to judgments of other states, hold that it is entitled to inquire what were the motives of the plaintiff in the judgment, or of the court by whom the decision was made.

As concurring in this conclusion, see reasoning of Mr. Chief Justice Cooley in Princeton Rev. for Jan. 1879; Cooley's Const. Lim. 16, n. 1; Walker's Am. Law, § 64, and article 13 Am. L. Rev. 181; In Matter of Romaine, 23 Cal. 585; Johnson v. Riley, 13 Ga. 97; Compton v. Williams, 3 Ohio L. J. 642, 40 Ohio St. 130, cited supra, § 28; Kentucky v. Dennison, 65 U. S. (24 How.) 66, 16 L. Ed. 717. See, however, In re Perry (D. C.), 2 Crim. L. Mag. 84, and note thereto.

Question in text distinguished.—The question in the text, it should be remembered, is very different from that which arises when it is attempted to use extradition process to enforce the collection of a debt. No doubt the courts will refuse their aid to such a perversion of justice, when the attempt is made to enforce such debt. See

an indictment or affidavit, specifying the crime. A mere statement that the crime has been committed is not enough.[7]

§ 68. —— Ordinarily issues warrant of apprehension. The requisition being in due form, and being presented to the governor of the asylum state, the practice is for him to issue a warrant of arrest containing the proper recitals and averments. In several states statutes have been passed prescribing the terms of such warrants; which statutes, so far as they are supplementary to federal legislation, are constitutional.[1] The warrant must set forth facts necessary to jurisdiction.[2]

§ 69. Habeas corpus can not go behind warrant. To examine the grounds of imprisonment, in this, as well as in other cases of arrest, a writ of habeas corpus may be obtained; this writ being within the jurisdiction of state courts to issue.[1] The points which may be thus raised are as follows:

Arrest prior to requisition. If there be a local statute authorizing this, and if proper ground be laid, the prisoner will be remanded, and the same course will be taken

supra, § 59. Rorer on Inter-State Law, 222.

But such collateral motive, extortionate as it may be, is no more a bar to extradition process than it would be a bar to ordinary proceedings of arrest for a crime.

It should be added that the position in the text is in no respect inconsistent with the position that a Governor may revoke his warrant after it has been issued. This he may undoubtedly do, for the reason that he is at liberty to decline to accept the agency in this respect that the federal government tenders him. See Wyeth v. Richardson, 76 Mass. (10 Gray) 240; Work v. Corrington, 34 Ohio St. 319. But if he undertakes the agency he must execute it according to the terms of the mandate.

7 Ex parte Pfitzer, 28 Ind. 451; Solomon's Case, 1 Abb. Pr. N. S. (N. Y.) 347; In re Doo Woon, 18 Fed. 898, 1 West Coast Rep. 333. See, also, cases cited supra.

1 Robinson v. Flanders, 29 Ind. 10, 16; Ex parte Ammons, 34 Ohio St. 518; Smith, Ex parte, 3 McL. 121, Fed. Cas. No. 12968.

2 Infra, § 69; In re Doo Woon, 1 West Coast Rep. 333, 18 Fed. 898.

1 Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. 544 cited infra, § 73.

when the arrest, under the local practice, is sustainable on grounds of comity.[2]

Defects in warrant. The first point is, is there a warrant on which the court can act? To the legality of the warrant there are the following prerequisites:

1. The prisoner must have been a fugitive.[3] If not, the governor had no jurisdiction, and on proof that the prisoner was not a "fugitive," and had not been in the state from which the requisition issues, there must be a discharge.[4] But a probable case is enough to sustain the warrant in this relation.[5]

2. The identity of the prisoner as the party charged must appear;[6] and this is a matter of parol proof.[7]

3. The warrant must be based on an indictment or affidavit, which is essential to the validity of the requisition.[8] But behind indictment or affidavit the court will not go, nor can their averments, except for the purpose of showing fraud or non-identity, be contradicted by parol.[9] And

2 Supra, § 62.

As to practice, see Leary, Ex parte, 10 Ben. 197, Fed. Cas. No. 8162; In re Miles, 52 Vt. 609.

3 Supra, § 64.

4 Jones v. Leonard, 50 Iowa 106, 32 Am. Rep. 116; Wilcox v. Nolze, 34 Ohio St. 520.

Discussion in text going with footnotes 4 and 5, § 64, ante.

Parol evidence is admissible to show where crime was committed. —Wilcox v. Nolze, 34 Ohio St. 520.

5 People v. Byrnes, 33 Hun (N. Y.) 98; Reggel, Ex parte, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148. See, also, discussion infra, § 93.

6 In Pennsylvania, in the case of Ex parte Butler (Luzerne Co. Ct. Pa.), 18 Alb. L. J. 369, it was held that the Pennsylvania statute authorizing examination for identification was not unconstitutional.

7 Ex parte Leary, 10 Ben. 197, Fed. Cas. No. 8162, 6 Abb. (N. Y.) N. C. 43. See In re Robb, 64 Cal. 431, 1 Pac. 881.

8 Ex parte Lorraine, 16 Nev. 63; People v. Brady, 56 N. Y. 182; People v. Donahue, 84 N. Y. 438; In re Hooper, 52 Wis. 699, 58 N. W. 741.

An information is sufficient.—See, supra, § 61.

9 DEL.—State v. Buzine, 4 Harr. 572; State v. Schlemm, 4 Harr. 577. MASS. — Kingsbury's Case, 106 Mass. 223; Davis's Case, 122 Mass. 324. N. Y.—In re Clark, 9 Wend. 212; People v. Pinkerton, 77 N. Y. 245, 17 Hun 199. OHIO—Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; Work v. Corrington, 34 Ohio St. 64, 319, 32 Am. Rep. 345. PA.—Com. v. Daniel, 6 Pa. L. J. 417, 4 Clark 49. FED.—

the warrant of the governor is prima facie evidence, at least, that all necessary legal prerequisites have been complied with, and, if previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the state from which he fled.[10] It is enough, therefore, if the return to the writ of habeas corpus aver an indictment or affidavit to its legal effect without annexing a copy.[11] When, however, the indictment or affidavit is annexed, it may be examined on habeas corpus for the purpose of determining how far it sets forth a crime under the federal statute.[12]

Whether the federal courts can discharge in such cases on habeas corpus is elsewhere discussed.[13]

§ 70. Bail not to be taken. It has been held in Texas that bail can not be taken in extradition process, even when the state constitution provides that all prisoners

Leary's Case, 10 Ben. 197-8, Fed. Cas. No. 8162, 6 Abb. (N. Y.) N. C. 441; In re Bull, 4 Dill. 323, Fed. Cas. No. 2119, 4 South. L. Rev. N. S. 676, 702. See Cooley's Const. Lim. 16; Hurd on Hab. Corp., §§ 327-38, 606; Sedg. Const. Law 395.

As to habeas corpus in such cases, see infra, chapter on "Habeas Corpus."

The certificate of the demanding Governor, that a copy of a complaint, made before a justice, is authentic, sufficiently authenticates the capacity of the justice to receive the complaint.—Kingsbury's Case, 106 Mass. 223; Donaghey, Ex parte, 2 Pitts. L. J. (Pa.) 166. See In re Manchester, 5 Cal. 237.

"Theft," in the warrant, is synonymous with "larceny."—People v. Donahue, 84 N. Y. 438.

Formal defects in indictment.—A fortiori when a warrant of surrender is issued by the Governor of the asylum state, upon an indictment found in the demanding state, the courts of the asylum state will not, on habeas corpus, inquire into formal defects of the indictment. — Davis's Case, 122 Mass. 324.

Information may take the place of an indictment.—See Hooper, In re, 52 Wis. 699, 58 N. W. 741.

10 Davis's Case, 122 Mass. 324.

11 Robinson v. Flanders, 29 Ind. 10, affirming Nichols v. Cornelius, 7 Ind. 611; People v. Pinkerton, 77 N. Y. 245; People v. Donahue, 84 N. Y. 438.

12 **As an extreme case** of such scrutiny, see People v. Brady, 56 N. Y. 182.

The rules of pleading in such cases are to be such as obtain in the demanding state.—Reggel, Ex parte, 114 U. S. 642, 29 **L. Ed.** 250, 5 Sup. Ct. 1148.

13 Kerr's **Whart. Crim. Law,** §§ 334, 335.

shall be bailable by sufficient sureties.[1] But by title IV, ch. I, § 831, of the New York Criminal Code, a person arrested on state extradition process may be admitted to bail by a judge of the Supreme Court.

§ 71. INDICTMENT OR AFFIDAVIT MUST SET FORTH A CRIME, AND MUST BE IN COURSE OF JUDICIAL PROCEEDINGS. We have just seen that a court, on habeas corpus, will not inquire as to formal defects of the indictment or other documents on which the requisition is based.[1] It is otherwise when the indictment or affidavit fails to set forth a crime in the demanding state,[2] though an indictment duly found or affidavit duly certified is sufficient prima facie proof that the offense was indictable in such state.[3] When the demand is based on affidavits they must have been previously filed in a court of justice as preliminary to prosecution, since the executive of the demanding state is "not authorized to make the demand unless the party was charged in the regular course of judicial proceedings."[4] The affidavit must be sworn to before a magis-

1 Erwin, Ex parte, 7 Tex. App. 788, citing Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32.

1 Davis's Case, 122 Mass. 324; Briscoe's Case, 57 How. (N. Y.) Pr. 422.

Under the New York statute the complaint must be sworn to, and must show that the accused had been duly charged with the crime, and that he had fled to the asylum state. — In re Heyward, 1 Sandf. (N. Y.) 701; In re Leland, 7 Abb. Pr. N. S. (N. Y.) 164.

"Crime" is used in its general sense, so as to include such misdemeanors as false pretenses.—State v. Stewart, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148.

2 CAL.—In re Romaine, 23 Cal. 585; Ex parte White, 49 Cal. 442. IND.—Degant v. Michael, 2 Ind. 396; Pfitzer's Case, 28 Ind. 450. N. J.—Fetter's Case, 23 N. J. L. (3 Zab.) 311, 57 Am. Dec. 382. N. Y.—People v. Brady, 56 N. Y. 182; People v. Brady, 1 Abb. Pr. N. S. 347; Rutter's Case, 7 Abb. Pr. N. S. 67; In re Heyward, 1 Sandf. 701. FED.—Ex parte Smith, 3 McL. 121, Fed. Cas. No. 12968.

3 CAL.—Ex parte White, 49 Cal. 434. IND.—Morton v. Skinner, 48 Ind. 123. ME.—Opinion of Maine Judges, 24 Am. Jur. 233, 18 Alb. L. J. 150. MASS.—Brown's Case, 112 Mass. 409, 17 Am. Rep. 114; Davis's Case, 122 Mass. 324. N. Y.—In re Clark, 19 Wend. 212.

4 Ex parte White, 49 Cal. 434; Kentucky v. Dennison, 65 U. S. (24 How.) 66, 16 L. Ed. 717.

trate; a notary not being sufficient.[5] It must be distinctly averred that the fugitive has been guilty of some specific offense against the demanding state.[6]

§ 72. FUGITIVE MAY BE TRIED FOR OTHER THAN REQUISITION OFFENSE. It will be noticed[1] that in cases where a fugitive is arrested on a demand from a foreign state, he can only, according to the better view, be tried for the offense for which the demand has been made. It is otherwise under the clause of the Federal Constitution now before us. The Constitution in this respect is supreme over the whole country,[2] and hence when a fugitive is transferred from state to state under its provisions, he is open in the second state to any prosecutions that may

5 **As to state statutes imposing additional requisites,** see Jones v. Leonard, 50 Iowa 106, 32 **Am. Rep.** 116; Work v. Corrington, 34 Ohio St. 64, 32 **Am. Rep.** 345.

Statutes limiting the constitutional process, their constitutionality may be questioned.—Moore v. Illinois, 55 U. S. (14 How.) 13, 14 **L. Ed.** 306.

6 Ex parte Snyder, 64 Mo. 58; State v. Swope, 72 Mo. 99; In re Morgan, 20 Fed. 298.

1 See discussion, infra, § 87.

2 ALA.—Carr v. State, 104 Ala. 43, 16 So. 155. IND.—Knox v. State, 164 Ind. 226, 108 **Am. St. Rep.** 291, 3 **Ann. Cas.** 539, 73 N. E. 255. IOWA—State v. Kealy, 89 Iowa 94, 56 N. W. 283. KAN.—State v. Hall, 40 Kan. 338, 10 **Am. St. Rep.** 200, 19 Pac. 918. MASS.—Com. v. Wright, 158 Mass. 149, 35 **Am. St. Rep.** 475, 19 **L. R. A.** 206, 33 N. E. 802. MO.—State v. Patterson, 116 Mo. 505, 22 S. W. 696; State v. Walker, 119 Mo. 467, 24 S. W. 1011. NEB.—State ex rel. Petry v. Leidigh, 47 Neb. 126, 66 N. W. 308, distinguishing In re Robinson, 29 Neb. 135, 26 **Am. St. Rep.** 378, 45 N. W. 267; In re Walker, 61 Neb. 803, 86 N. W. 510. N. Y.—People ex rel. Post v. Cross, 135 N. Y. 536, 31 **Am. St. Rep.** 850, 32 N. E. 246; Browning v. Abrams, 51 How. Pr. 172. N. C.—State v. Glover, 112 N. C. 896, 17 S. E. 525. OHIO—Ex parte McKnight, 48 Ohio St. 518, 28 N. E. 1034; In re Brophy, 4 Ohio Dec. Repr. 391, 2 Ohio N. P. 230. PA.—Dow's Case, 18 Pa. St. 37 (cited supra, § 59); Com. v. Johnston, 2 Pa. Dist. Ct. 673. TEX.—Ham v. State, 4 Tex. App. 645. VT.—State v. Brewster, 7 Vt. 118; In re Miles, 52 Vt. 609. WIS.—State v. Stewart, 60 Wis. 587, 50 **Am. Rep.** 388, 19 N. W. 429. FED.—Lascelles v. Georgia, 148 U. S. 537, 37 **L. Ed.** 549, 13 Sup. Ct. Rep. 687, affirming 90 Ga. 347, 35 **Am. St. Rep.** 216, 16 S. E. 945; In re Noyes (U. S. Dist. Ct.), 17 Alb. L. J. 407, 11 Chic. Leg. News 9. See discussion, supra, § 59.

be brought against him in such state.[3] And it has been held that he may be arrested and delivered on a requisition from another state.[4]

§ 73. OFFICERS EXECUTING SUCH PROCESS PROTECTED BY FEDERAL COURTS. We have already noticed numerous cases in which the action of the officers of a state in arresting alleged fugitives from justice have been reviewed by the judiciary of such state.[1] While this jurisdiction can not be rightfully disputed, it being now settled that an agent appointed by state authority to receive or deliver a fugitive is not a federal officer,[2] it may also be maintained that an officer who is arrested by state authorities when bona fide employed in executing extradition process may be released by federal courts on a writ of habeas corpus.[3] But so far as concerns the arrested party,

3 Compare remarks of Judge Cooley, Princeton Rev. 1879, p. 176; In re Cannon, 47 Mich. 481, 11 N. W. 280.

4 People v. Sennott, 20 Alb. L. J. 230. In this case Judge McAlister's ruling was afterwards approved by Judge Drummond.—Chic. Leg. News, Dec. 13, 1879.

Contra: Daniel's Case, cited 1 Brightly's Fed. Dig. 294. See criticism in 20 Alb. L. J. 425; 3 Cr. L. Mag. 808.

1 Supra, § 69.

2 See argument of Supreme Court of Alabama in the case of In re Mohr, 73 Ala. 503, 49 Am. Rep. 63, 5 Cr. L. Mag. 539; Rorer on Inter-State Law, 221, 222; article by Dr. Spear in 29 Alb. L. J. 206; note to 5 Cr. L. Mag. 548.

Compare: In re Hoyle, Fed. Cas. No. 6803, 1 Cr. L. Mag. 472.

Point in the text has been finally sustained by the Supreme Court of the United States in Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. 544, 16 Chic. Leg. N. 291, affirming 64 Cal. 431, 1 Pac. 881.

See In re Robb, 64 Cal. 431, 1 Pac. 881, where the United States Circuit Court in California (differing from the action of the Supreme Court of California in the same case, In re Robb, 64 Cal. 431, 1 Pac. 881, 1 West Coast Rep. 255) held that a state court had no right to review on habeas corpus the action of officers on extradition process.

3 In re Clark, 9 Wend. (N. Y.) 212; People v. Pinkerton, 77 N. Y. 245, 17 Hun 199; Prigg v. Pennsylvania, 41 U. S. (16 Pet.) 608, 10 L. Ed. 1060; United States v. Booth, 62 U. S. (21 How.) 507, 16 L. Ed. 169; In re Bull, 4 Dill. C. C. 323, Fed. Cas. No. 2119, 4 Cent. L. J. 255; United States v. McClay, 23 Int. Rev. Rec. 80, Fed. Cas. No. 15660.

it is now settled by the Supreme Court of the United States that the states have the concurrent right to inquire into the legality of the arrest, notwithstanding the fact that the question arises under the federal Constitution.[4]

§ 74. For federal offenses warrants may be issued in all districts. Under the Revised Statutes of the United States, it is made the duty of judges, when offenses against the United States are charged, to issue, under certain conditions, warrants for the arrest and removal of the offender for trial before such United States court as has cognizance of the offense.[1] In such cases the practice is to bring the defendant before a judge or other committing magistrate in the district of arrest, subject to the action of such magistrate, who may discharge or surrender.[2] The order is an exercise of a judicial function, and the court in considering it can go behind the indictment or information, and decide the question on the merits.[3]

§ 75. State has no power of international extradition. A state is not authorized, under the Constitution of the United States, to deliver fugitives to a foreign sov-

4 Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. 544, and see 29 Alb. L. J. 206.

1 See 2 Burr's Trial 483; Rhodes, Ex parte, 2 Wheel. Cr. Cas. (N. Y.) 550; United States v. Hamilton, 3 U. S. (3 Dall.) 17, 1 L. Ed. 490.

See discussion in 17 West. Jur. 209.

Judge Blatchford, in a case determined in 1873, declined to issue in New York a warrant, under the act of September 24, 1789, for the arrest of Mr. Dana, editor of the Sun, to answer an information filed in the police court of Washington, that court being authorized by act of Congress to try without juries, which act the court held unconstitutional.—Dana's Case, 7 Ben. 1, Fed. Cas. No. 3554.

2 Ex parte Clark, 2 Ben. 240, Fed. Cas. No. 12217; In re Buell, 3 Dill. 116, 2 Cent. L. J. 312, Fed. Cas. No. 2102; Ex parte Alexander, 1 Low 530, Fed. Cas. No. 162; United States v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15322; In re Bailey, 1 Wool. C. C. 422, Fed. Cas. No. 730.

3 Conk. Tr., 4th Ed., 582; United States v. Volz, 14 Blatch. 15, Fed. Cas. No. 16627; In re Buell, 3 Dill. 116, Fed. Cas. No. 2102; United States v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15322; In re Doig, 4 Fed. 193; In re Brawner, 7 Fed. 86; In re James, 18 Fed. 854.

ereign. The exclusive cognizance of international extradition is given to the government of the United States,[1] even though the crime for which extradition is sought was committed against the demanding state.[2]

1 People ex rel. Barlow v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; People ex rel. Gardinier v. Columbia County, 134 N. Y. 1, 31 N. E. 322; Ex parte Holmes, 12 Vt. 631; see Holmes v. Jennison, 39 U. S. (14 Pet.) 540, 10 L. Ed. 579; United States v. Rauscher, 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. Rep. 234; Read v. Bertrand, 4 Wash. 556, Fed. Cas. No. 11602.

That the clause in the Constitution securing grand juries and "due process of law" in criminal cases does not apply to offenses against foreign states, for which extradition is claimed, see 4 Op. Atty.-Gen. 201; Giacomo's Case, 12 Blatch. C. C. 391, Fed. Cas. No. 3747.

In Metzger's Case, 1 Barb. (N. Y.) 248, it was held by Judge Edmonds, on habeas corpus, that the French treaty of 1843 was not self-executing, and did not, therefore, without legislation, authorize arrest and extradition. See, however, s. c., 1 Edm. Sel. Ca. 399. This was followed by the act of Congress directing the process of extradition. See Spear on Extradition, 2d ed. 59.

2 United States v. Rauscher, 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. Rep. 234.

State statute investing Governor with power to control surrender of fugitives from foreign country, with which federal treaty therefor exists, is invalid.—People ex rel. Gardinier v. Columbia County, 134 N. Y. 1, 31 N. E. 322.

But see Ex parte Butler, 7 Luzerne Leg. Rep. 209, **holding statute constitutional.**

CHAPTER X.

EXTRADITION—AS BETWEEN THE FEDERAL GOVERNMENT AND FOREIGN STATES.

§ 76. LIMITED TO TREATY. Extradition, as a general rule, as between foreign states, is limited to cases provided for by treaty;[1] nor, as will hereafter be seen, when there

1 Whart. Confl. of L., § 835; Whart. Dig. Int. Law, § 268, and authorities there cited; United States v. Rauscher, 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. 234. In the same work the treaties are given.

is a treaty, will a requisition be sustained for an offense which the treaty does not include.[2] It has, however, been held by eminent jurists, that, independently of the cases provided for by treaty, it is by the law of nations within the discretion of the executive to surrender a fugitive from another land when there is reasonable proof showing such fugitive to be guilty of any offense regarded jure gentium as a gross crime.[3] The opinion of Chancellor Kent has not gone unchallenged and has in more recent cases been disapproved by the United States Supreme Court,[4] holding that no state is bound by the law of nations to deliver up a person charged with a criminal offense in, or even where convicted of crime in, another country.[5]

Jurisdiction was assumed by the President of the United States, in 1864, though without the opportunity

2 Infra, § 85.

3 In re Washburn, 4 John. Ch. (N. Y.) 106, 8 Am. Dec. 548.

Wheaton's International Law (§ 115) says: "The public jurists are divided upon the question, how far a sovereign state is obliged to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state, or of its officers of justice. Some of these writers maintain the doctrine, that according to the law and usage of nations, every sovereign state is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent. According to Puffendorf, Voet, Martens, Klüber, Leyser, Klint, Saalsfeld, Schmaltz, Mittermeyer, and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practiced by certain states as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it force of international law."

4 United States v. Rauscher, cited in footnote 1, this section.

5 See, also, State ex rel. Adams v. Buzine, 4 Harr. (Del.) 572; Ex parte Holmes, 12 Vt. 631; Dos Santos's Case, 2 Brock. 493, Fed. Cas. No. 4016; In re Sheazle, 1 Woodb. & M. 66, Fed. Cas. No. 12734.

of judicial revision.[6] But the weight of authority is against such a course.[7]

[6] Arguelles's Case, Whart. Confl. of L., §§ 835 et seq. Whart. Dig. Int. Law, § 268.

[7] See Clarke's Extradition, 2d Ed.; Spear on Extradition, 1 et seq; Letters from W. B. Lawrence in 15 Alb. L. J. 44; 16 Alb. L. J. 365; 19 Alb. L. J. 329; article by Mr. Lawrence in Revue de Droit Inter. x. 285; letter of Mancini in Lond. Law Mag. Feb. 1882.

In Stupp's case, in 1873, the United States refused to surrender to Belgium on the ground of want of treaty stipulation. Infra, § 84.

As coinciding with this conclusion, see State v. Hawes, 76 Ky. (13 Bush) 697, 26 Am. Rep. 242; Adrian v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; Dos Santos's Case, 2 Brock. 493, Fed. Cas. No. 4016; United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14932; British Privateers, 1 Woodb. & M. C. C. 66, Fed. Cas. No. 12734.

Mr. Jefferson in his correspondence with Mr. Genet, in 1793 (Am. St. Papers, I. 175) denied the right aside from treaty; and he took the same position in his letter to the President of Nov. 7, 1791. To the same effect is the opinion of Atty.-Gen. Lee, in 1797 (1 Op. Atty.-Gen. 68), of Atty.-Gen. Wirt (Ibid. 509), and of Atty.-Gen. Taney (2 Ibid. 559), and of Atty.-Gen. Legaré (3 Ibid. 661), and of Atty.-Gen. Cushing (6 Ibid. 431).

In England, by the third section of the extradition act, a fugitive criminal is not to be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to the King's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. A clause embodying this principle is contained in the English extradition treaties concluded since 1870 with Germany, Belgium, Austria, Italy, Denmark, Brazil, Switzerland, Honduras, and Hayti. The treaty of 1842 with the United States contains no such restriction. As to extradition treaty between Switzerland and Great Britain, see Reg. v. Wilson, L. R. 3 Q. B. D. 42.

For report of the Royal Commission on Extradition, in 1878, reviewing the position, see a comprehensive review by Mr. Lawrence, 19 Alb. L. J. 329.

For English practice, see Terraz's Case, L. R. 4 Ex. D. 63; 14 Cox C. C. 153.

Compare discussion in 11 Revue de Droit Int. (1879) 88; Ducrocq. Théorie de l'Extradition; Faustin Hélie, t. 1, § 964.

For notice of decision of Mexican Supreme Court, sustaining extradition from Mexico to the United States, see 18 Alb. L. J. 141.

The diplomatic authorities on this topic are given in Whart. Dig. Int. Law, § 268.

§ 77. OFFENSE MUST BE ONE RECOGNIZED BY ASYLUM STATE. Even supposing that extradition is to be granted, irrespective of treaty, it only lies for offenses jure gentium, and which are therefore punishable alike in the country granting the arrest[1] and that making the requisition.[2] The extradition treaties executed by the United States contain generally the provision that the surrender "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed."[3] Under this provision it has been held that it is sufficient if the offense charged be a crime in the asylum state at the time of its commission, though it was not so at the time of the execution of the treaty.[4] The offense must also be indictable as such in the demanding state; and if the facts do not show such an offense, within the treaty, the defendant will be discharged in the asylum state on habeas corpus.[5]

§ 78. TREATIES ARE RETROSPECTIVE. An extradition treaty, it has been held, covers cases of crimes committed before its adoption, so that under it process may issue to arrest fugitives charged with such crimes.[1]

§ 79. EXTRADITION REFUSED WHEN THERE CAN BE NO FAIR TRIAL. The sole object of extradition being to secure the due and effective administration of justice, a surrender

1 Tully, In re, 22 Blatch. C. C. 213, 20 Fed. 812.

2 Whart. Confl. of L., § 836. See Bar, § 149; Berner, p. 188. Sir R. Phillimore speaks positively to this effect. Int. Law, i. 413.

3 Whart. Confl. of L., § 835 et seq.

4 Müller's Case, 5 Phila. 289, Fed. Cas. No. 9913, 10 Opin. Atty.-Gen. 501.

5 For cases of discharge because the facts did not constitute forgery, see, infra, § 85, and Kerr's Whart. Crim. Law, § 872.

1 Whart. Dig. Int. Law, § 282; In re Giacomo, alias Ciccariello, 12 Blatchf. 391, Fed. Cas. No. 3747; Muller's Case, 5 Phila. 289, Fed. Cas. No. 9913.

A contrary view is taken by Bar, an eminent German jurist, in an article in the Revue de Droit International for 1877.

can not be rightfully made, apart from treaty obligation, to a state in which a fair trial can not be had; nor will treaties in this respect be executed when the demanding state proposes to subject the fugitive to an oppressive trial not within the contemplation of the parties at the time of the adoption of the treaty.[1]

Surrender will be refused also when the effect is to expose the fugitive to a barbarous punishment, or one revolting to a civilized jurisprudence.[2]

Surrendering sovereign may impose conditions as to the way in which the surrendered fugitive is to be tried.[3]

§ 80. —— AND SO FOR POLITICAL OFFENSES. Notwithstanding the authority of Grotius,[1] there is a general consent of modern jurists to the effect that between independent sovereignties there should be no extradition for political offenses.[2]

It is important, however, to remember that there may be cases nominally political, which, nevertheless, are essentially distinguishable from those in which the gist of the offense is opposition to government, and as to which extradition is to be refused.

§ 81. —— AND SO FOR PERSONS ESCAPING FROM MILITARY SERVICE. "The delivering up by one state," says Mr.

1 Whart. Confl. of L. 838.

2 Whart. Confl. of L., § 838. See Dana's Case, 7 Ben. 1, Fed. Cas. No. 3554, cited supra, § 74.

3 Ibid.

1 II. ch. 21, §§ 4-6.

2 Whart. Dig. Int. Law, § 272; Lawrence's Wheaton, 245, note; Woolsey, § 79; Lewis, p. 44; Phil. i. 407; Heffter, § 63; Fœlix, ii. No. 609; Mohl, p. 705; Marquardsen, p. 48; Bar, § 150; Geyer, in Holtzendorff's Ency. Leipzig, 1870, p. 540, Kluit, p. 85, cited Whart. Confl. of L. § 948.

In the extradition treaties negotiated by the United States political offenses are either implicitly excluded, by non-specification among those for which extradition will be granted, or are excepted in express terms. Nor can an independent extraditionable offense be used as a mask to cover a reserved political prosecution. No government, independent of treaty provisions, should surrender a fugitive without a guarantee that he is to be tried only for the offense specified in the demand. Infra, § 87.

Wheaton,[1] "of deserters from the military or naval service of another, also depends entirely upon mutual comity, or upon special compact between different nations"; but so far as concerns the extension of such surrender to any cases not provided for by convention, this may now be viewed as too broad a statement of the law.

With regard to the extradition of persons fleeing from threatened conscription, it is now conceded that no surrender should be made by the state of refuge.[2] So far as concerns deserters, no doubt cartel conventions for mutual extradition may, in some cases, be effective. But without such conventions, such surrenders are not now made; and under any circumstances there should be satisfactory proof that the deserter demanded was not led to enlist by wrong means, and will not be subjected, on his return, to a barbarous punishment. In the United States, conventions of this kind are rare.[3]

§ 82. —— BUT NOT BECAUSE THE PERSON DEMANDED IS A SUBJECT OF THE ASYLUM STATE. The practice in the United States and in England has been not to refuse the extradition of a subject when demanded by the sovereign of a foreign state, for a crime committed in such state.[1] It is otherwise in Germany;[2] and an exception to this effect exists in our treaties with Prussia and the North German states, with Bavaria, with Baden, with Norway and Swe-

1 Lawrence's Wheaton, p. 237.

2 Rotteck, in Staatslex. ii. p. 40; Mohl, die Völkerrechtliche Lehre vom Asyl. cited Whart. Confl. of L., § 951.

3 Dana's Wheaton, § 121, note 79.

1 Whart. Dig. Int. Law, § 273. See Robbins's Case, Wharton's St. Tr. 392; Bee, 266; Jour. Jur. 13; Kingsbury's Case, 106 Mass. 223; Reg. v. Ganz, 9 Q. B. D. 93.

This subject is discussed by the commission on extradition, appointed by the British government in 1877, which concludes as follows:

"On the whole, the commission unanimously were of the opinion that it is inexpedient that the state should make any distinction in this respect between its own subjects and foreigners; and stipulations to the contrary should be omitted from all treaties."—Central Law Journal, 1878, 40; 19 Alb. L. J. 329.

2 Dana's Wheaton, § 120, note; Lawrence's Wheaton, p. 237, note.

den, with Mexico, and with Hayti. No such exception appears in the treaties with Great Britain, France, Hawaiian Islands, Italy, Nicaragua, or with the Dominican Republic. The true rule is, that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offense alleged to have been committed by such subject abroad, the extradition in such case may be refused; the asylum state then having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of extra-territorial crimes committed by such subject, then extradition should be granted.

§ 83. —— WHERE ASYLUM STATE HAS JURISDICTION THERE SHOULD BE NO SURRENDER. Supposing that the state in which the defendant has sought an asylum has, with the prosecuting state, admiralty jurisdiction of the offense, as where the offense was committed on the high seas, ought a surrender to be made? For several reasons, to pursue the argument of the last section, it should not.[1] In the first place, by refusing to surrender, a needless circuity of process involving great cost is arrested. In the second place, a defendant's personal rights would be needlessly imperilled by his forcible removal to a foreign forum. And again, if a surrender could be made in one case of admiralty jurisdiction, it could be made in another; and if the rule be admitted at all, there would be few admiralty prosecutions that might not, at executive discretion, be removed to a foreign land under a foreign law. Even, therefore, should a surrender of such a party, in a case of admiralty jurisdiction, be granted, a court under the English common law, on a writ of habeas corpus, would direct his discharge.[2]

1 See Whart. Dig. Int. Law, § 271.

2 As sustaining this view, see Reg. v. Tivnan, 5 Best & S. 645, 117 Eng. C. L. 643, sub nom. "Turnan," 12 W. R. 848. On the other hand, in the case of In re Sheazle, 1 Woodb. & M. 66, Fed. Cas. No. 12734, it was held that the extradition treaty with England required the surrender by

§ 84. CONFLICT OF OPINION AS TO WHETHER A FOREIGN STATE CAN CLAIM A SUBJECT WHO HAS COMMITTED A CRIME IN A THIRD STATE. A cognate question arises when the offense was committed by a subject of the demanding state in the territory of an independent foreign state. The only admissible interpretation, it has been argued, of the term "jurisdiction," is to treat it as convertible with country, so as to make it necessary for the offense, in order to sustain a requisition, to have been committed within the territory of the demanding state. Such is the view, as has been noticed, of Sir R. Phillimore, and so, also, was it held in England in 1858, by the eminent law officers of the crown, when consulted by the government as to whether the American government could be asked to surrender to England a British subject who had been guilty of homicide in France.[1] In 1873 the question arose in New York whether Prussia could demand the extradition of a prisoner for alleged crimes committed out of the territory of Prussia, but punishable by its laws. The prisoner was remanded by Judge Blatchford to the custody of the marshal, after an opinion by that learned judge in which it was elaborately argued that the term "jurisdiction" in the treaty covers cases such as that before the court.[2] When, however, the question of issuing a warrant

the United States of a British subject who committed, on a British ship, on the high seas, piracy which was such by act of parliament, but not by the law of nations. Compare Bennett, In re, 11 Law T. R. 488.

In Reg. v. Nillins, 53 Law Journ. 157 (1858), it was held that extradition would be sustained in a case where the defendant, when in England, sent letters containing false pretenses to Hamburg, and then went to Hamburg, where the money was obtained. See, also, Reg. v. Jacobs, 46 L. T. 595.

It is stated by Sir R. Phillimore, that "the country demanding the criminal must be the country in which the crime is committed."—1 Phil. Int. Law, 413.

1 Allsop's Case, cited by Atty.-Gen. Williams, 14 Opin. Atty.-Gen. 281, 11 Blatch. 129; given more fully infra. See, also, Whart. Dig. Int. Law, § 271.

2 Stupp, In re, 11 Blatch. 124, Fed. Cas. No. 13562.

of surrender came before the secretary of state, he called upon Attorney-General Williams for an opinion on the question as to whether the surrender could be lawfully made. The question was answered in the negative by the attorney-general, on the ground that, so far as concerns the extradition treaties, "jurisdiction" by the demanding state can not be held to exist over the territory of an independent civilized state.[3] Restricting the opinion of the attorney-general to this narrow statement, it may be accepted as a suitable rule for the guidance of the federal executive in the delicate question of determining to which of two foreign civilized states a fugitive, in case of conflict, is to be surrendered.[4] But so far as concerns the meaning of the term "jurisdiction," the reasoning of Judge Blatchford is unanswerable. "Jurisdiction" can not, in our international dealings with other states, be restricted to "territory," without abandonment, not only of our right to punish for offenses on the high seas, and in barbarous lands, but of that authority over American citizens in foreign lands which we have uniformly

3 This is the only point necessarily involved, and it is just to the attorney-general to limit his argument to this point, though some expressions used by him have a wider scope.

4 From the opinion we take the following: "Thomas Allsop, a British subject, was charged as an accessory before the facts to the murder of a Frenchman in Paris, in 1858, and escaped to the United States, and as he was punishable therefore by the laws of Great Britain, the question as to whether he could be demanded by Great Britain of the American government, under the extradition treaty of 1842, was submitted to Sir J. D. Harding, the queen's advocate, the attorney and solicitor general, Sir Fitzroy Kelly, since chief baron of the exchequer, and Sir Hugh Cairns, since lord chancellor, and they recorded their judgment as follows: 'We are of the opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British crown, within the meaning of the treaty of 1842, and that his extradition can not properly be demanded of the United States under that treaty.' Forsyth's Case, p. 268." 11 Blatch. 128. See, also, opinion of Atty.-Gen. Cushing, 8 Opin. Atty.-Gen. 215.

claimed,[5] and which our imperial position as one of the leading powers of Christendom demands.[6]

§ 85. EXTRADITION DOES NOT LIE FOR A CASE NOT INCLUDED IN A TREATY. We have already noticed that, as a rule, there can be no extradition without treaty.[1] Where a treaty exists making certain offenses the subject of extradition, this must be regarded as declaring that only such offenses shall be the subject of extradition between the countries in question, and that consequently extradition is not to be granted for other offenses.[2] Thus in Vogt's case, which has just been discussed,[3] the attorney-general, after arguing that the case was not within the treaty with Prussia, properly held that if the claim was not within that treaty, it could not be based generally on the law of nations.[4]

Whether there can be extradition under a treaty without legislation has been much discussed. That there can be is plain when the treaty is not conditioned on future legislation.[5]

5 See Kerr's Whart. Crim. Law, §§ 743 et seq.

6 Kerr's Whart. Crim. Law, §§ 318 et seq.

1 Supra, § 76. Whart. Dig. Int. Law, § 270.

2 See Windsor's Case, 34 L. J. M. C. 163; 13 W. R. 655; 12 L. T. N. S. 307; Letter of Mr. Bancroft Davis of July 28, 1873, to the Belgian ministry; 10 Cox C. C. 118, 6 Best & S. 552; discussed Whart. Crim. Law, 9th ed., § 667; Ex parte Counhaye, L. R. 8 Q. B. 410. See, also, In re Hall, 8 Ontario App. 31; Eno's case, 30 Alb. L. J. 144, where the restricted sense given by the Canada court to forgery is ably criticised. Cf. Tully, In re, 22 Blatch. 213, 20 Fed. 812.

3 Supra, § 84.

4 On this point the attorney-general said: "Able writers have contended that there was a reciprocal obligation upon nations to surrender fugitives from justice; though now it seems to be generally agreed that this is altogether a matter of courtesy. But it is to be presumed where there are treaties upon the subject that fugitives are to be surrendered only in cases and upon the terms specified in such treaties." Vogt, In re. See, supra, § 84, for the other questions arising in this case.

5 Robbins's Case, Whart. St. Tr. 392; Bee's R. 266. This ruling was defended by Judge Marshall, when in the House of Representatives, on reasoning which Mr. Gallatin thought unassailable. Adams's Gallatin, 231-2. See, **contra**, Spear on Extrad. 53. But so fas as concerns

§ 86. —— NOR WHERE THE DEFENDANT IS IN CUSTODY FOR ANOTHER OFFENSE. Where the defendant is already in custody, or under recognizances for trial in the state on which the requisition is made, the requisition will be refused, at least until the defendant's discharge.[1]

§ 87. TRIAL FOR OFFENSE DIFFERENT FROM THAT FOR WHICH EXTRADITED. Whether, when a fugitive is demanded to meet a particular offense, included in the treaty under which the proceedings take place, he can be tried for another offense, has been the subject of much discussion.[1] It was held by Mr. Fish, when secretary of state, that the government of the United States could give no stipulation to that of Great Britain that a party extradited by the United States under the treaty then in force, would not be tried for any offense other than that for which he was extradited; and it was further maintained by him "that the treaty and the practice between the two countries would allow the prosecution for an offense distinct from that for which he (the fugitive) was surrendered." In December, 1886, the question came before the Supreme Court of the United States on a certificate of division from the circuit court of New York on a motion to arrest judgment on a conviction for inflicting cruel and unusual punishment on a sailor, this not being an extraditable defense, the offense for which the defendant was extradited being murder. It was held by the supreme court of the United States that the defendant could be tried, under the proceedings, for no other offense than murder, Waite, C. J., dissenting.[2] This ruling, therefore,

Judge Bee's decision to deliver Robbins to the British consul, this is not sustained by Judge Marshall's argument, which denies this right to the judiciary and asserts it for the president.

1 Whart. Confl. of L., § 845. Supra, § 66. See Miller, In re, 23 Fed. 32.

1 See Whart. Dig. Int. Law, § 270.

2 United States v. Rauscher, 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. 234.

Can not be tried for other offense than that for which surrendered. See: CAL.—In re Collins, 151 Cal. 340, 129 Am. St. Rep. 122, 90 Pac. 827. IND.—Hackney

decides that a party brought into the United States by extradition can not be convicted of any other crime than that for which he was extradited. This view is sustained by high independent authorities; and is right as a principle of international law. It is an abuse of this high process and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offense for which extradition lies to be used to cover an offense for which extradition does not lie, or which it is not considered politic to introduce in the demand.[3] At the same time when the defendant is brought over on an extraditable offense which contains another extraditable offense (*e. g.*, as murder contains manslaughter), there is no reason why the defendant, the proof failing of the higher crime, should not be convicted of the lower, both being extraditable.[4] But mere

v. Welsh, 107 Ind. 253, 57 **Am. Rep.** 101, 8 N. E. 141; Knox v. State, 164 Ind. 226, 108 **Am. St. Rep.** 291, 3 **Ann. Cas.** 539, 73 N. E. 255. KAN.—State v. Hull, 40 Kan. 338, 10 **Am. St. Rep.** 200, 19 **L. R. A.** 918, 19 Pac. 918. MASS.—Com. v. Wright, 158 Mass. 149, 35 **Am. St. Rep.** 475, 19 **L. R. A.** 206, 33 N. E. 82. N. Y.—People ex rel. Young v. Stout, 81 Hun 336, 30 N. Y. Supp. 898. OHIO—State v. Vanderpool, 39 Ohio St. 273, 48 **Am. Rep.** 431; Ex parte McKnight, 48 Ohio St. 508, 14 **L. R. A.** 128, 28 N. E. 1034; In re Brophy, 2 Ohio N. P. 230. PA.—In re Miller, 15 W. N. C. 551. FED.—In re Miller, 23 Fed. 32; Ex parte Hibbs, 26 Fed. 421. But see cases cited in footnote 4, this section.

[3] See Bouvier, Ex parte, 12 Cox C. C. 303, 27 L. T. R. 844.

[4] See article by W. B. Lawrence, 14 Alb. L. J. 96, 19 Alb. L. J. 329; Lord Cairns, quoted U. S. For. Rel. 1876, 286, 296; Spear on Extrad., ch. vi; Lowell, J., in 10 Am. Law J. 617, 620; London Law Mag. for 1875, 139; Renault, Etude sur l'Extradition; Field's Int. Code, § 237; Clarke on Extradition, 38. KY.—Com. v. Hawes, 76 Ky. (13 Bush) 697, 26 **Am. Rep.** 242. MICH.—In re Cannon, 47 Mich. 487, 11 N. W. 280. OHIO—State v. Vanderpool, 39 Ohio St. 273, 48 **Am. Rep.** 431. TEX.—Blandford v. State, 10 Tex. App. 627. FED.—United States v. Watts, 8 Sawy. 370, 14 Fed. 130; Ex parte Hibbs, 26 Fed. 421, 431.

Contra: Com. v. Wright, 158 Mass. 149, 35 **Am. St. Rep.** 475, 19 **L. R. A.** 206, 33 N. E. 82; Adriance v. Lagrave, 59 N. Y. 110, 7 **Am. Rep.** 317; Caldwell's Case, 8 Blatchf. 131, Fed. Cas. No. 14707; United States v. Lawrence, 13 Blatchf. 295, Fed. Cas. No. 15573; In re Miller, (U. S. Dist. Ct. Pa.), 6 Cr. L. Mag. 511; Paxton's Case, 10 Low. Can. Rep. 212; Von Aer-

irregularities in the extradition process will not be ground of defense in the trial court.[5]

§ 88. COURTS MAY HEAR CASE BEFORE MANDATE. In several treaties it is provided that *after* a requisition made on the president, he may issue a mandate, so that the fugitive may be subjected to judicial examination.[1] But the present practice is that, unless required by treaty or law, an executive mandate is not a condition precedent of a judicial examination.[2]

§ 89. COMPLAINT AND WARRANT SHOULD BE SPECIAL. The complaint should set forth the substantial and material features of the offense, though it need not aver personal knowledge on the part of the affiant.[1] It will be sufficient

nam's Case, 11 Low. Can. Rep. 352; Up. Can. Rep. 4 C. P. 288; House Ex. Doc. 173, 44th Cong. 1st session.

5 Kelly v. State, 13 Tex. App. 158.

In Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, aff. Ker v. Illinois, 119 U. S. 436, 30 L. Ed. 42, 7 Sup. Ct. 225, it was held that the principle in the text does not apply where the fugitive was kidnapped and not extradited from the foreign country.

1 See 6 Opin. Atty.-Gen. 91; Henrich, In re, 5 Blatchf. 414, 425, 10 Cox Crim. Cas. 626, Fed. Cas. No. 4644; Farez's Case, 7 Blatchf. C. C. 34, Fed. Cas. No. 4644; Castro v. De Uriarte, 16 Fed. 93.

2 Spear on Extrad. 211.

See In re Macdonnell, 11 Blatchf. C. C. 72, Fed. Cas. No. 2752; In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13887; Ex parte Ross, 2 Bond 252, Fed. Cas. No. 12069; Dugan, In re, 2 Low. 367, Fed. Cas. No. 4120; Castro v. De Uriarte, 16 Fed. 93; In re Herres, 33 Fed. 165; Calder's Case, 6 Opin. Atty.-Gen. 91.

See remarks of Lowell, J., in Kelley's Case, 2 Low. 339, Fed. Cas. No. 7655.

As to English practice, see Reg. v. Weil, L. R. 9 Q. B. D. 701; 4 Cr. L. Mag. 49.

1 Farez's Case, 2 Abb. U. S. 346, 7 Blatchf. 345, Fed. Cas. No. 645.

See Macdonnell, In re, 11 Blatchf. C. C. 79, Fed. Cas. No. 8771, and Whart. Dig. Int. Law, § 276a.

As to English practice, see Tiot, In re, 46 L. J. N. S. 120.

Form of complaint.—The complaint "need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offense."—Henrich, In re, 5 Blatchf. 414, 10 Cox Crim. Cas. 626, Fed. Cas. No. 6369.

Offense must be substantially stated in order to be sufficient.—Van Hoven, In re, 4 Dill. 411, Fed. Cas. No. 16858.

But it need not aver prior crimi-

if it plainly set forth an offense under the treaty.[2] Any person authorized by the demandant government may appear and file complaint.[3] Whether the party making the complaint was authorized is for the commissioner,[4] but such authority must appear to the satisfaction of the commissioner.[5] The warrant must recite the title of the commissioner,[6] and specify the crime,[7] though it is said that this specification need only be in the terms of the treaty.[8]

§ 90. WARRANT MAY BE RETURNABLE TO COMMISSIONER. The warrant of arrest may be returnable before the judge issuing it, or before a commissioner previously designated under the act of congress, by the circuit court for that purpose.[1]

§ 91. EVIDENCE SHOULD BE DULY AUTHENTICATED. Documentary evidence from abroad "should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of

nal proceedings against the defendant.—Ex parte Dane, 6 Fed. 34.

2 In re Roth, 15 Fed. 506.

3 In re Kelly, 26 Fed. 852.

4 In re Kelly, 26 Fed. 852.

5 In re Ferrelle, 28 Fed. 878.

6 In re Kelly, 25 Fed. 268.

7 Ex parte Hibbs, 26 Fed. 421.

8 Castro v. De Uriarte, 16 Fed. 93.

1 In re Kaine, 55 U. S. (14 How.) 142, 14 L. Ed. 345.

Compare: Farez's Case, 2 Abb. U. S. 346, 7 Blatchf. 345, Fed. Cas. No. 4645; In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8771.

As to duty of judge in issuing warrant, see In re Kelley, 2 Low. 339, Fed. Cas. No. 7655; In re Dugan, 2 Low. 367, Fed. Cas. No. 4120.

Warrant to all marshals and deputies can be executed in Wisconsin by a deputy marshal of the southern district of New York. See In re Henrich, 5 Blatchf. 414, 10 Cox Crim. Cas. 626, Fed. Cas. No. 6369. See, also, Whart. Dig. Int. Law, § 276a.

Papers to procure extradition.—In 6 Moak's Eng. Rep. 138 will be found a copy of papers carefully prepared by Mr. Moak to procure the extradition of a fugitive from Canada.

the same criminal charge by the tribunals of such foreign country."[1] But in default of such proof, authentication can be made by an expert.[2]

Commissioner should keep record of the oral evidence, with the objections made to it or to the documentary evidence, briefly stating the grounds of such objections.

Parties seeking extradition should be required by the commissioner to furnish an accurate translation of every foreign document, such translation to be verified by affidavit.[3] According to the practice under the United States statute, depositions, on a hearing for extradition, are to be allowed the same weight as if the witness were present at the hearing.[4]

§ 92. TERMS TO BE CONSTRUED AS IN ASYLUM STATE. When in a treaty a particular crime is specified, this crime must be construed in the general sense in which it is used in the asylum country. Thus, it was held by the English Queen's Bench in 1866, that the term fraudulent bankruptcy, in the French treaty, would be construed according to the rules applicable to fraudulent bankruptcy in

1 U. S. Rev. Stat. § 5271, 3 Fed. Stats. Ann. (1st ed.) 76, 3 Fed. Stats. Ann. (2d ed.), p. 281, and 10 Opin. of Atty.-Gen. 501.

See In re Kaine, 55 U. S. (14 How.) 103, 14 L. Ed. 345; Farez's Case, 2 Abb. U. S. 346, 7 Blatchf. 345, Fed. Cas. No. 4645; In re Bahrendt, 22 Fed. 699.

As to English practice, see Counhaye, Ex parte, L. R. 8 Q. B. 410; Terraz's Case, 14 Cox C. C. 161, L. R. 4 Ex. D. 63.

Nature of the requisite documentary evidence is considered in In re Fowler, 18 Blatchf. 430, 4 Fed. 303. See In re Charleston, 34 Fed. 531; In re McPhun, 30 Fed. 57; In re Herris, 32 Fed. 583.

Authentication by a vice-consul temporarily in charge is enough.—In re Herres, 33 Fed. 165.

2 In re Benson, 34 Fed. 649; citing In re Fowler, 18 Blatchf. 437, 4 Fed. 303. See, also, Kelly, In re, 26 Fed. 852; Reg. v. Ganz, 9 Q. B. D. 93; Whart. Dig. Int. Law, § 277.

3 In re Henrich, 5 Blatchf. 414, 425, 10 Cox Crim. Cas. 626, Fed. Cas. No. 6369.

As to translation of foreign terms, Piot, Ex parte, 48 L. T. (N. S.) 120.

4 Farez's Case, 2 Abb. U. S. 346, 7 Blatchf. 345, Fed. Cas. No. 4645; Farez's Case, 7 Blatchf. 491, Fed. Cas. No. 4646. See Wadge, In re, 21 Blatchf. 300, 16 Fed. 332.

England.[1] The same court ruled in 1865 that "forgery," in the treaty with the United States, would not be construed to include embezzlement.[2] And it is admissible for the defense to show that the case is not one included in the treaty.[3] At the same time, if the offense is not one which in the demanding state would be held to be within the treaty, surrender may be refused.[4]

§ 93. EVIDENCE MUST SHOW PROBABLE CAUSE. The process of extradition being a process of arrest for the purposes of trial, and not a process of trial, the prevalent opinion is that it is enough in order to justify a giving up for trial, that the evidence should show a probable case of guilt.[1]

§ 94. EVIDENCE MAY BE HEARD FROM DEFENSE. The practice both of England and of the United States, is for the asylum state, through its proper tribunals, to hear evidence for the defense.[1] Where the local laws allow it,

1 Widermann's Case, 12 Jurist N. S. 536; Clark on Extrad. 87; Whart. Confl. of L., § 972.

In Ex parte Terraz, L. R. 4 Ex. D. 63, 14 Cox C. C. 161, the rule as to bankruptcy offenses is further discussed.

2 Windsor's Case, 34 L. J. M. C. 163, 13 W. R. 655, 10 Cox 118, 6 B. & S. 552; supra, § 85.

3 Supra, § 85.

4 This was the position taken in Phipp's Case, Ontario Q. B. 865, 8 Ontario App. 77, 4 Crim. Law Mag. 685. The court, however, heard the testimony of experts to prove that the offense was forgery in Pennsylvania, the locus delicti, and decided accordingly.

1 Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 Sup. Ct. 1148; In re Farez, 2 Abb. U. S. 346, 351, 7 Blatchf. C. C. 345, 388, Fed. Cas. No. 4645; citing 1 Burr's Trial 11; In re Farez, 7 Blatchf. 491, Fed. Cas. No. 4646.

After discharge for insufficient evidence defendant may be rearrested without a second mandate. See In re Kelly, 26 Fed. 852; Herres, In re, 33 Fed. 165; Whart. Dig. Int. Law, § 277.

See, also, same case before Judge Woodruff, Farez's Case, 7 Blatchf. 491, Fed. Cas. No. 4646, where the requisite evidence is spoken of as prima facie; and see, infra, § 112.

1 Macdonnell, In re, 11 Blatchf. C. C. 79, Fed. Cas. No. 8771.

Compare: Wadge, In re, 15 Fed. 864, affirmed 21 Blatchf. C. C. 300, 16 Fed. 332, where it was said that a continuance would not be granted to enable the defendant to produce depositions; and also as denying the defendant's right to a hearing.

he is entitled to be personally examined.[2] If on the whole case, there is probable cause that the defendant was guilty of an offense under the provisions of a treaty, he should be surrendered.[3] Such appears to be the rule in England, under the extradition act of 1870.[4]

§ 95. CIRCUIT COURT HAS POWER OF REVIEW. The circuit court has power to review the decision of the commissioner on questions of law, but not of fact;[1] and the

See In re Dugan, 2 Low. 367, Fed. Cas. No. 4120.

In re Catlow, 16 Op. 642 (1879), it was held that evidence of the defendant's insanity was admissible. See, also, Woodhall's Case, 20 Q. B. D. 883.

2 Farez's Case, 2 Abb. U. S. 346, 7 Blatchf. 345, Fed. Cas. No. 4645.

Compare: In re Dugan, 2 Low. 367, Fed. Cas. No. 4120.

3 In re Dugan, 2 Low. 367, Fed. Cas. No. 4120.

Accused is not entitled, under the treaty with England, to be confronted with the adverse witnesses.—In re Dugan, 2 Low. 367, Fed. Cas. No. 4120; Whart. Dig. Int. Law, § 278.

4 1 Phil. Int. Law, ed. 1871, App. ix 39; Law Jour. 1870, N. S. Stat. 786.

Compare: Clarke on Extrad. 188; London Law Times, July 23, 1881, p. 206; Whart. Dig. Int. Law, § 277.

1 In Kaine's Case, 3 Blatchf. 1, Fed. Cas. No. 7597; Henrich's Case, 5 Blatchf. 414, 10 Cox Crim. Cas. 626, Fed. Cas. No. 6369, Nelson, J., and Shipman, J., overruled Veremaitre's Case, 9 N. Y. Leg. Obs. 137, where Judge Judson held that he had no power to revise the judgment of the commissioner on questions of fact. See Heilbronn's Case, 12 N. Y. Leg. Obs. 65, and Van Aernam's Case, 3 Blatchf. 160, Fed. Cas. No. 16824, where the latter view was expressed by Judge Betts.

Compare: In re Kelly, 26 Fed. 852.

On the other hand, in Stupp's Case, 12 Blatchf. 501, Fed. Cas. No. 13563, Judge Blatchford held that there could be no reviewal on the effect of the evidence when legally admitted. This is affirmed in Vandervelpen's Case, 14 Blatchf. 137, Fed. Cas. No. 16844.

In Wiegand's Case, 14 Blatchf. 370, Fed. Cas. No. 17618, Blatchford, J., said: "In a case of extradition before a commissioner, when he has before him documentary evidence from abroad, properly authenticated under the act of Congress, and such is made evidence by such act, it is the judicial duty of the commissioner to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon is imposed on any judicial officer. This province of the commissioner extended to a determination as to whether the embezzlement was a continuing embezzlement."

Decisions reviewed by Judge Woodruff, in In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8771.

In Reg. v. Maurer, L. R. 10 Q. B.

court will not reverse the commissioner's action upon trifling grounds or matters of form; and only for substantial error in law, or for such manifest error in procedure as would warrant a court of appeals in reversing.[2] And as was subsequently ruled, it is not enough to charge a conclusion at law, *e. g.*, "forgery." The time and place, and nature of the crime, and its subject-matter should be set out.[3] Nor will the court discharge absolutely on account of an error of the commissioner in admission or rejection of evidence.[4] The practice is, in such case, simply to discharge from the first commitment, leaving the examination to proceed anew.[5]

Practice as to habeas corpus, in other relations, is hereafter discussed.[6]

§ 96. FINAL SURRENDER BY EXECUTIVE.[1]—DISCRETION OF EXECUTIVE. Yet, even after the final commitment by the commissioner, and the remanding, in case of a habeas corpus before the circuit court, of the prisoner to the custody of the marshal, the final warrant of the executive must be obtained before the prisoner is surrendered to the custody of the demanding state. This warrant the executive may refuse to issue, on grounds of law as well as of policy.[2] Such was the course taken by the Presi-

D. 513, it was held that the High Court would not review, in conflicting questions of fact, the ruling of the committing magistrate.

2 Henrich, In re, 5 Blatchf. 414, 425, 10 Cox Crim. Cas. 626, Fed. Cas. No. 6369.

3 Farez's Case, 7 Blatchf. 34, 35, Fed. Cas. No. 4644.

4 In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8771.

In In re Fowler, 18 Blatchf. 430, 4 Fed. 303, it was held that when the commissioner had before him legal and competent evidence relevant to the issue, the circuit court will not on habeas corpus review his decision.

5 Supra, § 93; Farez's Case, 7 Blatchf. 34, 35, Fed. Cas. No. 4644.

As to habeas corpus, see Whart. Dig. Int. Law, § 279; Kaine, Ex parte, 55 U. S. (14 How.) 103, 14 L. Ed. 345.

6 See, post, chapter on "Habeas Corpus."

1 See Whart. Dig. Int. Law, § 280.

2 In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13563; 14 Opin. Atty.-Gen. 281.

dent in 1873, in Vogt's case.[3] In England, the surrender after remander on habeas corpus, may be made without such final executive warrant.[4]

3 Supra, § 84. See more fully Whart. Dig. Int. Law, § 280.

4 Statement of the English practice is given by the London Times of Feb. 17, 1873. See Terraz's Case, 14 Cox C. C. 161.

CHAPTER XI.

TAKING MONEY AND PROPERTY FROM PRISONER.

§ 97. In general. The general rule of law is that, in the absence of a statute, an officer has no right to take money or property from the person or possession of a prisoner, except such as may afford evidence of the crime charged,[1] which is a means of identifying the criminal,[2] or which may be helpful to the prisoner in effecting an escape.[3] The officer has an undoubted right to make a search,[4] and considering the nature of the accusation he

1 See, post, § 98. ALA.—Ex parte Hurn, 92 Ala. 102, 9 So. 515. COLO. — Newman v. People, 23 Colo. 273, 109 Pac. 961. ILL.—Stuart v. Harris, 69 Ill. App. 668. IOWA—Reifsnyder v. Lee, 44 Iowa 101, 24 Am. Rep. 733. MO.—Holker v. Hennessey, 141 Mo. 527, 64 Am. St. Rep. 524, 39 L. R. A. 165, 42 S. W. 1090. N. Y.—Houston v. Bachman, 17 Barb. 388. WASH.—State ex rel. Murphy v. Brown, 83 Wash. 100, 145 Pac. 69.

Instruments of the crime and evidentiary articles may be taken by apprehending officer.—Getchell v. Page, 103 Me. 387, 69 Atl. 624.

Question of fact whether property taken is fruit of crime charged. —Stuart v. Harris, 69 Ill. App. 668.

2 Newman v. People, 23 Colo. 273, 109 Pac. 961; Reifsnyder v. Lee, 44 Iowa 101, 24 Am. Rep. 733; Holker v. Hennessey, 141 Mo. 527, 64 Am. St. Rep. 524, 39 L. R. A. 165, 42 S. W. 1090.

3 Newman v. People, 23 Colo. 273, 109 Pac. 961; Commercial Exch. Bank v. McLeod, 65 Iowa 665, 54 Am. Rep. 36, 19 N. W. 329; Holker v. Hennessey, 141 Mo. 527, 64 Am. St. Rep. 524, 39 L. R. A. 165, 42 S. W. 1090.

Disarming prisoner lawfully apprehended is within rightful power of apprehending officer.—Lewis v. State, 178 Ala. 26, 59 So. 577.

Tools or weapons available for escape may be taken by apprehending officer.—O'Connor v. Bucklin, 59 N. H. 589.

4 **A right to search the person** of one legally apprehended has always been recognized under English and American law, and has been uniformly maintained in many cases.—Weeks v. United States, 232 U. S. 383, 392, 58 L. Ed. 652, 655, 34 Sup. Ct. Rep. 341. See: ALA.—French v. State, 94 Ala. 93, 10 So. 553; Sewell v. State, 99 Ala. 183, 13 So. 555. GA.—Rusher v.

may, when acting in good faith, take into his possession any articles which he may suppose will aid in securing the conviction of the prisoner, or will prevent his escape.[5]

State, 94 Ga. 363, 47 **Am. St. Rep.** 175, 21 S. E. 593; Dozier v. State, 107 Ga. 708, 33 S. E. 418. IOWA—State v. Phillips, 118 Iowa 660, 92 N. W. 876. KAN.—State v. Stockman, 9 Kan. App. 422, 58 Pac. 1032. LA.—State v. Aspara, 113 La. 940, 37 So. 883. MASS.—Com. v. Smith, 166 Mass. 370, 44 N. E. 503; Com. v. Yee Moy, 166 Mass. 376, 44 N. E. 1120; Com. v. Tucker, 189 Mass. 457, 7 **L. R. A.** (N. S.) 1056, 76 N. E. 127. MO.—State v. Jeffries, 210 Mo. 302, 14 **Ann. Cas.** 524, 109 S. W. 614; State v. Sharpless, 212 Mo. 176, 111 S. W. 69. N. Y.—Smith v. Jerome, 47 Misc. 22, 93 N. Y. Supp. 202. ORE.—State v. McDaniel, 39 Ore. 161, 65 Pac. 520. S. D.—State v. Madison, 23 S. D. 584, 122 N. W. 647. TEX.—Johnson v. State (Tex. Cr. App.), 76 S. W. 925. WASH.—State v. Nordstrome, 4 Wash. 506, 35 Pac. 382; State v. Royce, 38 Wash. 111, 3 **Ann. Cas.** 351, 80 Pac. 268. W. VA.—State v. Baker, 33 W. Va. 319, 10 S. E. 639; State v. Edwards, 51 W. Va. 220, 59 **L. R. A.** 465, 41 S. E. 429. WIS.—Thornton v. State, 117 Wis. 338, 98 **Am. St. Rep.** 924, 93 N. W. 1107. FED.—United States v. Wilson, 163 Fed. 338. ENG.—Crozier v. Cundey, 6 Barn. & C. 232, 13 Eng. C. L. 115; Rex v. Barnett, 3 Car. & P. 600, 14 Eng. C. L. 736; Reg. v. Frost, 9 Car. & P. 129, 38 Eng. C. L. 87; Dillon v. O'Brien, 16 Cox C. C. 245, Ir. L. R. 20 C. L. 300, 7 **Am. Cr. Rep.** 66.

A statute not necessary to authorize apprehending officer to search prisoner. The power exists from the nature and objects of the public duty the officer is to perform. Such authority is given to committing magistrates in some states (e. g. Mass. Rev. Stats. 1889, § 4308); but unless the apprehending officer has the authority immediately, on making the apprehension, all evidence of the crime, and of identification of the criminal, might be destroyed before the prisoner could be taken before the magistrate.—Holker v. Hennessey, 141 Mo. 527, 64 **Am. St. Rep.** 524, 39 **L. R. A.** 165, 42 S. W. 1090.

Carrying concealed weapons being charged, apprehending officer may search for same, although statute prohibits search warrant without affidavit.—North v. People, 139 Ill. 81, 28 N. E. 966.

Discoveries made in lawful search of the accused may be shown on his trial.—State ex rel. Murphy v. Brown, 83 Wash. 100, 145 Pac. 69.

Officer without warrant may not compel person apprehended on suspicion of having committed larceny, to be stripped and searched. —Hebrew v. Pulis, 73 N. J. L. 621, 118 **Am. St. Rep.** 716, 7 **L. R. A.** (N. S.) 580, 64 Atl. 121.

Person found in vicinity of crime who refuses to answer questions, may be searched for concealed weapons before being taken to prison.—Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43.

[5] Newman v. People, 23 Colo. 273, 109 Pac. 961; Holker v. Hennessey, 141 Mo. 537, 64 **Am. St.** Rep. 524, 39 **L. R. A.** 165, 42 S. W.

Search of prisoner by apprehending officer is justifiable as an incident of a lawful arrest, only; but if the apprehension be unlawful, the search is not only unlawful, but is an aggravation of the illegal arrest.[6]

§ 98. PROOFS OF CRIME MAY BE TAKEN FROM PERSON. Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged.[1] These articles are properly to be deposited with the committing magistrate, to be retained by him with the other evidence in the case, until the time comes for their return to the prosecuting authorities of the state. Sometimes, however, they are by local usage given at once to the prosecuting authorities. However this may be, they should be carefully preserved for the purpose of the trial; and after its close returned to the person whose property they lawfully are.

§ 99. —— BUT NOT MONEY, UNLESS CONNECTED WITH OFFENSE. The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offense with which the defendant is charged. Any wider license would not only be a violation of his personal rights, but would impair his means for preparing for his defense.[1]

1090; Classon v. Morrisson, 47 N. H. 482, 93 Am. Dec. 459.

Articles found upon person of one apprehended charged with crime, may be held to be used as evidence on the trial of the accused.—People for Use of Tamplin v. Beach, 49 Colo. 520, 37 L. R. A. (N. S.) 873, 113 Pa. 513.

Books and papers not relating to the matter in issue, seized on a bench warrant directing the apprehension of accused, are improperly taken, and it is within the nonreviewable discretion of the court to direct their return, and enforce the order against the district attorney by contempt proceedings. —Wise v. Mills, 110 C. C. A. 563, 189 Fed. 583.

[6] Cunningham v. Baker, 104 Ala. 160, 53 Am. St. Rep. 27, 16 So. 68.

[1] See various cases cited to § 97, ante.

[1] Reg. v. McKay, 3 Cr. & Dix 205; Reg. v. Jones, 6 Car. & P. 343, 25 Eng. C. L. 465; Reg. v. O'Donnell, 7 Car. & P. 138, 32 Eng. C. L. 539; Reg. v. Kinsey, 7 Car. & P. 447, 32 Eng. C. L. 700; Reg. v.

When money is taken in violation of this rule, the court will order its restoration to the defendant.[2] That where property is identified as stolen, or is in any way valuable as proof, it may be sequestrated, is nevertheless plain.[3]

Burgiss, 7 Car. & P. 488, 32 Eng. C. L. 722; Reg. v. Frost, 9 Car. & P. 129, 38 Eng. C. L. 87.

2 Reg. v. Bass, 2 Car. & K. 822, 61 Eng. C. L. 821; Reg. v. Coxon, 7 Car. & P. 651, 32 Eng. C. L. 804.

3 See Houghton v. Bachman, 47 Barb. (N. Y.) 388.

CHAPTER XII.

TAKING PHOTOGRAPHS AND MEASUREMENTS—HANDCUFFING.

§ 100. TAKING PHOTOGRAPHS AND BERTILLON MEASUREMENTS. A sheriff or other officer apprehending on a warrant may exercise his discretion as to the means necessary to keep the prisoner safe and secure after the apprehension, and has the right to take such steps and adopt such measures as to him may appear to be necessary to the identification and recapture of the prisoner in his custody, should he escape or be rescued. If he deems it necessary to the safe-keeping, and to prevent the escape of the prisoner, the officer may take his photograph, a measurement of his height, ascertain his weight, name, residence, place of birth, occupation, color of his eyes, hair, beard, and the like.[1]

1 State ex rel. Burns v. Clausmeier, 154 Ind. 599, 77 Am. St. Rep. 511, 50 L. R. A. 73, 57 N. E. 541; see Shaffer v. United States, 24 App. D. C. 417.

Photographing and measuring by Bertillon system of arrested persons is not unconstitutional, and violates no right of the prisoner where the photograph is not placed in the "rogues' gallery" before the accused is convicted.—Downs v. Swann, 111 Md. 62, 134 Am. St. Rep. 586, 23 L. R. A. (N. S.) 743, 73 Atl. 653.

"**Unless discretion abused** through wanton malice, or a reckless disregard for and a selfish indifference to the common dictates of humanity, the officer is not liable."—Monks, J., in State ex rel. Burns v. Clausmeier, 154 Ind. 599, 77 Am. St. Rep. 511, 50 L. R. A. 73, 57 N. E. 541. See Firestone v. Rice, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885; Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722.

Unless to identify person or detect crime, picture can not be taken. Where a person is under arrest, or within the court's jurisdiction, no necessity arises for the exercise of the photography act before trial and conviction.—Schulman v. Whitaker, 117 La. 703, 8 Ann. Cas. 1176, 7 L. R. A. (N. S.) 274, 42 So. 227.

On the ground that one of the ways to prevent crime and to protect the rights of persons and property, is to know who are habitual criminals, the authorities may photograph, and place the picture in the "rogues' gallery," a person who has been frequently arrested,[2] who is an associate of criminals, and who has been convicted of crime.[3] A mandamus will not lie to prevent such photographing,[4] or to compel police commissioners or other officers to remove the picture from the "rogues' gallery."[5]

Records made under authority of law, that is, after a conviction has been had, unless the statute provides relief for one whose conviction has been subsequently reversed, mandamus to compel the removal or destruction of such records will not lie, the legislature alone being able to grant relief.[6]

2 See People ex rel. Joyce v. York, 27 Misc. (N. Y.) 658, 59 N. Y. Supp. 418.

3 **Person accused of crime,** police may not photograph until after conviction.—Gow v. Bingham, 57 Misc. (N. Y.) 66, 107 N. Y. Supp. 1011; Molineux v. Collins, 177 N. Y. 395, 65 L. R. A. 104, 69 N. E. 727, affirming 41 Misc. (N. Y.) 154, 83 N. Y. Supp. 943; People v. York, 27 Misc. (N. Y.) 658, 59 N. Y. Supp. 418.

4 Mabry v. Kettering, 89 Ark. 553, 16 Ann. Cas. 1123, 117 S. W. 746.

5 People ex rel. Joyce v. York, 27 Misc. (N. Y.) 658, 59 N. Y. Supp. 418; Owen v. Partridge, 40 Misc. (N. Y.) 415, 82 N. Y. Supp. 248; Gow v. Bingham, 57 Misc. (N. Y.) 66, 107 N. Y. Supp. 1011.

"If the police commissioners have wronged the relator at all, that wrong is in the nature of a libel, for which he has an adequate remedy at law."—People ex rel. Joyce v. York, 27 Misc. (N. Y.) 658, 59 N. Y. Supp. 418, approved in Owen v. Partridge, 40 Misc. (N. Y.) 415, 82 N. Y. Supp. 248.

Injunction will lie to prevent taking of photograph of person accused of crime before his conviction, and from placing such photograph in the "rogues' gallery," unless it is necessary for identification, or for the detection of crime.—Itzkovitch v. Whitaker, 117 La. 708, 116 Am. St. Rep. 215, 42 So. 228.

Publication of innocent man's photograph in "rogues' gallery" sufficient ground to sustain injunction.—Itzkovitch v. Whitaker, 115 La. 479, 112 Am. St. Rep. 272, 1 L. R. A. (N. S.) 1147, 39 So. 499.

6 Molineux v. Collins, 177 N. Y. 395, 65 L. R. A. 104, 69 N. E. 727, affirming 41 Misc. (N. Y.) 154, 83 N. Y. Supp. 493.

§ 101. —— Arrest on suspicion of crime, or indictment for crime. There is no statute which gives the police the right to require one who is under suspicion of having committed crime, or who has been simply indicted on a charge of crime, but not yet convicted, to submit to having his photograph taken and being measured according to the Bertillon system, or impressions of the members of his body made for the purpose of preserving them in the criminal records of the police department; such acts are a gross outrage and lawless, and the persons connected therewith are liable both civilly and criminally.[1] Nevertheless mandamus will not lie[2] to compel the police to destroy the photographs, negatives, measurements and impressions; the reason being that mandamus will lie to compel one to do what ought to be done in the discharge of a public duty, only, and not to compel him to undo what has been improperly done, even when done under the color of the performance of a public duty.[3]

§ 102. Right to handcuff prisoner. An apprehending officer may exercise some discretion as to the best means of taking and securing the prisoner. To justify handcuffing it is not necessary that the prisoner should be unruly, should attempt to escape, or should do anything indicating a necessity for such a restraint, nor, in the absence of any of these, that he should be a notoriously bad character.[1] In other words, an apprehending officer

1 People v. Bingham, 57 Misc. 66, 107 N. Y. Supp. 1011.

2 See, ante, § 100, footnote 5.

3 People v. Bingham, 57 Misc. 66, 107 N. Y. Supp. 1011.

1 Edger v. Burke, 96 Md. 715, 54 Atl. 986; Firestone v. Rice, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885.

The mere fact that the arresting officer in a case of suspected felony put handcuffs on the prisoner is not such unnecessary violence as entitles the plaintiff to recover punitive damages.—Edger v. Burke, 96 Md. 715, 54 Atl. 986.

Where the officer had two prisoners who were strangers to him under arrest, and it was dark and he had a long distance to go with them, in the absence of wantonness or malice no additional damages can be assessed because the prisoners were handcuffed. — Mc-

is authorized to take such precautions for the safety of his prisoner as in his judgment seems necessary, such as tying or handcuffing, provided he acts in good faith and without malice.[2] The right to handcuff or otherwise manacle a prisoner depends upon the circumstances in each particular case,[3] such as the nature of the charge and the conduct and temper of the prisoner; but an officer is not justified in handcuffing with a felon one charged with a misdemeanor and marching them thus through the streets.[4]

Where the apprehending officer meets with resistance on the part of the prisoner, he may tie him;[5] but where to effect the apprehension and safe delivery to jail it is neither necessary nor reasonable to handcuff the prisoner, the officer may not do so.[6]

Collough v. Greenfield, 133 Mich. 463, 1 Ann. Cas. 924, 62 L. R. A. 906, 95 N. W. 532.

2 State v. Sigman, 106 N. C. 728, 11 S. E. 520.

3 Leigh v. Cole, 6 Cox C. C. 329.

4 Leigh v. Cole, 6 Cox C. C. 329.

5 State v. Belk, 76 N. C. 10.

6 Giroux v. State, 40 Tex. 97.

"Necessity for placing the defendant in irons was a question for the jury, and they were to consider, in determining that question, the threatening language used by the brother of the plaintiff, that there was no prison in which to confine the defendant, and that the irons were not placed upon him until after the threatening language referred to was used, together with other surrounding circumstances, and we see no reason for disturbing the verdict upon this ground."—Cochran v. Toher, 14 Minn. 385.

CHAPTER XIII.

DISPOSITION OF PERSON APPREHENDED.

§ 103. In general. The officer, after having apprehended a person on a charge of, or on reasonable suspicion of, his having committed an offense, the person thus apprehended can not be discharged by such officer without taking him before a magistrate;[1] otherwise he is a trespasser ab initio and is liable for false imprisonment.[2] Thus, where a man is seized by an officer because drunk and disorderly, and is afterward discharged without being taken before a magistrate, the officer is liable for

1 Brock v. Stimson, 108 Mass. 520, 11 **Am. Rep.** 390; State v. Parker, 75 N. C. 249, 22 **Am. Rep.** 669. See Tubbs v. Turkey, 57 Mass. (3 Cush.) 438, 50 **Am. Dec.** 744.

2 Stewart v. Feeley, 118 Iowa 524, 92 N. W. 670; Bath v. Metcalf, 145 Mass. 274, 1 **Am. St. Rep.** 455, 14 N. E. 133; Snead v. Bonnoil, 49 App. Div. (N. Y.) 330, 63 N. Y. Supp. 553; Pastor v. Regan, 9 Misc. (N. Y.) 547, 30 N. Y. Supp. 657.

Officer apprehending, to justify himself, must show that he did all that the law required that he should do.—Boston & M. R. Co. v. Small, 85 Me. 462, 35 **Am. St. Rep.** 379, 27 Atl. 349; Tubbs v. Turkey, 57 Mass. (3 Cush.) 438, 50 **Am. Dec.** 744; Brock v. Stimson, 108 Mass. 521, 11 **Am. Rep.** 390; Paine v. Farr, 116 Mass. 75; Phillips v. Fadden, 125 Mass. 198; Williams v. Delano, 155 Mass. 10, 28 N. E. 1122; Clark v. Tilton, 74 N. H. 330, 68 Atl. 335; Gibson v. Holmes, 78 Vt. 110, 4 **L. R. A.** (N. S.) 451, 62 Atl. 11; Leger v. Warren, 62 Ohio St. 500, 78 **Am. St. Rep.** 738, 51 **L. R. A.** 193, 57 N. E. 229; Richardson v. Dybedahl, 14 S. D. 126, 84 N. W. 486.

Origin of rule making officer trespasser ab initio where he fails to take prisoner before magistrate. —Atchison, T. & S. F. R. Co. v. Hinsdell, 76 Kan. 74, 13 **Ann. Cas.** 981, 12 **L. R. A.** (N. S.) 94, 90 Pac. 800.

Consent to discharge constitutes a waiver of claim against officer for false imprisonment.—Bates v. Reynolds, 195 Mass. 549, 81 N. E. 260.

assault and battery,[3] or for false imprisonment.[4] But a police officer apprehending for intoxication need not take the prisoner before a magistrate at an unreasonable hour at night, or where the offender is too intoxicated for trial.[5]

Apprehending with or without warrant,[6] as will be fully shown presently,[7] the officer must take the prisoner, without any unnecessary delay, before a magistrate.[8]

§ 104. APPREHENSION ON WARRANT. Where an officer acts on a warrant, he must follow its directions in dealing with his prisoner,[1] and take him before the justice's court issuing the warrant, as is commanded therein;[2] where the court is not in session, the officer may detain the prisoner until the court again convenes, and may lawfully commit the prisoner to jail for the purpose of safe keeping.[3]

§ 105. APPREHENSION WITHOUT WARRANT. Where the officer apprehends without a warrant for a felony it is his duty, equally with where he acts under a warrant, to take the prisoner, without unnecessary delay,[1] before

3 State v. Parker, 75 N. C. 249, 22 Am. Rep. 669.

4 Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390.

5 State v. Freeman, 86 N. C. 683.

6 See, post, § 105.

7 See, post, §§ 105, 111.

8 GA.—Moses v. State, 6 Ga. App. 251, 64 S. E. 699. ILL.—Wood v. Olson, 117 Ill. App. 128. MD.—Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Bush v. Carter, 98 Md. 445, 57 Atl. 210. N. Y.—Snead v. Bonnoil, 49 App. Div. 330, 63 N. Y. Supp. 553, affirmed in 166 N. Y. 325, 59 N. E. 899; Tobin v. Bell, 73 App. Div. 41, 76 N. Y. Supp. 425. OHIO—Leger v. Warren, 62 Ohio St. 500, 78 Am. St. Rep. 738, 51 L. R. A. 193, 57 N. E. 506. VT.—Kent v. Miles, 69 Vt. 379, 37 Atl. 1115. VA.—Hill v. Smith, 107 Va. 848, 59 S. E. 475.

1 People v. Fick, 89 Cal. 144, 26 Pac. 759.

2 Diers v. Mallon, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722; Burk v. Howley, 179 Pa. St. 539, 57 Am. St. Rep. 607, 36 Atl. 327; Wright v. Templeton, 80 Vt. 358, 130 Am. St. Rep. 990, 67 Atl. 817.

3 Kent v. Miles, 69 Vt. 379, 37 Atl. 1115.

1 Simmons v. Van Dyke, 138 Ind. 380, 46 Am. St. Rep. 411, 26 L. R. A. 33, 37 N. E. 973; Matter of Arthur Henry, 29 How. Pr. (N. Y.) 185; Hill v. Smith, 107 Va. 848, 59 S. E. 475.

a magistrate or some judicial officer who can take such proofs as may be offered,[2] or, if the circumstances justify it, can admit him to bail pending further examination.[3]

A misdemeanor being the ground of apprehension without a warrant, the officer must take his prisoner before a magistrate for a judicial determination of his probable guilt,[4] and to afford him an opportunity to give bail;[5] and this must be done without any unreasonable delay.[6]

§ 106. OFFICER BEFORE WHOM PRISONER MAY BE TAKEN. The officer before whom a prisoner may be taken must be a judicial officer; the practice of taking prisoners from the

2 Matter of Arthur Henry, 29 How. Pr. (N. Y.) 185; Hill v. Smith, 107 Va. 848, 59 S. E. 475.

The duty of the apprehending officer is to take the prisoner, to safely keep him, and to bring him before a magistrate.—Firestone v. Rice, 71 Mich. 377, 15 **Am. St. Rep.** 266, 38 N. W. 885.

3 Matter of Arthur Henry, 29 How. Pr. (N. Y.) 185; Hill v. Smith, 107 Va. 848, 59 S. E. 475.

4 Rutledge v. Rowland, 161 Ala. 114, 49 So. 461; Low v. Evans, 16 Ind. 486; Twilley v. Perkins, 77 Md. 252, 39 **Am. St. Rep.** 408, 19 **L. R. A.** 632, 26 Atl. 286; Brock v. Stimson, 108 Mass. 520, 11 **Am. Rep.** 390; Taylor v. Strong, 3 Wend. (N. Y.) 384 (within a reasonable time); Schmeider v. McLane, 36 Barb. (N. Y.) 495, affirmed in 4 Abb. Dec. 154.

Officer can not hold in custody subject to the alternative of paying a penalty or of going to jail forthwith.—Twilley v. Perkins, 77 Md. 252, 39 **Am. St. Rep.** 408, 19 **L. R. A.** 632, 26 Atl. 286.

Violation of a municipal ordinance charged, the prisoner must be taken before the mayor as soon as practicable.—State v. Freeman, 86 N. C. 683.

Statute providing a certain method of apprehending and dealing with a person that is intoxicated, the person must be dealt with in that manner, but a substantial compliance with the statute is sufficient.—Papineau v. Bacon, 110 Mass. 319.

5 Rutledge v. Rowland, 161 Ala. 114, 49 So. 461.

6 Johnson v. Mayor, 46 Ga. 80; Pastor v. Regan, 9 Misc. (N. Y.) 547, 36 N. Y. Supp. 657.

Apprehension by town marshal for the violation of an ordinance at eleven o'clock at night, the marshal is not required to take the offender before a justice of the peace that night, especially where the prisoner is so intoxicated as not to know what is occurring. He may be detained until the next day, and until in a condition to be taken before a justice of the peace. —Scircle v. Newes, 47 Ind. 289.

police station to the office of the district attorney is without warrant of law and can not be too severely condemned,[1] notwithstanding the fact that, when the defendant has not been injured thereby, prejudicial error can not be predicated upon such unwarranted action.[2]

Taking prisoner before third person for the purpose of having such third person become security for the prisoner's appearance at court, is unauthorized by law.[3]

1 State v. Thavanot, 225 Mo. 545, 20 Ann. Cas. 1122, 125 S. W. 473.

"When a defendant is once apprehended he then represents one side of a prospective litigated question, and the counsel for the state represents the other. The delicacy of the situation, from a professional standpoint, should dictate the opposite course from that followed in this case."—State v. Thavanot, 225 Mo. 545, 20 Ann. Cas. 1122, 125 S. W. 473.

2 State v. Thavanot, 225 Mo. 545, 20 Ann. Cas. 1122, 125 S. W. 473.

3 Rouse v. Mohr, 29 Ill. App. 321.

CHAPTER XIV.

APPREHENSION AND SURRENDER BY BAIL.

§ 107. BAIL MAY APPREHEND AND SURRENDER PRINCIPAL—AT COMMON LAW. Under the common law a bail or security for the appearance in court of one accused of crime, has the right, at his own discretion, to apprehend his principal and surrender him into the hands of the law,[1] by delivering him into the custody of the magistrate before whom the bail was entered, or to the court to which the cause is returned.[2] It is sometimes the prac-

1 ALA.—Gray v. Strickland, 163 Ala. 344, 50 So. 152. DEL.—State v. Mahon, 3 Harr. 568. GA.—Coleman v. State, 121 Ga. 594, 49 S. E. 716. KY.—Sallee v. Werner, 171 Ill. App. 96; Chesapeake & O. R. Co. v. Vaughn, 115 S. W. 217. LA.—State v. Cunningham, 10 La. Ann. 393. N. Y.—Nicolls v. Ingersoll, 7 John. 146. N. C.—State v. Lingerfelt, 109 N. C. 775, 14 **L. R. A.** 605, 14 S. E. 75. PA.—Respublica v. Gaoler, 2 Yeates 263. VT.—State v. Dwyer, 70 Vt. 96, 39 Atl. 629. W. VA.—Carr v. Sutton, 70 W. Va. 417, **Ann. Cas. 1913E,** 453, 74 S. E. 239. FED.—Reese v. United States, 76 U. S. (9 Wall.) 13, 9 **L. Ed.** 541.

The right to surrender implies the right of apprehending as an incident to it.—State v. Lazarre, 12 La. Ann. 166.

2 Com. v. Bronson, 53 Ky. (14 B. Mon.) 361; State v. Lazarre, 12 La. Ann. 166; Harp v. Osgood, 2 Hill (N. Y.) 216; State v. Le Cerf, 1 Bail. (S. C.) 410. See Milburn, Ex parte, 34 U. S. (9 Pet.) 704, 9 **L. Ed.** 280.

Bail given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that can not be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by

tice for the bail, when desiring to so apprehend, to apply to the magistrate, or to any other jurisdiction, for a warrant; but the right of the bail to apprehend exists without such a warrant.[3] The reason for this appears to be founded on the fact that the principal is supposed to be in the bail's constant custody, and, the former being the latter's jailer, may at any time surrender him into the custody of the law.[4]

Party on bail on state charge can not be taken out of

virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.—3 Blackstone's Commentaries, 290. See: Ruggles v. Corry, 3 Conn. 84, 421; Wheeler v. Wheeler, 7 Mass. 169, 5 Am. Dec. 35; Com. v. Brickett, 25 Mass. (8 Pick.) 137, 140; Boardman v. Fowler, 1 John. Cas. (N. Y.) 443, 1 Am. Dec. 121; Nicolls v. Ingersoll, 7 John. (N. Y.) 152; Com. v. Riddle, 1 Serg. & R. (Pa.) 311; Respublica v. Gaoler, 2 Yeates (Pa.) 263.

"In 6 Modern (page 231, case 339, Anon.) it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same."—Harp v. Osgood, 2 Hill (N. Y.) 218.

"They may doubtless permit him to go beyond the limits of the state within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and can not cast them upon the obligee."—Resp. v. Gaoler, 2 Yeates (Pa.) 265; Devine v. State, 37 Tenn. (5 Sneed) 625; United States v. Van Fossen, 1 Dill. 406, 410, Fed. Cas. No. 16607.

"In Devine v. State, 37 Tenn. (5 Sneed) 625, the court, speaking of the principal, say, 'The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . In the case before us, the failure of the sureties to surrender their principal was, in view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control.' The other authorities cited are to the same effect."—Swayne, J., Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

The practice is the same in the Roman law.—L. 4 D. de custodia reor. Feuerbach's Pein. Recht, § 533.

3 Gray v. Strickland, 163 Ala. 344, 50 So. 152; In re Siebert, 61 Kan. 112, 58 Pac. 971; State v. Dwyer, 70 Vt. 96, 39 Atl. 629.

"The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner."—Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

4 State v. Mahon, 3 Harr. (Del.) 568.

the custody of the bail by federal process for an offense against the federal law.[5]

§ 108. —— Under statute. In some jurisdictions the statutory provision qualifies the common-law right of the bail to apprehend the principal, and the method prescribed by the statute has been held to be cumulative, only, to the common-law remedy,[1] while in others it has been held to be exclusive.[2] Under some of these statutes the apprehension of the principal is provided for upon a certified copy of the bail-bond,[3] to be delivered to the jailer;[4] while under other statutes the bail must procure a copy of the recognizance from the clerk of the court, by virtue of which he, or his agent,[5] may take the principal in any county of the state;[6] and in yet others the statute requires the bail to make an affidavit before the clerk of the court.[7]

The statutory provisions, if any, of the particular jurisdiction should be consulted and followed by a bail seeking to apprehend his principal.

5 James's Case, 5 Crim. Law Mag. 216.

1 Carr v. Sutton, 70 W. Va. 417, Ann. Cas. 1913E, 453, 74 S. E. 239.

2 Gray v. Strickland, 163 Ala. 344, 50 So. 152.

§ 6351, Code of Alabama, 1907, provides for the arrest of the principal upon a certified copy of the undertaking. This provision is not cumulative but is exclusive of the common law right authorizing bail to apprehend the principal without process.—Gray v. Strickland, 163 Ala. 344, 50 So. 152.

3 People v. Phelps, 17 Ill. 200; Sallee v. Werner, 171 Ill. App. 96 (par. 305-308, ch. 38, Hurd's Rev. Stat.).

4 Gray v. Strickland, 163 Ala. 344, 50 So. 152; Sternberg v. State, 42 Ark. 127 (§ 1732, Gantt's Dig.).

5 As to apprehension by agent, see, post, § 110.

6 In re Bauer, 112 Mo. 231, 20 S. W. 488 (Rev. St. 1889, § 4130).

7 Whitener v. State, 38 Tex. Cr. 146, 41 S. W. 595 (arts. 318-323, Code Crim. Proc.); Woodring v. State, 53 Tex. Cr. 17, 108 S. W. 371.

This affidavit may be made out of the term of court and without any order from the judge.—Whitener v. State, 38 Tex. Cr. 146, 41 S. W. 595.

There are two modes by which bail can surrender their principal, one being to deliver him into the custody of the proper officer, and the other by making affidavit and obtaining a warrant.—Woodring v. State, 53 Tex. Cr. 17, 108 S. W. 371.

§ 109. —— WHEN AND WHERE RIGHT MAY BE EXERCISED. The right of a bail to apprehend his principal may be exercised at any time,[1] and at any place where the principal may be found[2] within the state.[3] To accomplish this purpose the bail may use such force as may be necessary.[4] There are some cases which hold that a bail may pursue his principal into another state to accomplish his apprehension,[5] and may take him into custody on the Sabbath.[6]

That a bail can arrest his principal in a foreign state, to which the principal has fled, has been sometimes asserted; but there is no ground for this opinion, as the bail only represents the court from which his authority emanates, and where the court has no power to arrest

1 Nicoll v. Ingersoll, 7 John. (N. Y.) 146; State v. Dwyer, 70 Vt. 96, 39 Atl. 629; Carr. v. Sutton, 70 W. Va. 417, Ann. Cas. 1913E, 453, 74 S. E. 239; United States v. Keiver, 56 Fed. 422.

2 DEL.—State v. Mahon, 3 Harr. 568. ILL.—Sallee v. Werner, 171 Ill. App. 96. MASS.—Com. v. Brickett, 25 Mass. (8 Pick.) 138. N. Y.—Nicolls v. Ingersoll, 7 John. 146. N. C.—State v. Lingerfelt, 109 N. C. 775, 14 L. R. A. 605, 14 S. E. 75. PA.—Respublica v. Gaoler, 2 Yeates 263. FED.—United States v. Keiver, 56 Fed. 422.

This power to apprehend "can only be exercised within the territory of the United States, and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their consent."—Reese v. United States, 76 U. S. (9 Wall.) 13, 9 L. Ed. 541.

3 People v. Paulsen, 146 Ill. App. 534.

4 State v. Dwyer, 70 Vt. 96, 39 Atl. 629.

Apprehension must be without violence, unless there be resistance.—State v. Mahon, 3 Harr. (Del.) 568.

Bail may break and enter, where necessary, the principal's house, for the purpose of apprehending him.—Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

The bail may break open the outer door of the house in order to take the principal.—Nicolls v. Ingersoll, 7 John. (N. Y.) 146.

"If the door should not be opened on demand at midnight the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take the principal."—Com. v. Brickett, 25 Mass. (8 Pick.) 138.

5 Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

6 Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287; United States v. Keiver, 56 Fed. 422.

the bail has no power to arrest. The proper course in such case is to apply for a warrant for extradition. But, as has been seen, the fact of the irregularity of an arrest does not entitle the prisoner, when brought to a court having jurisdiction of the crime, to a release.[7]

Right to apprehend principal at any time is the general rule of the cases;[8] yet there are other cases to the effect that there can be no apprehension by the bail after the principal has defaulted in appearance and there has been a forfeiture of the recognizance,[9] and the surety entered of record,[10] the right to apprehend by the bail being available to him just so long and no longer than the bail remains bound for the appearance of the principal.[11]

§ 110. —— How right of apprehension may be exercised. In those cases in which the bail or security for the appearance of a person charged with crime is a woman, or is a man who is too weak physically to apprehend the principal, such bail may lawfully deputize an agent to seize the body of the principal and deliver him into the custody of the sheriff or other officer of the law;[1] in other words, the right may be exercised by the bail either in person or by deputy.[2]

7 See, supra, § 59. See, ante, footnote 1, this section.

8 State v. Cunningham, 10 La. Ann. 393; Com. v. Johnson, 57 Mass. (3 Cush.) 454.

9 Com. v. Johnson, 57 Mass. (3 Cush.) 454.

10 Spillman v. People, 16 Ill. App. 224.

11 Ibid.

1 Coleman v. State, 121 Ga. 594, 49 S. E. 716; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

2 State v. Mahon, 3 Harr. (Del.) 568; Sallee v. Werner, 171 Ill. App. 96; Nicolls v. Ingersoll, 7 John. (N. Y.) 145; State v. Lingerfelt, 109 N. C. 775, 14 L. R. A. 605, 14 S. E. 75; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287.

CHAPTER XV.

HEARING BEFORE MAGISTRATE.

1 Commitment for Future Hearing.

2. Evidence Requisite.

3. Final Commitment and Binding Over.

4. Vagrants, Disorderly Persons, and Professional Criminals.

5. Bail After Habeas Corpus.

6. Bail After Verdict or After Quashing.

7. Summary Trial and Punishment by Military Courts.

1. Commitment for Further Hearing.

§ 111. WAIVER—HEARING MAY BE ADJOURNED FROM TIME TO TIME. The delinquent having been apprehended, the

next step is to have the case heard before a magistrate or justice of the peace,[1] unless the hearing should be waived;[2] and this hearing should be prompt.[3] It is not essential that the hearing should take place at once. The apprehending officer may, if requisite, put the person arrested in the county prison or other place of temporary confinement, until a hearing can be secured. But the hearing should be with all possible dispatch; should there be any undue delay, a justice of the supreme or of any superior court having jurisdiction for the purpose may, by a writ of habeas corpus, exact an immediate examination before himself. And the issue of such a writ, on due cause shown, is obligatory.[4] It has been also held that if the commitment be for an indefinite or unreasonable time, the warrant is virtually void, and an action for trespass lies for the imprisonment.[5] If requisite, the hearing, on due cause shown, may be adjourned from day to day.[6] But, in any view, the hearing should be prompt and continuous, and, without the consent of the accused, delay should be granted for strong reasons, only.[7]

1 **Statute must be strictly followed in this respect.**—Papineau v. Bacon, 110 Mass. 319.

As to Virginia, in cases of felony, see Jackson v. Com., 23 Grat. (Va.) 919; and, infra, § 339.

"Preliminary Investigation of Crime" is the subject of an article in the London Law Magazine for February, 1882.

2 **As to effect of waiving defects** of process, or hearing, see: ALA.—Gandy v. State, 81 Ala. 68, 1 So. 35. ARK.—McCoy v. State, 46 Ark. 141. CAL.—People v. Villarino, 66 Cal. 228, 5 Pac. 154. KAN.—State v. Longton, 35 Kan. 375, 11 Pac. 163. ME.—State v. Cobb, 71 Me. 198. MICH.—Stuart v. People, 42 Mich. 255, 3 N. W. 863. S. C.—State v. Mays, 24 S. C. 190. VA.—Butler v. Com., 81 Va. 159.

3 **By § 118 of N. J. Penal Code of 1882,** delay in this respect is made a misdemeanor.

4 See State v. Kruise, 32 N. J. L. (3 Vr.) 313.

5 See Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541; Cave v. Mountain, 1 Ad. & El. N. S. 18; Davis v. Capper, 10 Barn. & Cr. 28, 21 Eng. C. L. 22; Cave v. Mountain, 1 Man. & Gr. 257, 39 Eng. C. L. 747.

6 Hamilton v. People, 29 Mich. 173.

7 Peoples, **In re,** 47 Mich. 626, 14 N. W. 112.

2. *Evidence Requisite.*

§ 112. PRACTICE NOT USUALLY TO HEAR WITNESSES FOR DEFENSE. Must the magistrate hear the case of the defense as well as for the prosecution, so far as it may be tendered? The English practice, as stated by Blackstone, was for the justice, "by statute 2 & 3 Ph. & M. c. 10, to take in writing the examination of such prisoner, and the information of those who bring him." This statute was repealed by 7 Geo. 4, which provides that the justices at the preliminary hearing "shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, in writing," etc.

In several of the United States, among which Pennsylvania may be mentioned, the statute 2 & 3 Ph. & M. has not been viewed as in force; nor has the practice of taking the prisoner's examination been generally adopted.[1]

§ 113. EXCEPTION IN CASES OF IDENTITY, OR OF ONE-SIDEDNESS IN PROSECUTION'S CASE. Yet it must be conceded that there are cases in which, to avoid circuity and oppression, a magistrate should hear evidence for the defense. Suppose, for instance, the prosecution calls only a part of the witnesses to the res gestae, and the defendant offers to call the other witnesses, could the magistrate rightfully refuse to require the other witnesses of this class to be called?[1] Or suppose the defendant, in a liquor prosecution, tenders a license, would it not be an absurdity as well as an oppression to refuse to receive it? Such a distinction, indeed, has not been unrecognized by the courts,[2] nor is it inconsistent with the principles above stated that it should be definitely accepted. If so, the

1 As to New York, see 2 R. S. 709, §§ 22-24; Wendell's Black. iv 296.

1 See United States v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16685.

2 See In re Tivnan, 5 Best & S. 645, 117 Eng. C. L. 643; Whart.

magistrate may call for such evidence as may enable him to come to a right conclusion, or may receive such evidence when offered, applying to the whole case the test of probable cause.[3] And the same distinction is applicable to questions of identity.[4]

It is within the province of the magistrate, also, when sitting as a justice of the peace, to hear any evidence tending to throw light on the corpus delicti.[5]

§ 114. PROBABLE CAUSE, ONLY, NEED BE SHOWN. As has already been stated,[1] the better opinion is that on a preliminary hearing the magistrate is to hold the defendant for trial in case there is made out a probable case of guilt; nor is it necessary, at common law, that the binding over shall be for the specific charge for which the warrant issued, if, on the hearing, the offense takes another shape.[2] By Blackstone it is stated,[3] that if "it manifestly appears either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail, that is, put in securities to answer the charge against him." By Chief Justice Marshall, on a great historical occasion, in which his judicial sympathies were certainly not enlisted for the prosecution, the doctrine that probable cause is sufficient was declared

Confl. of L., § 967. Supra, §§ 83 et seq.

3 See remarks of Lord Denman, C. J., 2 Car. & K. 845, 61 Eng. C. L. 845.

4 As to the uncertainty of evidence on this point, see Whart. Crim. Ev., §§ 20, 27, 806.

5 In New York, as we have just seen, this rule is so far modified as to enable the defendant to have witnesses sworn and examined on his part. The magistrate, however, is required to hold the defendant for trial, if upon examination of the whole matter it appears to the magistrate that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof.

1 See, supra, § 92.

2 See Redmond v. State, 12 Kan. 172.

Contra, under Michigan statute, Yaner v. People, 34 Mich. 286.

3 Vol. iv, p. 296, Wendell's ed.

with still greater precision.[4] Nor can it be denied that the view that the case is to be fully heard by the magistrate, and that he is then to decide on its entire merits, would be prejudicial to those personal rights which this view is sometimes supposed to favor. For if we accept this, the defendant, instead of being subject to one trial, would be subject to two. The rule ne bis idem—no man to be tried twice for the same offense—would be overridden. The defendant would go to the jury oppressed by the presumption that upon his whole case he had already been condemned. Nor is this all. It is proper, in view of the immense power a government is capable of exercising in the influencing and intimidating of witnesses, as well as of the importance on other grounds to the defendant of keeping his case in reserve until the period of its final disclosure, that he should not be compelled to exhibit it at a preliminary hearing, subject to the mercies of whatever magistrate the prosecution might select. And then, again, it would lead to many complications to adopt at preliminary hearings before magistrates a rule as to the volume of proof different from that which obtains on habeas corpus and before grand juries. But both on habeas corpus and on hearings before grand juries, it is on all sides agreed, probable cause is the test.[5] And the rule has to the defendant this double advantage. It enables him, first, to inspect and prepare for the case of the prosecution without disclosing his own. It enables him, secondly, when the case comes on to be tried by a jury, to say, "I come before you as an innocent man, against whom no judicial condemnation is on file." For, on this hypothesis, the holding of a defendant to trial by a magistrate is not a decision that he is guilty, but only that on the prosecution's testimony there is probable cause that he should be tried.[6]

[4] Burr's Trial, 11, 15; and to same point, United States v. Walker, 1 Crumr. (Pitts.) 437. See

[5] See, infra, chapter on "Grand Jury," subdivision VI.

[6] State v. Roth, 17 Iowa 336; State v. Hartwell, 35 Me. 129; Yaner v. People, 34 Mich. 286; United States v. Bloomgart, 2 Ben. 356, Fed. Cas. No. 14612; Van

3. Final Committal and Binding Over.

§ 115. AT COMMON LAW, BAIL TO BE TAKEN IN ALL BUT CAPITAL CASES. The common law rule is stated by Blackstone to be, that "wherever bail will answer the same intention" (that of safe custody), "it ought to be taken, as in most of the inferior crimes; but in felonies, and other offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? And what satisfaction or indemnity is it to the public to seize the effects of those who have bailed a murderer, if the murderer himself be suffered to escape with impunity."[a] Pushing this rule to its practical consequences, it has been the practice of American courts to take bail in all cases not capital, where the trial is to be in the jurisdiction in which the bail is given. And indeed the enactment of extradition treaties should lead, in all cases of doubt, to a still further liberalization of the rule. For no longer exist those strong temptations to break bail and fly which existed when Blackstone wrote. A fugitive from justice, if his bail bonds are forfeited, is pursued to his place of refuge, not merely by government, which may be languid, but also by his sureties, who may be incensed and determined. At all events, through the ubiquitousness of extradition police, the probabilities of eventual escape are much diminished.

§ 116. EXCESSIVE BAIL NOT TO BE REQUIRED. By the eighth amendment to the constitution of the United States,[1] "excessive bail shall not be required"; and by the act of September 24, 1789, "upon all arrests in crimi-

Campen, Ex parte, 2 Ben. 419, Fed. Cas. No. 16835; Cox v. Coleridge, 1 Barn. & Cr. 37, 8 Eng. C. L. 17.

Magistrate's proceedings are presumed to be regular.—Boynton v. State, 77 Ala. 30.

[a] Blackstone, vol. iv, Wendell's ed.

[1] 9 Fed. Stats. Ann., 1st ed., p. 352.

Limitation on federal power, not upon states, is provided by this amendment. See Spies v. Illinois, 123 U. S. 131, 166, 31 **L. Ed.** 80, 86, 8 Sup. Ct. Rep. 21, 22, affirming 122 Ill. 1, 3 **Am. St. Rep.** 320, 6 **Am. Cr.**

nal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law."[2]

Similar provisions exist in most of the several states.[3]

Rep. 570, 12 N. E. 865, 17 N. E. 898; Eilenbecker v. Plymouth County, 134 U. S. 31, 34, 33 L. Ed. 801, 803, 10 Sup. Ct. Rep. 424; McElvaine v. Brush, 142 U. S. 155, 158, 35 L. Ed. 971, 972, 12 Sup. Ct. Rep. 156; O'Neil v. Vermont, 144 U. S. 332, 36 L. Ed. 450, 12 Sup. Ct. Rep. 693; Monongahela Nav. Co. v. United States, 148 U. S. 312, 324, 37 L. Ed. 463, 467, 13 Sup. Ct. Rep. 622; Brown v. Walker, 161 U. S. 591, 606, 40 L. Ed. 819, 824, 16 Sup. Ct. Rep. 644, affirming 70 Fed. 46; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. Ed. 119, 20 Sup. Ct. Rep. 77; Bollu v. Nebraska, 176 U. S. 83, 87, 44 L. Ed. 382, 383, 20 Sup. Ct. Rep. 287, affirming 51 Neb. 581, 71 N. W. 44; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 447, 48 L. Ed. 1062, 1065, 24 Sup. Ct. Rep. 703.

First ten amendments to the federal Constitution, operate upon the national government, and were not intended to limit the powers of the state governments in dealing with their own people.—Barron v. Baltimore, 32 U. S. (7 Pet.) 243, 247, 8 L. Ed. 672, 674; Livingston v. Moore, 32 U. S. (7 Pet.) 469, 552, 8 L. Ed. 751, 781; Fox v. Ohio, 46 U. S. (5 How.) 410, 434, 12 L. Ed. 213, 233; Smith v. Maryland, 59 U. S. (18 How.) 71, 76, 15 L. Ed. 569, 571; Withers v. Buckley, 61 U. S. (20 How.) 84, 91, 15 L. Ed. 816, 819; Pervear v. Com., 72 U. S. (5 Wall.) 475, 479, 18 L. Ed. 608, 609; Twitchell v. Com., 74 U. S. (7 Wall.) 321, 325, 19 L. Ed. 223, 224; Justices v. Murray, 76 U. S. (9 Wall.) 274, 278, 19 L. Ed. 658, 660; Edwards v. Elliott, 88 U. S. (21 Wall.) 532, 557, 22 L. Ed. 487, 492; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; United States v. Cruikshank, 92 U. S. 542, 552, 23 L. Ed. 588, 591; Pearson v. Yewdall, 95 U. S. 294, 296, 24 L. Ed. 436, 437; Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. Ed. 616, 618; Kelly v. Pittsburgh, 104 U. S. 79, 26 L. Ed. 568; Presser v. Illinois, 116 U. S. 252, 265, 29 L. Ed. 615, 619; Spies v. Illinois, 123 U. S. 131, 166, 31 L. Ed. 80, 86, 8 Sup. Ct. Rep. 21, 22.

2 1 Stats. at L. 91. See, also, Rev. Stats., § 1014, 1 Fed. Stats. Ann., 1st ed., p. 321, 2 Fed. Stats. Ann., 2d. ed., p. 654.

3 See State v. James, 37 Conn. 355.

The general test is, is the offense with which the defendant is charged punishable with death? If so, and if the proof of guilt is strong, bail will be refused. See: ALA.—Bryant, Ex parte, 34 Ala. 270; Carroll, Ex parte, 36 Ala. 300.

§ 117. PROPER COURSE IS TO REQUIRE SUCH BAIL AS WILL SECURE ATTENDANCE. It has been sometimes argued that bail should be arbitrarily graded to meet the heinousness of the offense. But this is a dangerous principle, as it tends to show that on the rich, who can find bail and afford to forfeit it, there is no necessary corporal punishment imposed. Far wiser is it to adopt the principle, that, in determining and adjusting bail, the test to be adopted by the court is the probability of the accused appearing to take his trial.[1] This probability is to be tested in part by the strength of the evidence against the defendant; in part by the nature of the crime charged, and by the severity of the punishment which may be imposed; and in part by the character and means of the

ARK.—Bird, Ex parte, 24 Ark. 275. ILL.—Lynch v. People, 38 Ill. 494. IND.—Heffren, Ex parte, 27 Ind. 87. MASS.—Dunlap v. Bartlett, 76 Mass. (10 Gray) 282, 69 Am. Dec. 320. MISS.—Beall v. State, 39 Miss. 715. N. H.—State v. McNab, 20 N. H. 160. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332. N. Y.—Ex parte Tayloe, 5 Cow. 39; People v. Perry, 8 Abb. Pr. N. S. 27; People v. Dixon, 4 Park. Cr. Rep. 651; People v. Godwin, 5 City Hall Rec. (N. Y.) 11. TEX.—Thompson v. State, 25 Tex. 395; Zembrod v. State, 25 Tex. 519; Mosby, Ex parte, 31 Tex. 566, 98 Am. Dec. 547. FED.—United States v. Stewart, 2 U. S. (2 Dall.) 343, 1 L. Ed. 408. ENG.—Reg. v. Williams, 8 D. P. C. 301; Reg. v. Scaife, 9 D. P. C. 553.

In most states the limits as to bail are fixed by constitution or statute.

Bail refused in England after commitment under a coroner's verdict of wilful murder in a duel, although there were strong affidavits to the effect that the "duel was fair," as the question of the capital crime was to be settled, on the ultimate proofs given, by the court and jury alone.—In re Barthelemy, Dears. C. C. 60, 1 El. & Bl. 1, 72 Eng. C. L. 1; In re Barronet, Dears C. C. 51, 1 El. & Bl. 1, 72 Eng. C. L. 1.

After protracted trials, jury being unable to agree, the court, at its discretion, may permit the defendant to be discharged on bail.—People v. Perry, 8 Abb. Pr. N. S. (N. Y.) 27, where there had been two abortive trials. And bail will be taken even in capital cases where there is a well-founded doubt of guilt.—Ex parte Bridewell, 56 Miss. 39; People v. Perry, 8 Abb. Pr. N. S. (N. Y.) 27.

1 Ex parte Bryant, 34 Ala. 270. See Ex parte Tayloe, 5 Cow. (N. Y.) 39; People v. Lohman, 2 Barb. (N. Y.) 450; People v. Dixon, 4 Park. Cr. Rep. (N. Y.) 651; Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227; Com. v. Lemley, 2 Pitts. (Pa.) 362; Perry, In re, 19 Wis. 676.

defendant. What to one is oppressive bail, to another is light; and of this the court is to judge.[2] As a general rule, the action of the court in this respect, unless great oppression is shown, is not revisable in error.[3] Even where there can be no question as to facts, there may be capital cases in which the government may consent to discharge on bail.

A striking illustration of this is the admission to bail of Jefferson Davis, when under indictment for treason, with the consent of the President of the United States.[4]

§ 118. AFTER CONTINUANCE, BAIL MAY BE GRANTED. Continuances on the part of the prosecution, especially after two sessions, will lead the court, even in capital cases, to admit to bail.[1] But a single continuance, necessitated by absence of witnesses, does not have this effect.[2]

§ 119. —— AND SO IN CASES OF SICKNESS. Danger to life from sickness caused by imprisonment has been held sufficient cause to justify the defendant's release on bail, under proper and peculiar sanctions.[1] But such danger must be serious.[2]

2 Reg. v. Badger, 4 Ad. & El. (4 Q. B.) 468, 45 Eng. C. L. 468. See People v. Smith, 1 Cal. 9; People v. Van Horne, 8 Barb. (N. Y.) 158; People v. Dixon, 4 Park. Cr. Rep. (N. Y.) 651.

See remarks of Coleridge, J., in In re Robinson, 23 L. J. Q. B. 286; and see article in London Law Times, Nov. 3, 1883, p. 5.

3 Lester v. State, 33 Ga. 192; People v. Perry, 8 Abb. Pr. N. S. (N. Y.) 27.

Otherwise, where there is a constitutional right.—Ex parte Wray, 30 Miss. 673.

As to discretion of justice, Ex parte Burke, 58 Miss. 50.

4 See Chase Dec. 124.

As to bail after conviction, and before sentence, see, infra, § 123.

1 People v. Perry, 8 Abb. Pr. N. S. (N. Y.) 27. See State v. Hill, 3 Brev. (S. C.) 89; Crosby's Case, 12 Mod. 66; FitzPatrick's Case, 1 Salk. 103, 9 Eng. Repr. 95.

2 United States v. Jones, 3 Wash. C. C. 224, Fed. Cas. No. 15494; Reg. v. Andrews, 2 D. & L. 10, 1 New Cas. 199.

1 United States v. Jones, 3 Wash. 224, Fed. Cas. No. 15495; Harvey's Case, 10 Mod. 334; Reg. v. Aylesbury, 1 Salk. 103, 91 Eng. Repr. 95; Reg. v. Wyndham, 1 Str. 2.

2 Ex parte Pattison, 56 Miss. 161; People v. Coles, 6 Park. Cr. Rep. (N. Y.) 695, 701, 20 Cent. L. J. 103; Thomas v. State, 4 Tex. 6.

§ 120. BAIL TO KEEP THE PEACE MAY BE REQUIRED. After conviction, and indeed in extraordinary cases of threatened crime, after acquittal, the court may hold the defendant, in addition to other penalties prescribed by law, over to keep the peace, and commit him on default of bail.[1] When an indictment is quashed on technical grounds, the court, a fortiori, will direct that the defendant be held on the original charge.[2]

4. Vagrants, Disorderly Persons, and Professional Criminals.

§ 121. MAGISTRATES HAVE POWER TO HOLD VAGRANTS, ETC., TO BAIL. By statutes which may now be viewed as part of Anglo-American common law, justices of the peace have power to hold to bail for their good behavior, or in default to commit, for definite periods, vagrants and disorderly persons.[1] Similar statutes have been adopted in the United States, and have frequently been held constitutional, though with the caution that the defendant should be duly summoned, and should have a fair hearing,[2] and

1 Infra, § 123. State v. Coughlin, 19 Kan. 537; State v. Chandler, 31 Kan. 201, 1 Pac. 787; O'Connell v. Reg., 11 Cl. & F. 155; Dunn v. Reg., 12 Ad. & El. N. S. (12 Q. B.) 1031, 64 Eng. C. L. 1030.

2 Nicholls v. State, 5 N. J. L. (2 South.) 539; Young v. Com., 1 Rob. (Va.) 744.

1 Kerr's Whart. Cr. Law, § 569; Paley on Convictions, ch. 1; Com. v. Carter, 108 Mass. 17; Brown v. State, 70 Tenn. (2 Lea) 158; Reg. v. Justices, 10 L. R. Ir. 294; Com. Dig. "Justice"; Burn's Just. "Vagrant."

"Idle and disorderly persons, vagrants, are terms often occurring in the old statutes. They have been from time immemorial, in England, subject to the summary jurisdiction of justices of the peace."—Earle, J., in State v. Maxcy, 1 McMull. (S. C.) 503.

History of the law is well given in Gneist, Englische Communalverfassung (3d ed, 1871), p. 225, and the power traced to 34 Ed. 3, ch. 1. See, also, Blackstone, iv, ch. 18.

Arrests are not allowable unless when the vagrancy was in the officer's presence.—Shanley v. Wells, 71 Ill. 78; see Way, In re, 41 Mich. 299, 1 N. W. 1021.

Unless authorized by statute.—State v. Newton, 59 Ind. 173.

As to who are vagrants, see Pointon v. Hill, L. R. 12 Q. B. D. 306.

2 Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; People v. Phillips,

that the statutes should be strictly construed.[3] In several states analogous power has been given in respect to professional thieves and other habitual criminals; and these statutes have been held constitutional. Sureties to keep the peace can also be required at common law from a person against whom oath is made that by him another person is put in fear or danger of life. In all these cases the sureties or commitment must be for a limited time.[4]

5. Bail After Habeas Corpus.

§ 122. ON HABEAS CORPUS, COURT MAY ADJUST BAIL. The writ of habeas corpus may be appealed to for the purpose, not only of determining the liability of the defendant to prosecution at all, but of settling the question of bail, supposing there be probable cause against him.[1] The court, on fixing the amount of bail, is guided by the considerations we have just noticed as governing the practice before magistrates.[2] The question as to the courts which may thus determine bail is a matter of local prac-

1 Park. Cr. Rep. (N. Y.) 95; People v. Forbes, 4 Park. Cr. Rep. (N. Y.) 611; People v. Gray, 4 Park. Cr. Rep. (N. Y.) 616; State v. Maxcy, 1 McMull. (S. C.) 501.

3 Reg. v. Waite, 4 Burr. 780, 2 Ld. Ken. 511, and other cases cited in Fisher's Crim. Dig., tit. "Practice."

4 Prickett v. Gratex, 8 Ad. & El. N. S. (8 Q. B.) 1021, 55 Eng. C. L. 1020. See Com. v. Doherty, 137 Mass. 245.

1 Infra, chapter on "Habeas Corpus."

2 IND.—Lumm v. State, 3 Ind. 293. PA.—Com. v. Keeper of Prison, 2 Ashm. 227; Com. v. Lemley, 2 Pitts. 362. S. C.—State v. Hill, 3 Brev. 89; State v. Everett, Dud. 296. TEX.—In re Henson, 24 Tex. App. 308, 5 S. W. 684. VA.—Com. v. Rutherford, 5 Rand. 646; Com. v. Semmes, 11 Leigh 665. ENG.—In re Barronet, Dears. 51, 1 El. & Bl. 2, 72 Eng. C. L. 1; Mohun's Case, 1 Salk. 104, 91 Eng. Repr. 96.

As to practice of looking into depositions of the coroner or magistrate, see Reg. v. Pepper, Comb. 298; Reg. v. Horner, 1 Leach 270; People v. Beigler, 3 Park. Cr. Rep. (N. Y.) 316.

Practice in this country is for the court to hear the witnesses afresh. See People v. Dixon, 4 Park. Cr. Rep. (N. Y.) 651; Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227.

For a learned article on this topic by Judge Seymour D. Thompson, see 14 Cent. L. J. 264.

tice. In England no court that has not jurisdiction to try can thus interpose.[3] In Pennsylvania such is substantially the law as to the adjudication of the merits, though the supreme court will, on such a writ, see if the record is right.[4] In New York the judges of the supreme court assert the jurisdiction generally.[5] But as a rule no court which has not jurisdiction of the offense can take cognizance of it in this way.[6] At the same time, a court having supreme criminal jurisdiction over a particular state or territory has, in matters within such jurisdiction, power to release on bail, the amount of which it is entitled to fix.

6. Bail After Verdict or After Quashing.

§ 123. IN EXCEPTIONAL CASES, BAIL MAY BE PERMITTED AFTER VERDICT. In cases involving no high degree of turpitude, and in cases in which the court has serious doubts as to the question of the rightfulness of the verdict, or of the sufficiency of the proceeding in point of law, bail may be taken after verdict of conviction,[1] or even after sentence, while the case is under review in a superior court.[2]

§ 124. AFTER QUASHING, BAIL MAY BE REFUSED. When an indictment has been quashed, or when judgment has been entered for the defendant, the court, when its action

3 Reg. v. Platt, 1 Leach C. L. 187; Reg. v. Mackintosh, 1 Stra. 308.

4 Ex parte Walton, 2 Whart. (Pa.) 501. See, also, Belgard v. Morse, 68 Mass. (2 Gray) 406.

5 People v. Jefferds, 5 Park. Cr. Rep. (N. Y.) 518.

6 People v. Harris, 21 How. Pr. (N. Y.) 83; Com. v. Taylor, 11 Phila. (Pa.) 386; Ex parte Irwin, 7 Tex. App. 288.

1 Archb. C. P. 187. See: MASS.—Com. v. Field, 93 Mass. (11 Allen) 788. MINN.—State v. Levy, 24 Minn. 362. MISS.—Dyson, Ex parte, 25 Miss. 356. N. Y.—McNiel's Case, 1 Cai. 72. PA.—Com. v. Lowry, 14 Leg. Int. 332; Resp. v. Jacob, 1 Smith's Laws 57. ENG.—In re Barronet, Dears. 51, 1 El. & Bl. 2, 72 Eng. C. L. 1. Though see Reg. v. Waddington, 1 East 143. Supra, § 120.

2 Supra, § 120; Anon. 3 Salk. 68; though see Reg. v. Bird, 5 Cox C. C. 11; Corbett v. State, 24 Ga. 391.

has been based on merely technical defects, may hold the defendant to answer further proceedings.[1]

7. Summary Trial and Punishment by "Military Courts."

§ 125. AUTHORITY OF "MILITARY COURTS" TO TRY AND PUNISH. In certain states of the Union, during times of labor troubles, domestic disturbances and social discord due to strikes and attendant lawlessness, when the militia is called out to quell the disturbances, protect property and lives, and to restore and preserve order, martial law being declared in the district of the troubled zone, the officer in command of the militia has erected "military courts" which usurped the functions of the civil courts to deal with offenses and to punish offenders, even though the ordinary law courts were unaffected by the local disturbances, were open for business and transacting and conducting business in the ordinary way, and were amply able and willing to hear all complaints charging offenses and to punish the offenders, if found to be guilty of an infraction of the law of the land. This is an act so unnecessary, so unwarranted, so unconstitutional, and so flagrantly revolutionary in its character,—so dangerous in its possibilities and pernicious in its consequences,—as to merit treatment in a separate chapter in this work, notwithstanding the fact that the question involved is one of constitutional law, rather than a question of criminal procedure. The pressing importance of the question justifies such a chapter and treatment herein.[2]

1 Infra, § 392.

2 See, post, ch. xviii.

CHAPTER XVI.

FORM OF INDICTMENT—GENERALLY.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION.

§ 126. Under federal constitution, trials for capital or infamous crimes must be by indictment.

§ 127. Presentment is an accusation by grand jury, on which indictment may be based.

§ 128. Information is ex-officio procedure by attorney-general.

§ 129. —— Is not usually permitted as to infamous crimes.

§ 130. "Infamous" crimes are such as involve disgrace or expose to penitentiary.

II. STATUTES OF JEOFAILS AND AMENDMENT.

§ 131. By statutes, formal mistakes may be amended, and formal averments made unnecessary.

§ 132. —— Various particulars as to amendments.

III. CAPTION AND COMMENCEMENT.

§ 133. Caption is no part of the indictment, being an explanatory prefix.

§ 134. Substantial accuracy only required.

§ 135. Caption may be amended.

§ 136. Commencement must aver office and place of grand jurors, and also their oath.

§ 137. Each count must contain averment of oath.

IV. NAME AND ADDITION OF DEFENDANT AND NAME OF PROSECUTOR AND THIRD PARTY.

1. As to Defendant.

§ 138. Name of defendant should be specifically given.

§ 139. Omission of surname is fatal.

XIII. Repugnancy.

XIV. Technical Averments.

XV. Clerical Errors.

XVI. Conclusion of Indictments.

XVII. Joinder of Offenses.

XVIII. Joinder of Defendants.

1. Who May Be Joined.

2. Severance.

I. Indictment as Distinguished from Information.

§ 126. Under federal constitution, trials of all capital or infamous crimes must be by indictment. "No

person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without compensation."[1]

§ 127. PRESENTMENT IS AN ACCUSATION BY GRAND JURY, ON WHICH INDICTMENT MAY BE BASED. "The first clause," to adopt the language of Judge Story, in commenting on this article, "requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital or infamous crime charged against him. This is regularly true, at the common law, of all offenses above the grade of common misdemeanor. A grand jury, it is well known, are selected in a manner prescribed by law, and duly sworn to make inquiry, and present all offenses committed against the authority of the state government within the body of the county for which they are empanelled. In the national courts they are sworn to inquire and present all offenses committed against the authority of the national government within the state or district for which they are empanelled, or elsewhere, within the jurisdiction of the national government.

1 Const. U. S. Amend., art. 5, 9 Fed. Stats. Ann., 1st ed., pp. 256 et seq.

Without either indictment or information a prosecution can not be maintained. See State v. First, 82 Ind. 1.

A de facto grand jury satisfies the constitutional rule. See People v. Petrea, 92 N. Y. 128.

"Due process of law," in the XIV amendment, does not necessitate a grand jury. See Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. 111, 292, approving Kalloch v. Sup. Ct., 56 Cal. 229; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

"*A presentment,* properly speaking, is an accusation made ex mero motu by a grand jury, of an offense, upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offense preferred to and presented upon oath as true, by a grand jury at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment, before the party accused can be put to answer to it."[1]

§ 128. INFORMATION IS EX OFFICIO PROCEDURE BY ATTORNEY-GENERAL. Informations are official criminal charges presented usually by the prosecuting officers of the state, without the interposition of a grand jury;[1] nor can an affidavit or charge by an unofficial person amount to an information.[2] An information, it is said, resembles not only an indictment, in the correct and technical description of the offense, but also an action qui tam, in which the informer must show the forfeiture, and its appropriation, or at least the proportion given him by the statute.[3] So far as the structure of an information is concerned, the same rules apply as obtain in cases of indictment.[4]

1 Story on the Constitution, § 657.

1 District attorney may proceed by information, although an indictment for the same offense has been quashed.—United States v. Nagle, 17 Blatch. 258, Fed. Cas. No. 15852.

United States Constitution does not prohibit prosecution by information when authorized by state constitution. See State v. Boswell, 104 Ind. 541, 4 N. E. 675; State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471; State v. Wishner, 35 Kan. 271, 10 Pac. 852; Louisville & N. R. Co. v. State, 112 Ky. 635, 66 S. W. 505; State v. Tucker, 36 Ore. 291, 51 L. R. A. 246, 61 Pac. 894; In re Wright, 3 Wyo. 478, 31 Am. St. Rep. 94, 13 L. R. A. 748, 27 Pac. 565.

2 People v. Keim, 79 Mo. 515.

3 1 Ch. C. L. 841; Archbold's C. P. by Jervis, 66; Burn's Justice, 20th ed., by Ch. Bears, tit. "Information." See, also, Vogel v. State, 31 Ind. 64; Vanatta v. State, 31 Ind. 220; Hill v. Davis, 4 Mass. 137; Com. v. Messenger, 4 Mass. 462, 465; Com. v. Cheney, 6 Mass. 347; Brimmer v. Long Wharf, 22 Mass. (5 Pick.) 131; Welde v. Com., 43 Mass. (2 Met.) 408; Evans v. Com., 44 Mass. (3 Met.) 453.

4 ALA.—Thomas v. State, 58 Ala.

In respect to *amendment*, however, there is a difference at common law, arising from the fact that an information emanates exclusively from the attorney-general, without the interposition of a grand jury; and hence he alone, with leave of court, is authorized to amend it, the assent of a grand jury not being required.[5]

§ 129. Is not usually permitted as to infamous crimes. The limitation in the federal constitution restricting prosecutions for infamous crimes to presentments or indictments by a grand jury applies distinctively to federal prosecutions.[1] In Pennsylvania there is a constitutional provision against proceeding by information in any case where an indictment lies;[2] and the same restriction exists in several of the other states.[3] In the United States

365. ILL.—Gallagher v. People, 120 Ill. 179, 11 N. E. 335; Avery v. People, 11 Ill. App. 332. IND.—State v. Beebe, 83 Ind. 171. LA.—State v. Anderson, 30 La. Ann. 557. TEX.—Antle v. State, 6 Tex. App. 202; Leatherwood v. State, 6 Tex. App. 244. ENG.—R. v. Steel, L. R. 2 Q. B. D. 40.

Information must conform to the affidavit on which it is based.—Dyer v. State, 85 Ind. 525. But the special reason why information is adopted instead of indictment need not be stated.—Hodge v. State, 85 Ind. 561.

5 CONN.—State v. Rowley, 12 Conn. 101; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; State v. Pritchard, 35 Conn. 319. IND.—Welty v. Ward, 164 Ind. 457, 3 Ann. Cas. 556, 73 N. E. 889. KY.—Com. v. Rodes, 31 Ky. (1 Dana) 595. N. H.—State v. Weare, 38 N. H. 314. ENG.—R. v. Stedman, 2 Ld. Ray. 1307, 92 Eng. Repr. 356; R. v. Seawood, 2 Ld. Ray. 1472, 92 Eng. Repr. 458.

An information may be granted on the basis of a quashed indictment. See United States v. Ronzone, 14 Blatch. 69, Fed. Cas. No. 16192.

That it does not require either prior hearing or finding, see United States v. Mollor, 16 Blatch. C. C. 65, Fed. Cas. No. 15794. Contra in Michigan, Brown v. State, 34 Mich. 37.

Under Texas practice an information must be supported by an affidavit, with which the information must be in substantial conformity, though technical conformity is not required.—Pittman v. State, 14 Tex. App. 576.

The information must be in itself sufficient, and can not be helped out by reference to the affidavit.—Pittman v. State, 14 Tex. App. 576; Lackey v. State, 14 Tex. App. 164.

1 Story on Const., § 653.

2 Const., art. 9, § 10.

3 State v. Mitchell, 1 Bay (S. C.) 267; Cleary v. Deliesseline, 1 McC. (S. C.) 35.

courts, as has been seen,[4] in New York,[5] and in Virginia,[6] the limitation is confined to cases of infamous crime. In New Hampshire, it obtains in all cases where the punishment is death or confinement at hard labor.[7] In Vermont, a distinction of the same character is made.[8] In Indiana,[9] and in California,[10] a larger range is given; and so as to Georgia.[11] It may, in fact, be stated as a general rule, that the provision in the federal constitution, given at the head of this chapter, applies only to cases in the United States courts.[12] In Massachusetts, it was at one time held that all public misdemeanors which may be prosecuted by indictment may be prosecuted by information on behalf of the commonwealth, unless the prosecution be restricted by the statute to indictment.[13] But now by the Gen. Stat., c. 158, § 3, all criminal prosecutions must be by indictment, except (1) When informations are expressly authorized by statute; (2) In cases before police justices; and (3) In courts-martial. In Connecticut all offenses not punished by death or by imprisonment for life are prosecuted by information.[14] In California

4 United States v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16273. See, also, Garnsey v. State, 4 Okla. Cr. Rep. 547, 38 L. R. A. (N. S.) 600, 112 Pac. 24.

5 Const., art. 7, § 7.

6 Davis's Cr. Law, 422.

7 Rev. Stat. N. Hamp. 457. See State v. Stimpson, 78 Vt. 124, 6 Ann. Cas. 639, 1 L. R. A. (N. S.) 1153, 62 Atl. 14.

8 Rev. Stat. Verm., ch. cii.

9 As to limitation in Indiana, see Davis v. State, 69 Ind. 130; Lindsey v. State, 72 Ind. 40; Heanly v. State, 74 Ind. 99.

10 See Campbell v. State, 59 Cal. 243, 43 Am. Rep. 257.

Prosecution by information, instead of by indictment, does not violate the Constitution of the United States.—People v. Hurtado, 2 Cal. Unrep. 206.

11 Groves v. State, 73 Ga. 205.

12 ALA.—Noles v. State, 24 Ala. 672. LA.—State v. Jackson, 21 La. Ann. 574; State v. Anderson, 30 La. Ann. 557; State v. Woods, 31 La. Ann. 267. S. C.—State v. Shumpert, 1 Rich. 85. VT.—State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450. WIS.—Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

As to Illinois, see Parris v. People, 76 Ill. 274.

As to Michigan, see McNamee v. People, 31 Mich. 473; Turner v. People, 33 Mich. 363.

13 Com. v. Waterborough, 5 Mass. 257, 259.

14 2 Swift's Dig. 371.

there is no longer any restriction.[15] In the United States courts, crimes against the elective franchise may be prosecuted by information filed by the district attorney.[16]

§ 130. "INFAMOUS" CRIMES ARE SUCH AS INVOLVE DISGRACE OR EXPOSE TO PENITENTIARY. In the United States courts it was once said that, for misdemeanors, which do not, at common law, preclude the person convicted from being a witness,[1] there can be a proceeding by information,[2] and hence that a person may be prosecuted by information for a violation of the revenue laws.[3] Severity of imprisonment, it has been argued, does not by itself create infamy.[4] But where at common law disgrace attaches, then the offense is infamous.[5]

15 People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257.

16 Rev. Stats., § 1022.

1 Disqualification to be a witness is said by Mr. Justice Gray not to be the proper test as to the infamy of a crime; the true question is whether the crime is one for which the statute authorizes the court to inflict or award an infamous punishment. When the defendant is in danger of being subjected to an infamous punishment if convicted, under the fifth amendment to the federal Constitution, he has a right to insist that he shall not be put upon his trial, except on the finding and presentment of a grand jury.—Ex parte Wilson, 114 U. S. 417, 420, 29 L. Ed. 89, 90, 5 Sup. Ct. Rep. 935.

2 Stockwell v. United States, 80 U. S. (13 Wall.) 531, 20 L. Ed. 491; United States v. Isham, 84 U. S. (17 Wall.) 496, 21 L. Ed. 728; United States v. Bozzo, 85 U. S. (18 Wall.) 125, 21 L. Ed. 812; United States v. Block, 15 Bank. Reg. 325, 4 Sawy. 211, Fed. Cas. No. 14609; United States v. Ebert, 1 Cent. L. J. 205, Fed. Cas. No. 15019; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15750; United States v. Mann, 1 Gall. C. C. 3, Fed. Cas. No. 15717; United States v. Waller, 1 Sawy. 701, Fed. Cas. No. 16634.

3 United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15750.

4 People v. Whipple, 9 Cow. (N. Y.) 707; Com. v. Shaver, 3 Watts & S. (Pa.) 338; Reddick v. State, 4 Tex. App. 82; R. v. Hickman, 1 Mood. C. C. 34.

5 Infamous punishment, power of court to inflict on conviction; the crime charged is an "infamous" one, within the meaning of the fifth amendment to the federal Constitution. See Mackin v. United States, 117 U. S. 348, 351, 29 L. Ed. 909, 911, 6 Sup. Ct. Rep. 777; Ex parte McClusky, 40 Fed. 74.

Imprisonment in the penitentiary, subjecting to, as a punishment, upon conviction, and a term at hard labor, the crime charged is an "infamous" one.—Ex parte Wilson, 114 U. S. 417, 420, 29 L. Ed. 89, 90, 5 Sup. Ct. Rep. 935;

Informations, under the federal constitution,[6] on principle, should be restricted to quasi civil offenses not mala in re, or involving moral turpitude.[7] And it may now

Ex parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849, 853, 7 Sup. Ct. Rep. 781; Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959, 7 Sup. Ct. Rep. 896; United States v. Todd, 25 Fed. 815; United States v. Brady, 3 Crim. L. Mag. 63.

6 "Informations," said Mr. Justice Gray, in 1884, "within the last fifteen years, have greatly increased, and the current of opinion in the Circuit and District courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness."—In re Wilson, 114 U. S. 417, 420, 26 L. Ed. 89, 90, 5 Sup. Ct. Rep. 935. See United States v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16273; United States v. Field, 21 Blatch. 330, 16 Fed. 778; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15750; United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774; United States v. Baugh, 4 Hughes 501, 1 Fed. 784; United States v. Block, 4 Sawy. 211, Fed. Cas. No. 14609; United States v. Yates, 6 Fed. 861; In re Wilson, 18 Fed. 33.

7 United States v. Brady, 3 Crim. Law Mag. 69, and note thereto.

In conflict with the text may be cited United States v. Wynn, 3 McCr. 266, 9 Fed. 886, where it was held that stealing from the mail was not "infamous"; United States v. Burgess, 3 McCr. 278, 9 Fed. 896, where it was held not "infamous" to conspire to counterfeit coin; United States v. Field, 21 Blatch. 330, 16 Fed. 778, where it was held not "infamous" to pass counterfeit coin; United States v. Black, 4 Sawy. 211, Fed. Cas. No. 14609, 15 Bank. Reg. 325, where the same was held of secreting goods by bankrupt; United States v. Reilley, 20 Fed. 46, where it is held that embezzlement is not "infamous."

In United States v. Butler, 4 Hughes 514, 6 Fed. 247, conspiracy was held infamous; in United States v. Cross, 1 McArth. (D. C.) 149, the term was limited to cases where there is a forfeiture of civil rights. See United States v. Brady, 3 Crim. Law Mag. 69, and United States v. Blackburn, 1 N. Y. Week. Dig. 276, Fed. Cas. No. 14603.

In United States v. Yarborough, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. 152, the statute making it indictable to conspire to abridge another's civil rights was held constitutional; and in United States v. Waddell, 112 U. S. 76, 28 L. Ed. 673, 5 Sup. Ct. 35, it was applied to a conspiracy to drive a citizen of the United States from a homestead entry and was held within the statute, but it was doubted whether the proceeding in such cases could be by information. But now all crimes punishable by imprisonment in the penitentiary are infamous under this clause; Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909, 6 Sup. Ct. 777; see United States v. Tod, 25 Fed. 815. A person, imprisoned on a conviction in such a case on which there has been no presentment by a grand jury, will be discharged on

be held that in all cases in which penitentiary imprisonment is imposed, it is within the contemplation of the constitution that the safeguard of a grand jury should be secured.[8]

II. Statutes of Jeofails and Amendment.[1]

§ 131. By statutes, formal mistakes may be amended, and formal averments made unnecessary. No inconsiderable portion of the difficulties in the way of the criminal pleader, at common law, have been removed in England by the 7 Geo. 4, c. 64, ss. 20, 21; 11 & 12 Vict., c. 46, and 14 & 15 Vict., c. 100, and in most of the states in the American Union, by statutes containing similar provisions.[2] In some jurisdictions, also, it is provided that as to certain offenses certain prescribed forms shall be sufficient.[3]

Whether such statutes conflict with constitutional provisions providing that the indictment should notify the defendant of the character of the offense depends in part upon the words of the constitution, in part upon the degree in which the rights of the defendant are abridged by the indictment as to which the question arises. Supposing that the constitutional provision, as is sometimes the case, is simply a presentation of the common law

a habeas corpus.—Wilson, Ex parte, 114 U. S. 417, 29 L. Ed. 89, 5 Sup. Ct. 935.

8 See Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909, 6 Sup. Ct. 777.

1 For forms of amendment, see Form Nos. 157-160.

2 R. v. Larkin, 1 Dears. C. C. 365, 6 Cox C. C. 377; R. v. Frost, 1 Dears. C. C. 427; R. v. Walton, 9 Cox C. C. 297; R. v. Gumble, 12 Cox C. C. 248; R. v. Bird, 12 Cox C. C. 257; R. v. Sturge, 3 El. & Bl. 734, 77 Eng. C. L. 734.

As to how far verdict cures, see infra, chapter on "Motion in Arrest of Judgment."

Merely clerical errors, as will be seen, may be disregarded in error, or in motions of arrest of judgment. Infra, § 322.

Unauthorized material amendment is fatal.—State v. Vest, 21 W. Va. 796.

3 As to liquor prosecutions, see Kerr's Whart. Crim. Law, § 1839. See, also, State v. Comstock, 27 Vt. 553; State v. Amidon, 58 Vt. 524, 2 Atl. 154; Hewitt v. State, 25 Tex. 722.

rule, that the defendant is entitled to notice in the indictment of the charge against him,[4] we can adopt the following conclusions:

1. Statutes which merely facilitate the pleading in a case, such as those providing that technical objections are to be taken by demurrer, or that defects of process must be met by motion to quash, or that formal statements as to time, place, tenor, name, and value, are open to amendment on trial, or that a substantial accuracy of statement shall be sufficient, are constitutional.[5] In such

An amendment imprudently granted, there will be a new trial. See Com. v. Foynes, 126 Mass. 267.

As to limits, see State v. Doe, 50 Iowa 541; State v. Finn, 31 La. Ann. 408; McCarthy v. State, 56 Miss. 294.

As to waiver of constitutional rights, see Kerr's Whart. Crim. Law, § 186.

[4] See, to same effect, Com. v. Phillips, 33 Mass. (16 Pick.) 211; Com. v. Holley, 69 Mass. (3 Gray) 458.

[5] ALA.—Noles v. State, 24 Ala. 672; Thompson v. State, 25 Ala. 41; Tatum v. State, 66 Ala. 465. CAL.—People v. Kelly, 6 Cal. 210. IND.—McLaughlin v. State, 45 Ind. 338. LA.—State v. Mullen, 14 La. Ann. 570; State v. Christian, 30 La. Ann. (Pt. I.) 367; State v. Sullivan, 35 La. Ann. 844. MD.—Cochrane v. State, 9 Md. 400; Hawthorne v. State, 56 Md. 530; Slymer v. State, 62 Md. 237. MASS.—Com. v. Holley, 69 Mass. (3 Gray) 458. MICH.—People v. Cook, 10 Mich. 164; Marvin v. People, 26 Mich. 298, 12 Am. Rep. 314; People v. Sutherland, 104 Mich. 390, 62 N. W. 519. MISS.—Rocco v. State, 37 Miss. 357; Peebles v. State, 55 Miss. 454. MO.—State v. Schricker, 29 Mo. 265; State v. Craighead, 32 Mo. 561; State v. Krull, 5 Mo. App. 589. N. J.—State v. Graves, 45 N. J. L. (16 Vr.) 347, 46 Am. Rep. 778. N. Y.—People v. Conroy, 97 N. Y. 62. N. C.—State v. Hart, 26 N. C. (4 Ired.) 246. OHIO—Lasure v. State, 19 Ohio St. 44. PA.—Crown v. Com., 78 Pa. St. 122; Goersen v. Com., 99 Pa. St. 388; Com. v. Seymour, 2 Brewst. 567. TEX.—State v. Manning, 14 Tex. 402; Townsend v. State, 5 Tex. App. 574; Bates v. State, 12 Tex. App. 26. VT.—State v. Comstock, 27 Vt. 553. VA.—Trimble v. Com., 2 Va. Cas. 143. WIS.—Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

As amendments sustained as going to form, see State v. Fonsnette, 38 La. Ann. 61; People v. Johnson, 104 N. Y. 213, 10 N. E. 690; State v. Amidon, 58 Vt. 524, 2 Atl. 154; State v. Freeman, 59 Vt. 661, 10 Atl. 752; Huff v. State, 23 Tex. App. 291, 4 S. W. 890.

As to amendments of records under U. S. Rev. Stats., § 1037 (2 Fed. Stats. Ann., 1st ed., 348), see Kelly v. United States, 27 Fed. 616.

Defects of indictment or information not objected to during trial,

cases, however, the court may, if conducive to justice, require additional particulars to be given by the prosecution.[6]

2. Statutes which authorize forms [7] which give no substantial notice of the offense are unconstitutional,[8] and such is also the case, as to all amendments, in jurisdictions in which the constitution makes a bill found by a grand jury a pre-requisite to a trial.[9] And such is the

will be disregarded after verdict. —People v. Sutherland, 104 Mich. 468, 62 N. W. 566.

Statute making it unnecessary to set forth the means by which the death occurred is constitutional. ALA.—Noles v. State, 24 Ala. 672; Thompson v. State, 25 Ala. 41. MISS.—Newcomb v. State, 37 Miss. 397. OHIO—Wolf v. State, 19 Ohio St. 248. PA.—Goerson v. Com., 99 Pa. St. 388. W. VA.—State v. Schnelle, 24 W. Va. 767. WIS.—Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

Contra: State v. Mott, 29 Ark. 147; Clavy v. State, 33 Ark. 561.

Statutory simplification of criminal pleading does not abrogate the judicial construction previously attached to the terms ordinarily used in such pleading.—People v. Conroy, 97 N. Y. 62.

6 Infra, chapter on "Certain Incidents of Trial," division V.

7 Legislature has power to prescribe form of and regulate proceedings in criminal cases.—Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912.

8 ME.—State v. Learned, 47 Me. 426; State v. Mace, 76 Me. 399. MASS.—Com. v. Harrington, 130 Mass. 135. MISS.—Blumenberg v. State, 55 Miss. 528. N. Y.—People v. Campbell, 4 Park. Cr. Rep. 386. PA.—Kilrow v. Com., 89 Pa. St. 480; Goerson v. Com., 99 Pa. St. 388. OHIO—Miller v. State, 3 Ohio St. 476; Williams v. State, 35 Ohio St. 175. TEX.—State v. Wilburn, 25 Tex. 738; State v. Daugherty, 30 Tex. 360; Williams v. State, 12 Tex. App. 395; Brinster v. State, 12 Tex. App. 612; Allen v. State, 13 Tex. App. 28. VA.—Com. v. Buzzard, 5 Grat. 694.

9 See cases cited in last note.

This question, supposing the constitutional provisions are mere expressions of the common law in this respect, will be found elaborately discussed in Bradlaugh v. R., L. R. 3 Q. B. D. 607; 14 Cox C. C. 68.

As to effect of verdict in curing formal errors, see People v. Sutherland, 104 Mich. 468, 62 N. W. 566.

Pennsylvania ruling that the name of the owner in larceny can be stricken out, and "persons unknown" inserted.—Com. v. O'Brien, 2 Brewst. (Pa.) 566. See, also, Phillips v. Com., 44 Pa. St. 197; Myers v. Com., 79 Pa. St. 308, cited infra, § 162.

To same general effect, see Mulrooney v. State, 26 Ohio St. 326.

As to other amendments, see People v. Mott, 34 Mich. 80; Garvin v. State, 52 Miss. 207; State v. Arnold, 50 Vt. 731.

effect of a ruling, in 1887, of the supreme court of the United States.[10]

§ 132. —— Various particulars as to amendments. The legislature having full power to prescribe the form, and regulate the proceedings, in criminal cases,[1] has full power to provide as to the amendment of the pleadings in such a case, providing, only, that no substantial constitutional rights of the defendant are invaded. In the absence of a statute conferring such authority the court, either of its own motion, or on the motion of the attorney prosecuting for the state,[2] can not make any amendment, except as to matters of form, only;[3] any amendment as to matter of substance must be with the consent and concurrence of the grand jury which found the bill and made the presentment.[4]

10 **Ex parte Bain**, 121 U. S. 1, 30 L. Ed. 849, 7 Sup. Ct. 781. In this case there was no federal statute authorizing the amendment, but the reasoning of the court strikes at statutory amendments. The constitutional amendment in question does not limit the states, applying only to the national government.—Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 21. See United States v. Connant, Abb. Nat. Dig. 686, per Lowell, J., 9 Cent. L. J. 129, Fed. Cas. No. 14844.

1 State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471; State v. Newton, 74 Kan. 561, 87 Pac. 757; Bennett v. State, 57 Wis. 69, 14 N. W. 912.

2 State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584.

"Indictments not within the statutes of jeofails, and can not, therefore, be amended by the court; being the finding of a jury upon oath, the court can not amend without the concurrence of the grand jury by whom the bill is found."—State v. Sexton, supra.

As to general power of courts over pleadings in criminal cases, see Ganaway v. State, 22 Ala. 772; State v. Harrison, 18 Tenn. (10 Yerg.) 542; Bradshaw v. Com., 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

3 See Com. v. Drew, 57 Mass. (3 Cush.) 279; State v. Cody, 119 N. C. 908, 56 Am. St. Rep. 692, 26 S. E. 252.

4 Resubmission to grand jury is essential. ALA.—Gregory v. State, 46 Ala. 151; Johnson v. State, 46 Ala. 212. IND.—Cain v. State, 4 Blackf. 512. MD.—Hawthorn v. State, 56 Md. 530. MISS.—McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124. NEB.—State v. Leese, 37 Neb. 92, 40 Am. St. Rep. 474, 20 L. R. A. 579, 55 N. W. 798. N. Y.—People v. Campbell, 4 Park. Cr. Rep. 386. N. C.—State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584; State v. Cody, 119 N. C. 908, 56 Am. St. Rep. 692, 26

Amendment of indictment as to formalities, merely, may be made, by leave of the court, at any time, without the consent and concurrence of the jury which returned the indictment.[5]

Amending information as to matters of form, and as to matters of substance, may be made,[6] either by the state's attorney who filed the information, by his successor in office,[7] or by his assistant in charge of the prosecution,[8] in the absence of the prosecuting attorney.

Grand jury may amend indictment, with leave of court, at any time before their finding and presentment is recorded, and they have left the court-room.[9] And it has been held that after trial and conviction, and a new trial granted at the request of the defendant, the grand jury may amend the indictment, charging the defendant with the same offense; and the defendant may be tried and

S. E. 252. WIS.—State v. McCarty, 2 Pinn. 513, 54 Am. Dec. 150. FED.—Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849, 7 Sup. Ct. Rep. 871.

5 McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124. See authority in footnote 3, supra.

6 State v. White, 64 Vt. 372, 24 Atl. 250; State v. Hubbard, 71 Vt. 405, 45 Atl. 75; State v. Borrell, 75 Vt. 202, 98 Am. St. Rep. 813, 54 Atl. 183.

7 State v. Borrell, 75 Vt. 202, 98 Am. St. Rep. 813, 54 Atl. 183. In this case it was contended that leave to amend could be granted to the state's attorney who filed the information only, because, it was claimed, the act was done by him under his oath of office, and that, his term having expired, the legal and proper course for his successor in office to pursue, if the information was defective, was to enter a nolle prosequi, and then file a new information. The court held that this contention was without merit. See State v. Meacham, 67 Vt. 707, 32 Atl. 494.

8 People v. Hessler, 48 Mich. 49, 11 N. W. 804.

9 State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec. 656.

Any time prior to arraignment indictment may be withdrawn and amended.—People v. Rodley, 131 Cal. 240, 251, 63 Pac. 351; State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec. 656; Lawless v. State, 72 Tenn. (4 Lea) 173.

But it seems that after demurrer sustained, the court can not resubmit to the grand jury. See Terrill v. Superior Court, 6 Cal. Unrep. 416, 60 Pac. 516.

New indictment may be filed without new preliminary hearing, to cure technical defects in first indictment.—State v. Hasledale, 3 N. D. 36, 53 N. W. 430.

convicted on the amended indictment before the first indictment is dismissed or otherwise disposed of.[10]

Amendment of indictment at instance of defendant, and with his consent, made in open court, a subsequent plea of not guilty to the amended indictment, and a trial thereon without objection until after verdict, is binding on the defendant.[11]

Amendment of information after trial begun, the jury impaneled and sworn, by erasing one word and substituting another in the descriptive title or name of a corporation—as substituting "New Haven" for Norwalk"—has been held to be permissible where the alteration is of no importance in itself, and in no way jeopardizes the rights of the defendant or affects the defense he may put in to the charge.[12]

Amending indictment to conform to evidence may be authorized by statute, and such statutes have been held to be constitutional.[13]

10 Gannon v. People, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525.

Mr. Justice Shaw, in Com. v. Drew, 57 Mass. (3 Cush.) 279, says that "where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment if an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects of the first. And it is no good ground of abatement that the first has not been actually discontinued when the latter is returned."

11 "It would be a fraud on the court if it were not."—Shiff v. State, 84 Ala. 454, 4 So. 419; McCorkle v. State, 14 Ind. 39; State v. Cody, 119 N. C. 908, 56 Am. St. Rep. 692, 26 S. E. 252.

Plea to indictment deemed to admit its genuineness as recorded, and objection can not be taken after verdict.—Gitchell v. People, 146 Ill. 175, 37 Am. St. Rep. 147, 33 N. E. 757; Cooper v. State, 120 Ind. 377, 22 N. E. 320.

12 State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223. See State v. Pritchard, 35 Conn. 319; Welty v. Ward, 164 Ind. 457, 3 Ann. Cas. 556, 73 N. E. 889.

13 See: CAL.—People v. Kelly, 6 Cal. 210. CONN.—State v. Pritchard, 35 Conn. 326. MISS.—Miller v. State, 53 Miss. 403; Peebles v. State, 53 Miss. 434. N. C.—State v. Taylor, 118 N. C. 1262, 24 S. E. 526. OHIO—Lasure v. State, 19 Ohio St. 43. TEX.—State v. Manning, 14 Tex. 402.

III. Caption[1] *and Commencement.*[2]

§ 133. CAPTION IS NO PART OF INDICTMENT, BEING AN EXPLANATORY PREFIX. The caption is no part of the indictment.[3] It is made up from the record of the court, generally by the clerk or other proper officer of the court, and its office is to state the style of the court, the time and place of its meeting, the time and place where the indictment was found, and the jurors by whom it was found. These particulars it must set forth with reasonable certainty for the use, as will presently be seen, of a superior or appellate court to which it may be removed.[4] It must show that the venire facias was returned, and

1 **Captions** to indictments and informations in the various jurisdictions, state and federal, at common law and under statute, are given in Forms Nos. 1 to 7.

2 **Commencements** to indictments and informations in the various jurisdictions, state and federal, at common law and under statute, are given in Forms Nos. 8 to 78.

3 1 East P. C. 113; Fost. 2; Ch. C. L. 327; 1 Saund. 250d, n. l.; 1 Stark. C. P. 238. See: ALA.—Noles v. State, 24 Ala. 672. DEL.—State v. Smith, 2 Harr. 532. ILL.—Duncan v. People, 2 Ill. (1 Scam.) 456; George v. People, 167 Ill. 447, 47 N. E. 741. ME.—State v. Conley, 39 Me. 78. MO.—Kirk v. State, 6 Mo. 469; State v. Blakely, 83 Mo. 359. N. H.—State v. Gary, 36 N. H. 359. N. J.—State v. Price, 11 N. J. L. (6 Halst.) 203; Berrian v. State, 22 N. J. L. (2 Zab.) 9. N. Y.—People v. Jewett, 3 Wend. 319; People v. Bennett, 4 Abb. Pr. N. S. 89; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; Loomis v. People, 19 Hun 601. N. C.—State v. Brickell, 8 N. C. (1 Hawks) 354; State v. Haddock, 9 N. C. (2 Hawks) 261. TENN.—Mitchell v. State, 16 Tenn. (8 Yerg.) 514; Caldwell v. State, 62 Tenn. (3 Baxt.) 429. VT.—State v. Gilbert, 13 Vt. 647; State v. Thibeau, 30 Vt. 100. WIS.—State v. McCarty, 2 Pinn. 513, 54 Am. Dec. 150. ENG.—R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143. See other cases, infra, § 135.

"An error in designating the name of the crime in the commencement of the indictment is an irregularity only. The charging part of the indictment must be alone considered in determining whether the indictment charges a public offense."—State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096.

4 ALA.—Reeves v. State, 20 Ala. 33. ME.—State v. Conley, 39 Me. 78. TENN.—McClure v. State, 9 Tenn. (1 Yerg.) 206 (per White, J.). TEX.—English v. State, 4 Tex. 125. FED.—United States v. Thompson, 6 McL. 56, Fed. Cas. No. 16490.

from whence the jury came, or it will be fatal on demurrer.[5]

When the indictment is returned from an inferior court, in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the schedule, and from this instrument the caption is extracted.[6] When taken from the schedule it is entered upon the record, and prefixed to the indictment, of which, however, it forms no part, but is only the preamble which makes the whole more full and explicit.[7] When there has been a

5 State v. Hunter, 7 Tenn. (Peck) 166. See State v. Williams, 2 McC. (S. C.) 301; State v. Fields, 7 Tenn. (Peck) 140.

In England, the caption in general does not appear until the return to a writ of certiorari, or a writ of error; yet in cases of high treason the defendant is entitled to a copy of it in the first instance after the finding of the indictment, in order that he may be acquainted with the names of the jurors by whom it was presented.—1 East P. C. 113; Fost. 2; Ch. C. L. 327.

Forms no part of the indictment, and no ground for arresting judgment that the indictment does not show, in its caption, that it was taken in the state; for, it is said, while it stood on the records of the court below, it appeared to be an indictment of that court, and when sent to the Supreme Court, the caption of the record, of which it is a part, officially certified, renders it sufficiently certain.—State v. Brickell, 8 N. C. (1 Hawks) 354; 1 Saunders, 250d, n. 1.

If wholly omitted in the court below, it is said the indictment may nevertheless be sufficient, as the minute of the clerk upon the bill, at the time of the presentment, and the general records of the term, will supply any defect in such preface.—State v. Smith, 2 Harr. (Del.) 532; State v. Gilbert, 13 Vt. 647.

In North Carolina it was held that a caption to an indictment is only necessary where the court acts under a special commission.—State v. Wasden, N. C. Term, 163.

Giving only the initials of the first names of the grand jurors is no defect.—Stone v. State, 30 Ind. 115.

In Massachusetts practice, it seems, each indictment is framed with its own special caption, instead of leaving the caption to be made up, as is the usual and better course, from the records of the court, by the clerk, when the record is taken into another court. Yet even in Massachusetts, this "caption," if it is so to be called, is purely formal, and is amendable. See Com. v. Edwards, 70 Mass. (4 Gray) 1. See, also, State v. Conley, 39 Me. 78.

6 1 Saund. 309.

7 2 Hale, 165; Bac. Ab. Indictment, J.; Burn, J., Indictment, ix; Williams, J., Indictment, iv.

removal by certiorari, its principal object, as we have seen, is to show that the inferior court had jurisdiction, and, therefore, a certainty in that respect is particularly requisite. Care must be taken duly to set it forth, for if there be no caption, or one that is defective, the error, in England, may be taken advantage of on arrest.[8] But ordinarily its caption is not vitiated by mere surplusage.[9]

§ 134. SUBSTANTIAL ACCURACY ONLY REQUIRED. A formal statement in the indictment that it was found by the authority of the State is not necessary, if it appear, from the record, that the prosecution was in the name of the State.[1] The caption must set forth the court where the indictment was found, as a "General Session of the Peace," "the Court of Oyer and Terminer," etc., "for N. Y. County," etc., so that it may appear to have jur-

8 2 Sessions cases, 316; 1 Ch. C. L. 327. See State v. Wasden, 4 N. C. 596, N. C. Term 163; State v. Haddock, 9 N. C. (2 Hawks) 461.

9 Winn v. State, 5 Tex. App. 621.

1 FLA.—Ex parte Nightingale, 12 Fla. 272; Savage v. State, 18 Fla. 909. ILL.—Whitesides v. People, 1 Ill. (1 Breese) 21. IND.—Curtz v. State, 4 Ind. 385. LA.—State v. Russell, 2 La. Ann. 604. MISS.—Greeson v. State, 6 Miss. (5 How.) 33.

"In behalf of" a named state is an allegation that the prosecution is by the state, within the constitutional requirement.—Wrocklege v. State, 1 Iowa 167; Baurose v. State, 1 Iowa 374.

Indictment in name of state, concluding against its peace and dignity, is a prosecution in the name of the state.—Allen v. Com., 5 Ky. (2 Bibb) 210; State v. Moore, 8 Rob. (La.) 518; State v. Foster, 61 Mo. 549; Phelps v. People, 72 N. Y. 334; State v. Kerr, 3 N. D. 523, 58 N. W. 27; State v. Anthony, 1 McC. (S. C.) 285; State v. Delue, 1 Chad. (Wis.) 166, 2 Pinn. 204.

Omissions of the words "of Texas" held fatally defective.—Saine v. State, 14 Tex. App. 144.

"Grand jurors of the county of," naming it, of a given state, is not a prosecution by the state.—State v. Cutter, 83 Mo. 359.

Need not state presented by grand jury "in the name and by the authority of the state."—Holt v. State, 47 Ark. 196, 1 S. W. 61.

Prosecution by proper law officials meets constitutional requirement of Texas that all prosecutions shall be "in the name and by the authority of the republic of Texas."—Drummond v. Republic, 2 Tex. 156.

Record showing prosecution in the name of state and by its authority, is sufficient; indictment

isdiction.[2] Next to the statement of the court [3] follows the name of the place and county where it was holden, and which must always be inserted;[4] and though it may be enough, after naming a place, to refer to "the county aforesaid," yet, unless there be such express reference to the county in the margin, or it be repeated in the

need not so recite.—Savage v. State, 18 Fla. 909; Dickson v. State, 62 Ga. 583; State v. Thompson, 4 S. D. 95, 55 N. W. 725.

Board of pilot commissioners must prosecute violations of the pilotage act in the name of the state and not in the name of the pilot commissioners.—Ex parte Nightingale, 12 Fla. 272.

2 2 Hale 165; 2 Hawk., ch. 25, §§ 16, 17, 118, 119, 120; Burn's Justice, 29th ed. by Chitty & Bears, Indict. ix; State v. Zule, 10 N. J. L. (5 Halst.) 348; Dean v. State, 8 Tenn. (Mart. & Yerg.) 127.

3 **Caption must specify court** before which indictment is found. —State v. O'Neil, 24 Idaho 582, 135 Pac. 60; State v. Sutton, 5 N. C. 281.

"County court of Clay county," instead of "county court of Clay," does not vitiate an indictment.—Collins v. State, 3 Ala. App. 64, 58 So. 80.

"Grand jurors of United States," in a territorial court exercising a dual jurisdiction over offenses against the territory and offenses against the United States, is a proper designation on an indictment for a federal offense.—Billingsley v. United States, 101 C. C. A. 465, 178 Fed. 653.

"In the circuit court," in an indictment found by a grand jury impaneled in a federal district court, held to be a merely formal imperfection which would not necessarily prejudice the accused, nor have the effect to return the indictment to the circuit instead of the district court.—Ledbetter v. United States, 47 C. C. A. 191, 108 Fed. 52.

"In the district court of the United States for the district of Alaska," though inaccurate, is a mere clerical or technical error, and the indictment is not vitiated thereby.—Jackson v. United States, 42 C. C. A. 452, 102 Fed. 473.

"Liquor circuit court," for Laurel circuit court, does not vitiate the indictment.—Mitchell v. Com., 106 Ky. 602, 51 S. W. 17.

Name of court need not be stated in title to indictment.—State v. Daniel, 49 La. Ann. 954, 22 So. 415; State v. Craft, 164 Mo. 631, 65 S. W. 280.

"Territory of New Mexico, county of Socorro, in the district court," etc., is a sufficient designation of the court in which the indictment is found.—Territory v. Claypool, 11 N. M. 568, 71 Pac. 463.

4 Dyer 69, A.; Cro. Jac. 276; 2 Hale 166; 2 Hawk., ch. 25, § 128; Bacon Ab. Indictment, i.

Time and place, strictness of averments as to, is not essential in collateral or negative matters, or in indictments for misdemeanors. —State v. Stimson, 24 N. J. L. (9 C. E. Gr.) 478.

body of the caption, it will be insufficient.[5] This is necessary in order to show that the place is within the limits of the jurisdiction;[6] and, therefore, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike invalid, though amenable;[7] as, if it state it to be taken only at the town, without adding "the county aforesaid," the omission will vitiate.[8] But though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough, in Virginia, if the county be stated in the body of the indictment.[9]

5 2 Hale 180; 3 P. Wms. 439; 1 Saund. 308, n.; Cro. Eliz. 137, 606, 738.

6 R. v. Stanbury, L. & C. 128.

As to venue, see fully, infra, § 181.

7 Cro. Jac. 276; 2 Hale 166; 2 Hawk., ch. 25, § 128; Bac. Ab. Indictment, i.

8 Cro. Eliz. 137, 606, 738, 751; 2 Hale 166; 2 Hawk., ch. 25, § 128; Bac. Ab. Indictment, i; Williams, J., Indictment, iv; United States v. Wood, 2 Wheel. Cr. Cas. 325, 336, Brun. Col. Cas. 456, Fed. Cas. No. 16757.

9 Teft v. Com., 8 Leigh (Va.) 721.

In England an indictment purporting to be presented by the grand jurors "upon their oath and affirmation" need not state the reasons why any of the jurors affirmed instead of being sworn.—Mulcahy v. R., 3 L. R. H. L. Cas. 306; Com. v. Brady, 73 Mass. (7 Gray) 320.

Compare: State v. Harris, 7 N. J. L. (2 Halst.) 361.

In Maine, where the record commenced: "State of Maine, Cumberland, ss. At the Supreme Court begun and holden at Portland, within the county of Cumberland," it was held that this was sufficient to show that the court at which the indictment was found was holden for that county in the State of Maine.—State v. Conley, 39 Me. 78. Infra, § 181.

In Massachusetts, an indictment, with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," on a certain day, sufficiently shows that it was found at a court held in this Commonwealth.—Com. v. Fisher, 73 Mass. (7 Gray) 492. See, also, Jefferies v. Com., 94 Mass. (12 Allen) 145; Com. v. Mullen, 95 Mass. (13 Allen) 551.

In the same state, an indictment which purports by its caption to have been found at a court of common pleas for the county of Hampshire, and in the body of which "the jurors of said Commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire.—Com. v. Edwards, 70 Mass. (4 Gray) 1. Infra, § 176.

For North Carolina cases, see State v. Haddock, 9 N. C. (2

§ 135. CAPTION MAY BE AMENDED. Defects in the caption of the indictment, as not naming the judges, the jurors, and the county, which would be fatal if the indictment were removed into a superior court, may be sup-

Hawks) 461; State v. Lane, 26 N. C. (4 Ired.) 113.

Other rulings on captions. See: ALA.—Reeves v. State, 20 Ala. 33; IND.—Lovell v. State, 45 Ind. 550. MD.—Davis v. State, 39 Md. 355. MISS.—Woodsides v. State, 3 Miss. (2 How.) 655. OHIO—Davis v. State, 19 Ohio St. 270.

The Grand Jury.—It must appear on the face of the record, that the bill was found by at least twelve jurors, or it will be insufficient.—Cro. Eliz. 654; 2 Hale 167; 2 Hawk., ch. 25, §§ 16, 126; 1 Saund. 248, n. 1; 4 East 175, 176; Andr. 230; Bac. Ab. Indictment, i; Burn, J., Indictment, ix; Williams, J., Indictment, iv.

Where the statute requires more than twelve, the requisite number must be averred.—Fitzgerald v. State, 4 Wis. 395.

—"Good and lawful men" is sufficient designation, though they are usually described.—2 Hale 167; Cro. Eliz. 751; 1 Keb. 629; Cro. Jac. 635; State v. Jones, 9 N. J. L. (4 Halst.) 357, 17 Am. Dec. 483; State v. Price, 11 N. J. L. (6 Halst.) 203.

But this is not in England absolutely essential, especially when the indictment is found in a superior court, because all men shall be so regarded until the contrary appear.—2 Keb. 366; 2 Hawk., ch. 25, §§ 16, 126; Bac. Ab. Indictment, i; Burn, J., Indictment, ix; Williams, J., Indictment, iv; Stark. C. P. 236-7; R. v. Butterfield, 2 Man. & Ry. 522.

For early rulings in this country, see Jerry v. State, 1 Blackf. (Ind.) 395; Beauchamp v. State, 6 Blackf. (Ind.) 299; State v. Glasgow, 1 N. C. (Conf.) 38, 2 Am. Dec. 629; State v. Yancy, 1 Tread. (S. C.) 237; Bonds v. State, 8 Tenn. (Mart. & Yerg.) 143, 17 Am. Dec. 795.

—The caption then must state that they are "of the county aforesaid," or other vill or precinct for which the court had jurisdiction to inquire; and if these words are omitted the whole will be vicious. —Cro. Eliz. 667; 2 Keb. 160; 2 Hale 167; 2 Hawk., ch. 25, §§ 16, 126; Bac. Ab. Indictment, i; Burn, J., Indictment, ix; Williams, J., Indictment, iv; Tipton v. State, 7 Tenn. (Peck) 308; Cornwell v. State, 8 Tenn. (Mart. & Yerg.) 147.

The caption, by implication, at least, must show that the grand jury were of the county where the indictment was taken.—Tipton v. State, 7 Tenn. (Peck) 308; Woodsides v. State, 3 Miss. (2 How.) 655.

—Names of grand jurors, under present practice, need not be given in the indictment.—R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143; R. v. Aylett, 6 Ad. & El. 247, 33 Eng. C. L. 148.

Contra: In Georgia. See Form No. 21.

If the names are given, a variance as to one of them is not fatal. —State v. Norton, 23 N. J. L. (3 Zab.) 33; State v. Dayton, 23 N. J. L. (3 Zab.) 49.

plied in the court in which it is taken, by reference to other records there,[1] since when the indictment remains

Where it appeared by the record that a foreman was appointed, and the indictment was returned, signed by him, and the caption stated that the grand jury returned the bills into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury.—Greeson v. State, 6 Miss. (5 How.) 33.

—"Oath" or "oaths," as to whether averment of is material, see Com. v. Sholes, 93 Mass. (11 Allen) 554; State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270; infra, § 326.

If the caption omit to state the grand jury were sworn, it will be presumed they were sworn; at least the recital in the record that "the grand jury were elected, empanelled, sworn, and charged," will be sufficient.—McClure v. State, 9 Tenn. (1 Yerg.) 206, per Catron, J.

In New York it was ruled that an indictment taken at the sessions must, in the caption, state that the grand jury were, then and there, sworn and charged; the omission of the words "then and there" being fatal on motion in arrest of judgment.—People v. Guernsey, 2 John. Cas. (N. Y.) 265; but the contrary was held in Mississippi, where it was said that, if it appear from the record that the grand jurors were sworn, it will be presumed that they were then and there sworn.—Woodsides v. State, 3 Miss. (2 How.) 655.

—When an indictment purports to be on affirmation of some of the grand jurors, it is said, in New Jersey, that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or it will be fatally defective.—State v. Harris, 8 N. J. L. (3 Halst.) 361.

But such is not the usual practice; the indictment going no further, in most states, than to aver the fact of its being made on the oaths and affirmations of the grand jurors.—Com. v. Fisher, 73 Mass. (7 Gray) 492.

[1] ALA.—State v. Murphy, 9 Port. 487; Reeves v. State, 20 Ala. 33. ARK.—Cornelius v. State, 7 Eng. 782. MASS.—Com. v. Mullen, 95 Mass. (13 Allen) 551; Com. v. Hines, 101 Mass. 33. MO.—Kirk v. State, 6 Mo. 469; State v. Freeman, 21 Mo. 481. N. J.—State v. Useful Man. So., 42 N. J. L. (13 Vr.) 504. N. Y.—Dawson v. People, 25 N. Y. 399. PA.—Pennsylvania v. Bell, Add. 156, 173, 1 Am. Dec. 298; Brown v. Com., 78 Pa. St. 122; Com. v. Bechtell, 1 Am. L. J. 414. OHIO—Mackey v. State, 3 Ohio St. 362. S. C.—State v. Creight, 1 Brev. 169, 2 Am. Dec. 656. VT.—State v. Brady, 14 Vt. 353. WIS.—Allen v. State, 5 Wis. 329. FED.—United States v. Thompson, 6 McL. 152, 156, Fed. Cas. No. 17154. ENG.—Faulkner's Case, 1 Saund. 249, 85 Eng. Repr. 292; Broome v. R., 12 Ad. & El. N. S. (12 Q. B.) 834, 64 Eng. C. L. 834; R. v. Davis, 1 Car. & P. 470, 12 Eng. C. L. 274.

As to particularity required in Indiana, see State v. Connor, 5 Blackf. (Ind.) 325.

As to Massachusetts practice, see Com. v. Gee, 60 Mass. (6

in the court of finding a caption is unnecessary.[2] And it is also held that the caption may be amended in the Supreme Court, on proper evidence of the facts; or the certiorari may be returned to the court below, and the amendment made there.[3]

§ 136. COMMENCEMENT MUST AVER OFFICE AND PLACE OF GRAND JURORS, AND ALSO THEIR OATH. It is ordinarily sufficient for the commencement to state that the grand jurors of the State or Commonwealth, inquiring for the particular county or city, as the case may be, on their oaths or affirmations[1] respectively,[2] find the special facts making up the charge.[3] The authority of the sovereign is in this way vouched.[4]

§ 137. EACH COUNT MUST CONTAIN AVERMENT OF OATH. It must appear in the commencement of each count of an indictment that it was found by the jurors of the particular jurisdiction, on their oaths or affirmations,[1] and a want of such allegation in a subsequent count will not be aided by such allegations in a former count, where the

Cush.) 174; Com. v. Stone, 69 Mass. (3 Gray) 453; Com. v. Cullon, 77 Mass. (11 Gray) 1.

As to Wisconsin, see Fitzgerald v. State, 4 Wis. 395, and see cases cited supra, § 133.

2 Wagner v. People, 4 Abb. App. Dec. (N. Y.) 509.

3 State v. Jones, 9 N. J. L. (4 Halst.) 357, 17 Am. Dec. 483; State v. Norton, 23 N. J. L. (3 Zab.) 33; Vandyke v. Dare, 1 Bail. (S. C.) 65; State v. Williams, 2 McC. (S. C.) 301.

1 **As to oaths of grand jurors**, see, ante, § 134, footnote 9; post, § 137.

2 **This is essential.**—Vanvickle v. State, 22 Tex. App. 625, 2 S. W. 642.

3 **The commencement of an indictment** in these words, "The grand jurors for the people of the state of Vermont, upon their oath, present," etc., is sufficient, on motion, in arrest of judgment.—State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135.

As to when "oaths" and not "oath" is used.—Com. v. Sholes, 95 Mass. (13 Allen) 554; State v. Dayton, 22 N. J. L. (2 Zabr.) 49.

In Texas the statutory form of commencement "in the name and by the authority of the state of Texas" is essential, and can not be varied.—Saine v. State, 14 Tex. App. 144.

4 Savage v. State, 18 Fla. 909.

1 2 Hale 167; 2 Hawk., ch. 25, § 126; Burn, J., Indictment, ix.

word "aforesaid," or other words of reference, are not introduced.[2] It is not necessary that the commencement should use the term "grand" before jurors, when the rest of the record shows that it was "grand jurors" that was meant.[3]

The indorsement upon an indictment is no part of it.[4]

IV. Name and Addition of Defendant and Name of Prosecutor and Third Parties.

1. As To Defendant.

§ 138. NAME OF DEFENDANT SHOULD BE SPECIFICALLY GIVEN. The indictment must be certain as to the defendant's name.[1] The name should be repeated to every dis-

ALA.—Morgan v. State, 19 Ala. 556. IND.—Clark v. State, 1 Ind. 253. ME.—State v. Conley, 39 Me. 78. MASS.—Com. v. Fisher, 73 Mass. (7 Gray) 492. MISS.—Byrd v. State, 2 Miss. (1 How.) 163; Abram v. State, 25 Miss. 589. OHIO—Young v. State, 6 Ohio 435. S. C.—State v. Williams, 2 McC. 301. VT.—State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135. VA.—Burgess v. Com., 2 Va. Cas. 483.

As to requiring this should be shown by caption, see Potsdamer v. State, 17 Fla. 895.

As to inserting "good and lawful men," see Weinzorpflin v. State, 7 Blackf. (Ind.) 186.

Usual form is, "The grand jurors of the state (or commonwealth) of A, inquiring for the city (or town) of B, upon their oaths and affirmations respectively do present." To this, as a title, is prefixed the statutory name of the court. See, for forms in full, Forms Nos. 1-78 for particular jurisdiction.

"Oath" may supply the place of "oaths."—State v. Dayton, 23 N. J. L. (3 Zab.) 49; 53 Am. Dec. 270; Jerry v. State, 1 Blackf. (Ind.) 395.

Commencement may be amended. See Com. v. Colton, 77 Mass. (11 Gray) 1; State v. Mathis, 21 Ind. 277; State v. England, 19 Mo. 481.

Distinction between "caption" and "commencement" is not maintained by some of our courts, both, by such courts, being called "caption." But as both are purely formal, and are open to amendment by the record, they should be so amended when faulty.

2 R. v. Waverton, 17 Q. B. 562, 2 Den. C. C. 347, 79 Eng. C. L. 561; State v. McAllister, 26 Me. 374.

Otherwise when the second and subsequent counts refer to the first count by the word "aforesaid."—State v. Dufour, 63 Ind. 567; Chase v. State, 50 Wis. 510, 7 N. W. 376.

3 State v. Pearce, 14 Fla. 153; Com. v. Edwards, 70 Mass. (4 Gray) 1; United States v. Williams, 1 Cliff. 5, Fed. Cas. No. 16707.

4 Collins v. People, 39 Ill. 233.

1 Bac. Abr. Misn. B.; 2 Hale

tinct allegation; but it will suffice to mention it once as the nominative case in one continuing sentence.

When once given in full, the name need only be repeated by the Christian title as "the said John" or "James," as the case may be.[2] But each count must describe the defendant by his full name.[3]

§ 139. Omission of surname is fatal. If the surname of the defendant be omitted in the presenting portion of an indictment, the defect is fatal, though the full name be mentioned in subsequent allegations referring to the name as their antecedent.[1]

§ 140. Mistake as to either surname or Christian name may be met in abatement. A plea in abatement, in the language of Mr. Chitty, has always been allowed when the Christian name of the defendant is mistaken,[1] but it seems formerly to have been supposed that an error in the surname was not thus pleadable.[2] But it is now the settled law that a mistake in the latter is equally fatal with one in the former.[3] A plea in abatement is the only way to meet the misnomer of the defendant; and this plea is too late after the general issue.[4]

175; Chitty's C. L. 167; Enwright v. State, 58 Ind. 567. See 22 Cent. Law J., 220.

Caption need not contain name of person indicted.—State v. Parks, 61 N. J. L. 468, 39 Atl. 1023.

2 State v. Pike, 65 Me. 111.

3 R. v. Waters, 1 Den. C. C. 356; Com. v. Sullivan, 72 Mass. (6 Gray) 478.

Indictment bad against "Edward Toney Joseph Scott," laborers, intended for Edward Toney and Joseph Scott.—State v. Toney, 13 Tex. 74.

1 State v. Hand, 1 Eng. (Ark.) 165.

1 2 Hale 176, 237, 238; 2 Hawk., ch. 25, § 68; Bac. Ab. Ind. G. 2, Misn. B.; Burn, J., Indict.; Gilb. C. P. 217; Washington v. State, 68 Ala. 85.

2 2 Hale 176; 2 Hawk., ch. 25, § 69; Burn, J., Indict.; Williams, J., Misn. Bac. Ab. Misn. B.; Com. v. Demain, Brightly (Pa.) 441.

3 10 East 83; Kel. 11, 12.

4 ALA.—Miller v. State, 54 Ala. 155. IOWA—State v. White, 32 Iowa 17. ME.—State v. Bishop, 15 Me. 122; State v. Nelson, 29 Me. 329. MASS.—Smith v. Bowker, 1 Mass. 76; Com. v. Lewis, 42 Mass. (1 Met.) 151; Com. v. Fredericks, 119 Mass. 199. R. I.—State v. Drury, 13 R. I. 540. TEX.—Foster v. State, 1 Tex. App. 531. VA.—Com. v. Cherry, 2 Va. Cas. 20.

When the issue is tried on plea in abatement, if the sound of the name is not affected by the misspellings, the error will not be material.[5] If two names are, in original derivation, the same, and are taken promiscuously in common use though they differ in sound, yet there is no variance.[6]

A blank in either Christian name or surname is ground for a motion to quash, or plea in abatement.

§ 141. SURNAME MAY BE LAID AS AN ALIAS. The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an alias dictus,[1] thus, "Richard Wilson, otherwise called Richard Layer." Proof of either will be enough.[2]

§ 142. INHABITANTS OF PARISH AND CORPORATION[1] MAY BE INDICTED IN CORPORATE NAME FOR DISOBEDIENCE. The inhabitants of a parish, in England, may be indicted for not repairing a highway, or the inhabitants of a county, for not repairing a bridge, without naming any of them.[2] And in Pennsylvania it was determined, that, where an act of assembly directed "the president, managers, and

5 10 East 84; 16 East 110; 2 Hawk., ch. 27, § 81. Infra, § 161; Whart. Crim. Ev., §§ 94 et seq.

As to plea, see, infra, chapter on "Pleas," division IV.

6 2 Rol. Ab. 135; Bac. Ab. Misn., where the instances of this principle are stated at large.

1 Bro. Misn. 37.

2 Evans v. State, 62 Ala. 6; State v. Graham, 15 Rich. (S. C.) 310.

It was once doubted whether there could be an alias of the Christian name.—1 Ld. Raym. 562; Willes, 554; Burn, J., Indict.; 3 East 111.

Mr. Chitty well argues this doctrine is not well founded; for, admitting that a person can not have two Christian names at the same time, yet he may be called by two such names, which is sufficient to support a declaration or indictment, baptism being immaterial.—R. T. H. 26; 6 Mod. 116; 1 Camp. 479.

Lord Ellenborough said that for all he knew, on a demurrer, "Jonathan, otherwise John," might be all one Christian name.—Scott v. Soans, 3 East 111.

1 As to form for indictment of corporation, see Form No. 88.

2 2 Roll. Abr. 79; Archbold's C. P. 25.

company" of a certain turnpike road to remove a gate on the road, an indictment would not lie against the president and managers, *individually,* for not removing the gate.[3] In Maine, however, it is said, that where an offense is committed by virtue of corporate authority, the individuals concerned in its commission, in their personal capacity, and not as a corporation, must be indicted;[4] and in Virginia it has been ruled, still more broadly, that a corporation can not be impleaded criminaliter by its artificial name at common law.[5] But for all disobedience to statutes and derelictions of duty, the better opinion is that a corporation aggregate may be indicted by its corporate name; which name must, as a rule, be correctly alleged as it existed at the time of the offense.[6]

§ 143. MIDDLE NAMES TO BE GIVEN WHEN ESSENTIAL. In several jurisdictions it has been determined that the law does not recognize more than one Christian name, and, therefore, when the middle names of the defendant are omitted, the omission is right.[1] And the same view is taken in Ohio and Tennessee, with the qualification that if a middle name is nevertheless set out, it must be

3 Com. v. Demuth, 12 Serg. & R. (Pa.) 389.

4 State v. Great Works, 20 Me. 41, 37 Am. Dec. 38.

5 Com. v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362. See Kerr's Whart. Crim. Law, §§ 116-122.

6 MASS.—Com. v. Phillipsburg, 10 Mass. 78; Com. v. Dedham, 16 Mass. 142. N. Y.—McGarry v. People, 45 N. Y. 153. PA.—Com. v. Demuth, 12 Serg. & R. 389. VT.—State v. Vermont, C. R., 28 Vt. 583. ENG.—R. v. Birmingham & Gloucester R. Co., 3 Ad. & El. Q. B. 223, 43 Eng. C. L. 708; Firkin v. Edwards, 9 Car. & P. 478, 38 Eng. C. L. 283; R. v. Mayor, etc., City of Manchester, 7 El. & Bl. 453, 90 Eng. C. L. 453; R. v. Great North. of England R. Co., 9 Ad. & El. N. S. (9 Q. B.) 315, 58 Eng. C. L. 314.

See, also, cases cited in Kerr's Whart. Crim. Law, §§ 116-122.

1 ALA.—Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169; Cleveland v. Pollard, 37 Ala. 556. ARK.—State v. Smith, 7 Eng. 622. IND.—West v. State, 48 Ind. 483; Cohen v. State, 52 Ind. 347, 21 Am. Rep. 179. IOWA—State v. Williams, 20 Iowa 98. MO.—State v. Martin, 10 Mo. 391. N. Y.—Roozevelt v. Gardiner, 2 Cow. 463; People v. Cook, 14 Barb. 259. R. I.—

proved as laid.[2] It was held a misnomer, however, in Massachusetts, when T. H. P. was indicted by the name of T. P.[3] The omission of the first name, giving only the middle, is fatal, unless the party is only known by the middle name.[4]

The better view is that when a party is known by a combination of names, by these he should be described; though it is otherwise when he is only known by a single name.[5]

§ 144. INITIALS SUFFICIENT WHEN USED BY PARTY HIMSELF. Where names are ordinarily written with an abbreviation, this will be sufficient in an indictment.[1] And where a man is in the habit of using initials for his Christian name, and he is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground.[2]

State v. Funy, 13 R. I. 623. TEX.—State v. Manning, 14 Tex. 402. ENG.—R. v. Newman, 1 Ld. Raym. 562, 91 Eng. Repr. 1275.

Insertion of middle letter in indictment immaterial. — Borroughs v. State, 17 Fla. 643.

Middle name "Ann" instead of "Jane" in indictment held to be immaterial.—Pace v. State, 69 Ala. 231; Brooks v. State, 83 Ala. 79, 3 So. 720 (like holding as to "Rooks" and "Rux").

2 Price v. State, 19 Ohio 423; State v. Hughes, 31 Tenn. (1 Swan.) 261.

Contra: People v. Lockwood, 6 Cal. 205; Miller v. People, 39 Ill. 457.

3 Com. v. Perkins, 18 Mass. (1 Pick.) 388. See to same effect, State v. Homer, 40 Me. 438; Com. v. Hall, 20 Mass. (3 Pick.) 362.

4 State v. Martin, 10 Mo. 391; State v. Hughes, 31 Tenn. (1 Swan.) 266; Hardin v. State, 26 Tex. 113.

5 Whart. Crim. Ev., § 100. See Pace v. State, 69 Ala. 231, 44 Am. Rep. 513.

1 State v. Kean, 10 N. H. 347, 34 Am. Rep. 162.

See Com. v. Kelcher, 60 Ky. (3 Metc.) 484, where "Mrs. ——— Kelcher" was held sufficient on demurrer.

Contra: Gatty v. Field, 9 Ad. & El. N. S. (9 Q. B.) 431, 58 Eng. C. L. 428.

2 CONN.—Tweedy v. Jarvis, 27 Conn. 42. ILL.—Vandermark v. People, 47 Ill. 122. MO.—State v. Johnson, 93 Mo. 73, 317, 5 S. W. 699, 6 S. W. 77. N. C.—State v. Bell, 65 N. C. 313; State v. Johnson, 67 N. C. 58. S. C.—City Council v. King, 4 McC. 487; State v. Anderson, 3 Rich. 172. TEX.—State v. Black, 31 Tex. 560. ENG.—R. v. Dale, 17 Ad. & El. N. S. (17 Q. B.) 64, 79 Eng. C. L. 63.

Motion to quash will be refused when based simply on the adoption of initials for Christian names.[3]

§ 145. PARTY CAN NOT DISPUTE A NAME ACCEPTED BY HIM. If a man, by his own conduct, renders it doubtful what

See, also, cases cited, infra, §§ 157-159.

In Texas initials are sufficient under statute.—McAfee v. State, 14 Tex. App. 668.

"Lord Campbell, when an objection was made to a recognizance taken before Lee B. Townshend, Esq., and I. H. Harper, Esq., that only the initials of the Christian names of the justices were mentioned, remarked: 'I do not know that these are initials; I do not know that they (the justices) were not baptized with those names; and I must say that I can not acquiesce in the distinction that was made in Lomax v. Tandels, that a vowel may be a name, but a consonant can not. I allow that a vowel may be a Christian name, and why may not a consonant? Why might not the parents, for a reason good or bad, say that their child should be baptized by the name of B, C, D, F, or H? I am just informed, by a person of most c r e d i b l e authority, that within his own knowledge a person has been baptized by the name of T.' And in this opinion of the chief, Justices Patterson, Wightman, and Erle concurred, R. v. Dale, 15 Jur. 657, 5 E. L. & E. 360."—18 Alb. L. J. 127. See, also, Tweedy v. Jarvis, 27 Conn. 42.

In Kinnersley v. Knott, 7 C. B. 980, Mr. Sergeant Talfourd contended that a defendant called "John M. Knott" was not legally and properly designated, saying that the letter M, standing by itself, could not be pronounced and meant nothing, but that in this connection it meant something, and that that something ought to be stated, for the law forbade the use of initials in pleadings. The court, however, held that M was not a name. Maule, J., said that vowels might be names, and that in Sully's Memoirs a Monsieur D'O is spoken of; but that consonants could not be so alone, as they require in pronunciation the aid of vowels; and the chief justice said that the courts had decided that they would not assume that a consonant expresses a name, but that it stood for an initial only, and that the insertion of an initial instead of a name was a ground of demurrer. In this country, as we have seen, single consonants may be names.—18 Alb. L. J. 127. See State v. Brite, 73 N. C. 26; Mead v. State, 26 Ohio St. 505.

If record shows that the initial is not the full name, the variance may be fatal.—State v. Webster, 30 Ark. 166.

In Gerrish v. State, 53 Ala. 476, the defendant was indicted by the name of F. A. Gerrish, and he pleaded that his name was not F. A. Gerrish, but Frank Augustus Gerrish, and that he was generally known as Frank A. Gerrish, and that this was known to the grand jury that indicted him. The plea was held good.

[3] United States v. Winter, 13 Blatch. 276, Fed. Cas. No. 16743.

his real name is, he can not defend himself on the ground of misnomer, if he be indicted by a name commonly accepted by him.[1]

§ 146. UNKNOWN PARTY MAY BE APPROXIMATELY DESCRIBED. Where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison;[1] but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient.[2]

The practice is to indict the defendant by a specific name, such as John No-name, and if he pleads in abatement, to send in a new bill, inserting the real name which he then discloses, by which he is bound. This course is in some States prescribed by statute.[3]

A known party can not be indicted as unknown,[4] and if it appear that the grand jury knew the name, the indictment may be quashed.[5]

The Christian name may, if necessary, be averred to be unknown.[6]

The pleading as to unknown co-conspirators is elsewhere discussed.[7]

§ 147. AT COMMON LAW ADDITION IS NECESSARY. Stat. 1 Henry 5, c. 5, in force in most of the United States, specifies the following additions: "Estate or degree, or mys-

1 People v. Leong Quong, 60 Cal. 107; State v. Bell, 65 N. C. 313; Newton v. Maxwell, 2 Crompt. & Jer. 2, 15; Whart. Crim. Ev., § 95.

1 State v. Angell 29 N. C. (7 Ired.) 27.

2 R. v. ———, R. & R. 489.

3 See Geiger v. State, 5 Iowa 484, where, under such a statute, it was held necessary to give a fictitious name.

4 Infra, § 154; Whart. Crim. Ev., 9th ed., § 97; Geiger v. State, 5 Iowa 484.

As to Christian name, see Stone v. State, 30 Ind. 115; Wilcox v. State, 31 Tex. 586.

5 Jones v. State, 63 Ala. 27.

6 Bryant v. State, 36 Ala. 270; Kelley v. State, 25 Ark. 392; Smith v. Bayonne, 23 La. Ann. 78.

7 Kerr's Whart. Crim. Law, § 1660.

tery"; and also the addition of the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant."[1] The construction given to the statute in England has been, that the words "estate or degree" have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men.[2] The omission of the addition is at common law fatal,[3] but in most jurisdictions additions are no longer necessary.[4]

§ 148. WRONG ADDITION TO BE MET BY PLEA IN ABATEMENT. Though, when there is no addition, the correct course at common law is to quash, yet, when there is a misnomer, the only method of meeting the error is by plea in abatement.[1] The error, however, must be one of substance; hence a plea in abatement that James Baker is a husbandman, and not a laborer, being demurred to, was adjudged bad.[2]

1 As to Pennsylvania, see Roberts's Dig., 2d ed., 374.

2 2 Inst. 666. This statute is in force in Pennsylvania.—Com. v. France, 3 Brewster (Pa.) 148.

3 State v. Hughes, 2 Har. & McH. (Md.) 479; Com. v. Sims, 2 Va. Cas. 374.

As to Indiana, see State v. McDowell, 6 Blackf. (Ind.) 49.

4 Mystery means the defendant's trade or occupation; such as merchant, mercer, tailor, schoolmaster, husbandman, laborer, or the like.—2 Hawk., ch. 33, § 111.

Where a man has two trades, he may be named of either.—2 Inst. 658. But if a man who is a "gentleman" in England be a tradesman, he should be named by the addition of gentleman.—2 Inst. 669. In all other cases he may be indicted by his addition of degree or mystery, at the option of his prosecutor. See Mason v. Bushel, 8 Mod. 51, 52; Horspoole v. Harrison, 1 Str. 556, 93 Eng. Repr. 967; Smith v. Mason, 2 Str. 816, 93 Eng. Repr. 868, 2 Ld. Raym. 1541, 92 Eng. Repr. 499.

1 ALA.—Lynes v. State, 5 Port. 236, 30 Am. Dec. 557. IOWA—State v. White, 32 Iowa 17. ME.—State v. Nelson, 29 Me. 329; State v. Bishop, 15 Me. 122. MASS.—Smith v. Bowker, 1 Mass. 76; Com. v. Lewis, 42 Mass. (1 Met.) 151. PA.—Com. v. Demain, Brightly 441. VA.—Com. v. Cherry, 2 Va. Cas. 20.

2 Haught v. Com., 2 Va. Cas. 3. See, however, Com. v. Sims, 2 Va. Cas. 374.

In ordinary cases it has been held sufficient to give the addition of yeoman or laborer.—8 Mod. 51, 52; 1 Str. 556; 2 Str. 816; 2 Ld. Raym. 1541.

But laborer (R. v. Franklyn, 2 Ld. Raym. 1179), or yeoman (2

§ 149. DEFENDANT'S RESIDENCE MUST BE GIVEN. The defendant must be described as of the town or hamlet, or place and county, of which he was or is, or in which he is or was, conversant.[1] In most States, the forms in common use give the addition of place, as "late of the said county," or "of the county of ———." The place may be averred to be that of the commission of the crime.[2]

§ 150. "JUNIOR" MUST BE ALLEGED WHEN PARTY IS KNOWN AS SUCH. Where a father and son have the same name, and are both indicted, the English rule was to distinguish them by naming one as the elder, the other as the younger;[1] though such seems no longer requisite;[2] and the general rule in this country is that junior is no necessary part of the name,[3] though it has been held that when L. W. and L. W., Junior, being father and son, lived in the same place, and the indictment avers certain acts to be done by L. W., evidence is inadmissible to show that they were done by L. W., Junior, it being

Inst. 668), is not a good addition for a woman.

Servant is not a good addition in any case.—R. v. Checkets, 6 M. & S. 88.

As to tradesmen, etc., the addition of the mystery; to widows, the addition of widows; to single women, the addition of spinster or single woman; to married women, usually thus: "Jane, the wife of John Wilson, late of the parish of C, in the county of B, laborer," though "matron" is not fatal.—State v. Nelson, 29 Me. 329.

Any addition calculated to cast contempt or ridicule on the defendant is bad; and it has been held, in Maine, that the addition, "lottery vender," when the defendant was, in fact, a lottery broker, is bad on abatement.—State v. Bishop, 15 Me. 122.

Where addition descriptive.—Where, in an indictment against a woman, she is described as A. B., "wife of C. D.," these latter words are mere additions, or descriptio personae, and need not be proved on trial.—Com. v. Lewis, 42 Mass. (1 Met.) 151.

1 Arch. C. P. 27.

2 Com. v. Taylor, 113 Mass. 1.

1 1 Bulst. 183; 2 Hawk., ch. 25, § 70; Salk. 7.

2 Gevaghty v. State, 110 Ind. 103, 11 N. E. 1; R. v. Peace, 3 Barn. & Ald. 579, 5 Eng. C. L. 334; Hodgson's Case, 1 Lewin C. C. 236. But see R. v. Withers, 4 Cox C. C. 17.

3 CAL.—San Francisco v. Randall, 54 Cal. 408. CONN.—Coit v. Starkweather, 8 Conn. 289. ME.—State v. Grant, 22 Me. 171. MASS.—Com. v. Perkins, 18 Mass. (1 Pick.) 388; Com. v. East Boston

presumed L. W. in the indictment meant L. W., Senior.[4] In New York, in an early case, it was said that if a man be known by the addition of "junior" to his name, an indictment against him without that addition is not conclusive that he is the person indicted.[5] The question is one of usage. If a party is commonly known as "Junior" or as "2d," as such he must be indicted; otherwise not.[6]

2. Description of Parties Injured and Third Parties.

§ 151. NAME ONLY OF THIRD PERSON NEED BE GIVEN. The statute of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name;[1] and therefore no addition is in such case necessary, unless more than two persons are referred to whose names are similar.[2] It is enough to state a party injured, or any person except the defendant, whose name necessarily occurs in the bill, by the Christian and surname; as, for instance, "on John Slycer did make an assault," or, the "goods of John Nokes did steal." The name thus given must be the name by which the person is generally known,[3] including Christian as well as surname.[4]

Ferry Co., 95 Mass. (13 Allen) 589; Com. v. Parmenter, 101 Mass. 211. N. H.—State v. Weare, 38 N. H. 314. N. Y.—People v. Collins, 7 John. 549; People v. Cook, 14 Barb. 259. TEX.—McKay v. State, 8 Tex. 376. VT.—Allen v. Taylor, 26 Vt. 599.

4 State v. Vittum, 9 N. H. 519; R. v. Bailey, 7 Car. & P. 264, 32 Eng. C. L. 604.

Contra: R. v. Peace, 3 Barn. & Ald. 579, 5 Eng. C. L. 334.

In Com. v. Parmenter, 101 Mass. 211, it was held that "W. R., Jr.," might be indicted as "W. R.," the second of that name.

5 Jackson ex dem. Pell v. Provost, 2 Caines (N. Y.) 165.

6 Whart. Crim. Ev., § 100.

1 2 Leach 861; 2 Hale 182; Burn, J., Indictment; Bac. Ab. Indictment, G. 2; Com. v. Varney, 64 Mass. (10 Cush.) 402; R. v. Ogilvie, 2 Car. & P. 230, 12 Eng. C. L. 542; R. v. Graham, 2 Leach 547.

Compare: R. v. Deeley, 1 Mood. C. C. 303, 4 Car. & P. 578, 19 Eng. C. L. 858.

2 Ibid.

3 Walters v. People, 6 Park. Cr. Rep. (N. Y.) 16; State v. Haddock, 3 N. C. (2 Hayw.) 162; R. v. Berriman, 5 Car. & P. 601, 24 Eng. C. L. 729; R. v. Williams, 7 Car. & P. 298, 32 Eng. C. L. 623; R. v. Norton, Rus. & Ry. 510.

4 Morningstar v. State, 52 Ala.

§ 152. CORPORATE TITLE MUST BE SPECIAL. When the name of a corporation is given, the corporate title must be strictly pursued, unless specification is made unnecessary by local statute;[1] and there should be an allegation that it is incorporated, where such is the fact.[2] Where the company is not incorporated, the allegation should be that the intent,—as in a burning to injure the

405; State v. Taylor, 15 Kan. 420; Collins v. State, 43 Tex. 577.

Addition is stated descriptively, a variance may be fatal.—R. v. Deeley, 1 Mood. C. C. 303, 4 Car. & P. 579, 19 Eng. C. L. 658; Whart. Crim. Ev., § 100.

1 Supra, § 143; Kerr's Whart. Crim. Law, § 1180. ILL.—Wallace v. People, 63 Ill. 481. IND.—Smith v. State, 28 Ind. 321. N. J.—Fisher v. State, 40 N. J. L. (11 Vr.) 169. N. Y.—McGary v. People, 45 N. Y. 153. TEX.—White v. State, 24 Tex. App. 233, 5 Am. St. Rep. 879, 5 S. W. 857. VT.—State v. Vermont R. R., 28 Vt. 583. VA.—Lithgow v. State, 2 Va. Cas. 296. ENG.—R. v. Birmingham & Gloucester R. Co., 3 Ad. & El. N. S. (3 Q. B.) 223, 43 Eng. C. L. 708.

Whether at common law, in an indictment for stealing the goods of a corporation, it is requisite to aver that the corporation was incorporated, has been much disputed. That it is necessary is ruled in: CAL.—People v. Schwartz, 32 Cal. 160. ILL.—Wallace v. People, 63 Ill. 451. N. J.—Fisher v. State, 40 N. J. L. (11 Vr.) 169. N. Y.—Cohen v. People, 5 Park. Cr. Rep. 330. VT.—State v. Mead, 27 Vt. 722.

That it is unnecessary, unless made so by statute, is ruled in: IND.—Johnson v. State, 65 Ind. 204. MASS.—Com. v. Phillipburg, 10 Mass. 70; Com. v. Dedham, 16 Mass. 141. N. J.—Fisher v. State, 40 N. J. L. (11 Vr.) 169. N. Y.—People v. Jackson, 8 Barb. 637; People v. McCloskey, 5 Park. Cr. Rep. 57, 334. PA.—McLaughlin v. Com., 4 Rawle 464. ENG.—R. v. Patrick, 1 Leach 253.

See, also, Kerr's Whart. Crim. Law, § 921.

The question depends upon whether the court takes judicial notice of the charter.—Whart. on Ev., §§ 292-3.

2 CAL.—People v. Schwartz, 32 Cal. 160. ILL.—Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333. KAN.—State v. Suppe, 60 Kan. 569, 57 Pac. 106. OHIO—Burke v. State, 34 Ohio St. 81. TEX.—White v. State, 24 Tex. App. 233, 5 Am. St. Rep. 879, 5 S. W. 857.

See, however, Emmonds v. State, 87 Ala. 14, 6 So. 54; McCowan v. State, 58 Ark. 17, 22 S. W. 955; People v. Bogart, 36 Cal. 248; People v. Henry, 77 Cal. 445, 19 Pac. 830; People v. Goggins, 80 Cal. 229, 22 Pac. 206; People v. Mead, 200 N. Y. 16, 140 Am. St. Rep. 616, 92 N. E. 1051.

"Said company being legally established," used in indictment, is not equivalent to an allegation that it is incorporated.—People v. Schwartz, 32 Cal. 160.

insurer; or the theft of goods, and the like,—was to injure the persons composing the company.[3]

§ 153. THIRD PERSONS MAY BE DESCRIBED AS "UNKNOWN." Where a third person can not be described by name, it is enough to charge him as a "certain person to the jurors aforesaid unknown,"[1] which, as will presently be seen, is correct, if the party was at the time of the indictment unknown to the grand jury, though he became known afterwards.[2] A deceased person may thus be described as "unknown," when the grand jury have no knowledge of his name;[3] and it is to be noted that the same is also true as to the owner of stolen property,[4] or

3 Wallace v. People, 63 Ill. 451; Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333.

1 2 Hawk., ch. 25, § 71; 2 East P. C. 651, 781; Cro. C. C. 36; Plowd. 85b; Dyer 97, 286; 2 Hale 181. ILL.—Willis v. People, 2 Ill. (1 Scam.) 399. IND.—State v. Irvin, 5 Blackf. 343; Brooster v. State, 15 Ind. 190. IOWA—State v. McConkey, 20 Iowa 574. MASS.—Com. v. Thompson, 56 Mass. (2 Cush.) 551; Com. v. Hill, 65 Mass. (11 Cush.) 137; Com. v. Stoddard, 91 Mass. (9 Allen) 280; Com. v. Sherman, 95 Mass. (13 Allen) 248. MO.—State v. Bryant, 14 Mo. 340. N. Y.—Goodrich v. People, 3 Park. Cr. Rep. 622. TEX.—Mackey v. State, 20 Tex. App. 603. VT.—State v. Higgins, 53 Vt. 191.

A Christian name may be averred to be unknown.—Bryant v. State, 36 Ala. 270; Smith v. Bayonne, 23 La. Ann. 68.

2 Stra. 186, 497; Com. v. Hendrie, 68 Mass. (2 Gray) 503; Com. v. Intoxicating Liquors, 116 Mass. 21.

As to vendee in liquor sales, see Kerr's Whart. Crim. Law, § 1806.

3 Reed v. State, 16 Ark. 499; State v. Haddock, 2 Hayw. (N. C.) 348; R. v. Campbell, 1 Car. & K. 82, 47 Eng. C. L. 80.

"Smutty my Darling," it was held in Wade v. State, 23 Tex. App. 308, 4 S. W. 896, as the given name of the deceased, though peculiar, was not bad.

4 2 East P. C. 651, 781; 1 Ch. C. L. 212; 1 Hale 181; 2 Barn. & Ald. 580; Com. v. Morse, 14 Mass. 217; Com. v. Manley, 29 Mass. (12 Pick.) 173; Kerr's Whart. Crim. Law, § 1188.

"To support the description of 'unknown,'" remarks Mr. Sergeant Talfourd, "it must appear that the name could not well have been supposed to have been known to the grand jury."—R. v. Stroud, 1 Car. & K. 187, 47 Eng. C. L. 186.

A bastard is sufficiently identified by showing the name of its parent, thus: "A certain illegitimate male child then lately born of the body of A. B. (the mother)."—R. v. Hogg, 2 M. & Rob. 380. See R. v. Hicks, 2 Ibid. 302, where an indictment for child-murder was held bad for not stating the

name of the child, or accounting for its omission. A bastard must not be described by his mother's name till he has acquired it by reputation.—R. v. Clark, R. & R. 358. Contra: Wakefield v. Mackey, 1 Phill. R. 134.

A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder.—R. v. Evans, 8 Car. & P. 765, 34 Eng. C. L. 1009.

Bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment styling it "Eliza Waters," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of Waters by reputation.—R. v. Waters, 1 Mood. C. C. 457, 2 Car. & K. 864, 61 Eng. C. L. 862.

No baptismal register, or copy of it, was produced at either trial. Semb.: "Eliza" would have sufficed. See R. v. Stroud, 1 Car. & K. 187, 47 Eng. C. L. 186, and cases collected; Williams v. Bryant, 5 M. & W. 447.

In the previous case of R. v. Clark, R. & R. 358, an indictment stated the murder of "George Lakeman Clark, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened George Lakeman, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of Clark. The court held that the child was incorrectly described as Clark, and as nothing but the name identified him in it, the conviction was held bad. See, also, R. v. Sheen, 2 Car. & P. 634, 12 Eng. C. L. 776.

However, in R. v. Bliss, 8 Car. & P. 773, 34 Eng. C. L. 1014, an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain infant male child of tender years, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, etc., did make an assault," etc., was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." It is, however, sufficient to describe the child "as a certain male child, etc., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B." See 2 C. & P. 635, n.; R. v. Willis, 1 Car. & K. 722, 47 Eng. C. L. 720; see, also, R. v. Sheen, 2 Car. & P. 634, 12 Eng. C. L. 776; Dickins, Q. S., 6th ed., 213. Junior and Senior.

The law as to defendants on this point has been already stated, § 108. In England, it is said that where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed. —Singleton v. Johnson, 9 M. & W. 67. But this was held immaterial when it is sufficiently proved who Elizabeth Edwards, the party de-

an assaulted person.[5] Unless there be such an averment, an indictment in which the injured party is not individuated can not be sustained.[6]

§ 154. —— BUT THIS ALLEGATION MAY BE TRAVERSED. But if the third party's name be known to the grand jury, or could have been known by inquiry of witnesses at hand, the allegation will be improper, and the defendant must be acquitted on that indictment, though he may be afterwards tried upon a new one, in which the mistake is corrected.[1] Discovery of the name subsequently to the finding of the, however, is no ground for acquittal,[2] or arrest of judgment.[3] But the allegation that co-defendants are "unknown" is material, and may be trav-

scribed assaulted, was, viz., the daughter of another Elizabeth Edwards.—R. v. Peace, 3 Barn. & Ald. 579, 5 Eng. C. L. 334.

Indicted for the murder of bastard child, whose name was to the jurors unknown, of mother, where it appeared that the child had not been baptized, but that the mother had said she would like to have it called Mary Ann, and little Mary, the indictment was held good.—R. v. Smith, 1 Mood. C. C. 402, 6 Car. & P. 151, 25 Eng. C. L. 368.

"A certain Wyandott Indian, whose name is unknown to the grand jury," in indictment for murder, is valid, and sufficiently descriptive of the deceased, without an allegation that the words "Wyandott Indian" mean a human being.—Reed v. State, 16 Ark. 499.

5 Grogan v. State, 63 Miss. 147.

6 Parker v. State, 9 Tex. App. 351; Rutherford v. State, 13 Tex. App. 92.

1 2 East P. C. 561, 781; 3 Camp. 265, note; 1 Hale 512; 2 Hawk., ch. 25, § 71; 2 Leach 578; Whart. Cr. Ev., § 97. CONN.—State v. Wilson, 30 Conn. 500. NEB.—Guthrie v. State, 16 Neb. 601, 21 N. W. 455. N. Y.—White v. State, 35 N. Y. 465. OHIO—Buck v. State, 1 Ohio St. 61. TEX.—Jorasco v. State, 6 Tex. App. 283; Williamson v. State, 13 Tex. App. 514. ENG.—R. v. Robinson, 1 Holt N. P. 595, 3 Eng. C. L. 233; R. v. Stroud, 2 Mood. 270.

As to unknown conspirators, see Kerr's Whart. Crim. Law, §§ 1660, 1806.

Proof of a "person unknown" will not sustain an averment of "persons unknown." See Moore v. State, 65 Ind. 213.

2 Whart. Cr. Ev., § 97. ALA.—Cheek v. State, 38 Ala. 227. IND.—Zellers v. State, 7 Ind. 659. MASS.—Com. v. Hill, 65 Mass. (11 Cush.) 137; Com. v. Hendrie, 68 Mass. (2 Gray) 503. MO.—State v. Bryant, 14 Mo. 340. ENG.—R. v. Campbell, 1 Car. & K. 82, 47 Eng. C. L. 80; R. v. Smith, 1 Mood. C. C. 402.

3 People v. White, 55 Barb. (N. Y.) 606; People v. White, 32 N. Y. 465; Whart. Crim. Ev. § 97.

ersed under the plea of not guilty.[4] Thus, an indictment will be bad against an accessory, stating the principal to be unknown to the grand jury, contrary to the truth, and the judge will direct an acquittal.[5]

§ 155. —— THE TEST IS WHETHER THE NAME WAS UNKNOWN TO THE GRAND JURY. The test is, had the grand jury notice, actual or constructive, of the name; for if so, the name must be averred.[1] But it is not enough to defeat the bill that the same grand jury found another bill specifying the "person unknown" as "J. L.,"[2] and the burden is on the defendant to prove knowledge at the time by the grand jury.[3]

It is the approved practice, in cases of doubtful ownership, to lay the ownership in one count in persons unknown, and in other counts in several persons tentatively.

§ 156. IMMATERIAL MISNOMER MAY BE REJECTED AS SURPLUSAGE. If the allegation in which the misnomer appears is immaterial, it may be rejected as surplusage.[1]

§ 157. SUFFICIENT IF DESCRIPTION BE SUBSTANTIALLY CORRECT. A mere statement of the Christian name, without any addition to ascertain the precise individual, is bad, because uncertain.[1] But where the pleader undertakes to

4 Barkman v. State, 13 Ark. (8 Eng.) 703; Cameron v. State, 13 Ark. (8 Eng.) 712; Reed v. State, 16 Ark. 499.

See Whart. Crim. Ev., § 97; Kerr's Whart. Crim. Law, § 1187.

5 Camp. 264, 265; 2 East P. C. 781.

1 IND.—Blodgett v. State, 3 Ind. 403. MASS.—Com. v. Sherman, 95 Mass. (13 Allen) 249; Com. v. Glover, 111 Mass. 401. TEX.—Atkinson v. State, 19 Tex. App. 462. ENG.—R. v. Stroud, 1 Car. & K. 187, 47 Eng. C. L. 186; R. v. Robinson, Holt N. P. 595, 3 Eng. C. L. 233.

2 R. v. Bush, R. & R. 372. See 1 Den. C. C. 361; Com. v. Sherman, 95 Mass. (13 Allen) 250.

3 Whart. Crim. Ev., § 97; Com. v. Hill, 65 Mass. (11 Cush.) 137; Com. v. Gallagher, 126 Mass. 54.

As to liquor cases, see Kerr's Whart. Crim. Law, §§ 1805, 1806.

1 State v. Farrow, 48 Ga. 30; Com. v. Hunt, 21 Mass. (4 Pick.) 252; United States v. Howard, 3 Sumn. C. C. 12, Fed. Cas. No. 15403; Whart. Crim. Ev., § 138. See, infra, § 200.

1 2 Hawk., ch. 25, §§ 71, 72; Bac. Ab. Indictment, G. 2. But see Starkie 171, 172; 6 St. Tr.

set out the names of a firm, a variance in the proof of these names is fatal.[2]

§ 158. VARIANCE IN THIRD PARTY'S NAME IS FATAL. A variance or an omission in the name of the person aggrieved is much more serious than a mistake in the name or addition of the defendant, as the latter can only be taken advantage of by the plea in abatement, while the former will be ground for arresting the judgment when the error appears on the record, or for acquittal, when a variance arises on the trial.[1]

§ 159. NAME MAY BE GIVEN BY INITIALS. Initials, it seems, are a sufficient designation of the Christian name, if the party uses and is known by such initials;[1] and at all events can not be excepted to after verdict.[2]

§ 160. REPUTATIVE NAME IS SUFFICIENT. As has been already incidentally noticed, a description of a person in legal proceedings by the name acquired by reputation has been held sufficiently certain.[1] Thus where, in a case of homicide, an indictment charges the name of the per-

805; Moore 466; Dyer 285 a; Keilw. 25; 1 Leach 248; 2 Leach 861; 2 East P. C. 990; Harne v. State, 39 Md. 552; Martin v. State, 25 Tenn. (6 Humph.) 204. See Stockton v. State, 25 Tex. 772. Infra, § 158.

2 Doane v. State, 25 Ind. 495; Whart. Crim. Ev., §§ 94 et seq.

1 1 East P. C. 514, 651, 781; 2 Leach 774; 1 Chit. Crim. Law 217; State v. Sherrill, 81 N. C. 550; Haworth v. State, 7 Tenn. (Peck) 89; Osborne v. State, 14 Tex. App. 225. See fully Whart. Crim. Ev., §§ 94 et seq.

Variance as to middle name may be fatal. See Ibid.; Com. v. O'Hearn, 132 Mass. 553; Com. v. Budeley, 145 Mass. 181, 13 N. E. 368.

1 ALA.—Graham v. State, 40 Ala. 659; Thompson v. State, 48 Ala. 165. ARK.—State v. Seely, 30 Ark. 162. ILL.—Vandermark v. People, 47 Ill. 122. N. C.—State v. Bell, 65 N. C. 313; State v. Brite, 73 N. C. 26. OHIO—Mead v. State, 26 Ohio St. 505. S. C.—State v. Anderson, 3 Rich. 172. TEX.—State v. Black, 31 Tex. 560. See, supra, § 144.

As to variance, see Whart. Crim. Ev., §§ 94 et seq.

2 Smith v. State, 8 Ohio 294.

1 GA.—Jones v. State, 65 Ga. 147. ME.—State v. Bundy, 64 Me. 507. MASS.—Com. v. Trainor, 123 Mass. 414. MISS.—McBeth v. State, 50 Miss. 81. N. Y.—Waters v. People, 6 Park. Cr. Rep. 16. N. C.—State v. Bell, 65 N. C. 313. ENG.—R. v.

son slain as Marie Gardiner, alias Maria Bull, and the proof shows her real name to have been Maria Frances Bull, though generally known by the name in the indictment, it is sufficient.[2]

§ 161. IDEM SONANS IS SUFFICIENT. Should the name proved be idem sonans with that stated in the indictment, and different in spelling only, the variance will be immaterial.[1] Thus, Segrave for Seagrave;[2] McLaughlin for McGloflin;[3] Chambles for Chambless;[4] Usrey for Userry;[5] Authron for Autrum;[6] Benedetto for Beniditto;[7] Whyneard for Winyard, pronounced Winnyard;[8] Petris for Petries, the pronunciation being the same;[9] Hutson for Hudson,[10] form no variance. But it has been decided that when the sound differs, the variance is fatal,[11] and that McCann and McCarn,[12] Shakespear and Shakepear,[13] Tabart and Tarbart,[14] Shutliff and Shirt-

Berriman, 5 Car. & P. 601, 24 Eng. C. L. 729; Anonymous, 6 Car. & P. 408, 25 Eng. C. L. 498; R. v. Norton, R. & R. 509. See Whart. Cr. Ev., § 95.

Omission of an initial middle name is not fatal.—People v. Ferris, 56 Cal. 142.

2 CAL.—People v. McGilver, 67 Cal. 55, 7 Pac. 49. KY.—Kriel v. Com., 68 Ky. (5 Bush) 362. OHIO—State v. Gardiner, Wright 392. N. Y.—O'Brien v. People, 48 Barb. 274. ENG.—R. v. Willis, 1 Car. & K. 722, 47 Eng. C. L. 720.

1 Whart. Cr. Ev., § 96. ALA.—Point v. State, 37 Ala. 148; Donnelly v. State, 78 Ala. 453. KAN.—State v. Witt, 34 Kan. 488, 8 Pac. 769. MO.—State v. Pullens, 81 Mo. 387. N. C.—State v. Hare, 95 N. C. 682. VT.—State v. Bean, 19 Vt. 530. WIS.—State v. Lincoln, 17 Wis. 579. ENG.—R. v. Wilson, 2 Car. & K. 527, 1 Den. C. C. 284, 2 Cox C. C. 426, 61 Eng. C. L. 527. See 22 Cent. L. J. 247, 249, where a number of illustrations are given.

2 Williams v. Ogle, 2 Str. 889, 93 Eng. Repr. 919.

3 McLauglin v. State, 52 Ind. 476.

4 Ward v. State, 28 Ala. 53.

5 Cresham v. Walker, 10 Ala. 370.

6 State v. Scurry, 3 Rich. (S. C.) 68.

7 Ahibol v. Beniditto, 2 Taunt. 401, 127 Eng. Repr. 1133.

8 R. v. Foster, R. & R. 412.

9 Petries v. Woodworth, 3 Cain. (N. Y.) 219. See State v. Upton, 12 N. C. (1 Dev.) 513.

10 State v. Hutson, 15 Mo. 512.

11 Clements v. State, 21 Tex. App. 258, 17 S. W. 156; Neiderluck v. State, 21 Tex. App. 320, 17 S. W. 467; McDevro v. State, 23 Tex. App. 429, 5 S. W. 133. See cases in 22 Cent. L. J. 247-8.

12 R. v. Tannett, R. & R. 351.

13 R. v. Shakespear, 10 T. R. 83.

14 Bingham v. Dickie, 5 Taunt.

liff,[15] Comyns and Cummins;[16] are not the same in sound.[17]

What is idem sonans is for the jury.[18]

Decisions on the subject of variance will be found fully collated in the treatise on Criminal Evidence with which this work is to be taken in connection.[19]

V. Time: Necessity for Alleging and How Averred.

§ 162. TIME MUST BE AVERRED, BUT NOT GENERALLY MATERIAL. Time and place must be attached to every material fact averred,[1] but the time of committing an offense (ex-

814, 1 Eng. C. L. 415, 128 Eng. Repr. 913.

15 1 Chit. C. L. 216; 3 Chit. Burn 341.

16 Cruickshank v. Comyns, 24 Ill. 602.

17 See Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

18 Com. v. Donovan, 95 Mass. (13 Allen) 571; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; People v. Cooke, 6 Park. Cr. Rep. (N. Y.) 31; R. v. Davis, 2 Den. C. C. 231, 5 Cox C. C. 238, T. & M. 557. See fully Whart. Crim. Ev., §§ 94 et seq.; 22 Cent. L. J. 247.

It may be stated in brief:

1st. A variance in defendant's name or addition can only be taken advantage of by plea in abatement. Supra, § 148.

2d. A blank in either Christian name, surname, or addition of defendant can be taken advantage of by plea in abatement, though the proper course is by motion to quash. Supra, § 148.

3d. Any variance in sound in the name of material third parties is fatal at common law, it being the duty of the court to order an acquittal, though such acquittal is no bar to a second and correct indictment. Supra, § 158.

Court will determine by inspection what is the name as written in the indictment.—O'Neil v. State, 48 Ga. 66.

19 Whart. Crim. Ev., 9th ed., § 96.

1 Chit. on Pleading, 4th ed. Index, tit. Time. ALA.—State v. Beckwith, 1 Stew. 318, 18 Am. Dec. 46; Roberts v. State, 19 Ala. 526. CAL.—People v. Littlefield, 5 Cal. 355. KAN.—State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471. ME.—State v. Baker, 34 Me. (4 Reding) 52; State v. Hanson, 39 Me. 337; State v. Day, 74 Me. 220. MO.—State v. Walker, 14 Mo. 398. N. J.—State v. Lyon, 45 N. J. L. (16 Vr.) 272. N. Y.—Crichton v. People, 6 Park. Cr. Rep. 363. S. C.—State v. Orrell, 1 Dev. L. 139, 17 Am. Dec. 563; State v. Brown, 24 S. C. 224. TEX.—Sanders v. State, 26 Tex. 119; State v. Slack, 30 Tex. 354. ENG.—R. v. Haynes, 4 Moore & S. 214; R. v. Aylett, 1 T. R. 69, Stand. 95 a; R. v. Holland, 5 T. R. 607.

Day certain on which alleged offense committed, must be pleaded. ALA.—State v. Beckwith, 1 Stew. 318, 18 Am. Dec. 46; Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168. N. C.—State v. Roach, 3 N. C. (2 Hayw.) 352,

cept where the time enters into the nature of the offense, or becomes material under a statute of limitations), may be laid on any day previous to the finding of the bill,[2] during the period within which it may be prosecuted.[3]

2 Am. Dec. 626; State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584; State v. Orrell, 12 N. C. (1 Dev. L.) 139, 17 Am. Dec. 563. TEX.—Barnes v. State, 42 Tex. Cr. Rep. 297, 96 Am. St. Rep. 801, 59 S. W. 882. VT.—State v. G. S., 1 Tyl. 350, 4 Am. Dec. 724. WIS.—Mau-zau-mau-ne-kah v. United States, 1 Pinn. 124, 39 Am. Dec. 279.

—"And divers other days," following charging of offense on day certain, will be treated as surplusage, and the indictment held good as to the day certain.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 40; Gallagher v. State, 26 Wis. 425.

—Exact time need not be set forth where time is not an essential or material ingredient of the offense charged.—Cecil v. Territory, 16 Okla. 197, 8 Ann. Cas. 457, 82 Pac. 654. See Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229.

—"On or about" a certain day, sufficient allegation of time, in an indictment for murder.—State v. Harp, 31 Kan. 496, 3 Pac. 432; State v. Thompson, 10 Mont. 559; State v. Elliott, 34 Tex. 151; State v. Williams, 13 Wash. 335, 43 Pac. 15.

Contra: Morgan v. State, 51 Fla. 78, 40 So. 829; Mau-zau-mau-ne-kah v. United States, 1 Pinn. (Wis.) 124, 39 Am. Dec. 279.

—Rule modified by statute, as in Indiana, providing that no indictment or information shall be quashed or set aside, or proceedings thereunder arrested, for the omission of the time at which the offense was committed, or for stating that time imperfectly, where time is not of the essence of the offense charged.—Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767.

—In Massachusetts statute providing that where caption gives county and time of finding of indictment, this shall be considered as allegations that crime was committed within jurisdiction of court and before finding of indictment, after the act became a crime; also that time and place need not be alleged.—Com. v. Snell, 189 Mass. 12, 3 L. R. A. (N. S.) 1019, 75 N. E. 75.

2 Williams v. State, 12 Tex. App. 226.

3 Whart. Cr. Ev., § 102. ALA.—Shelton v. State, 1 Stew. & P. 208; M'Dade v. State, 20 Ala. 81. CAL.—People v. Miller, 12 Cal. 291. GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Wingard v. State, 13 Ga. 396; McBryde v. State, 34 Ga. 202. IOWA—State v. Bell, 49 Iowa 440. ME.—State v. Williams, 76 Me. 480. MASS.—Com. v. Dillane, 67 Mass. (1 Gray) 483; Com. v. Sego, 125 Mass. 210. MICH.—Turner v. People, 33 Mich. 363. MO.—State v. Magrath, 19 Mo. 678. N. H.—State v. Havey, 58 N. H. 377; State v. Ingalls, 59 N. H. 88. N. Y.—People v. Van Santvoord, 9 Cow. 660. N. C.—State v. Swaim, 97 N. C. 462, 2 S. E. 68. TENN.—State v. Gibbs,

To assign the day as that of the finding of the bill (unless there be a specific averment that the offense was prior to the finding),[4] or subsequent thereto, is bad.[5]

If a day certain be laid before the finding, other insensible dates may be rejected as surplusage.[6]

Where there is a statute authorizing amendments of formal errors, and there is no constitutional impediment, dates when formal may be amended.[7]

§ 163. WHEN "SUNDAY" IS THE ESSENCE OF OFFENSE, THE DAY MUST BE SPECIFIED. The statement of the day of the month, in an indictment for an offense on Sunday, though the doing of the act on that day is the gist of the offense, is not more material than in other cases; and hence, if the indictment charge the offense to have been committed on Sunday, though it names the day of the month which does not fall on Sunday, it is good, or though the Sunday averred is not the Sunday proved.[1] But "Sunday" or "Sabbath" must be averred.[2]

65 Tenn. (6 Baxt.) 238; State v. Davis, 65 Tenn. (6 Baxt.) 605. W. VA.—State v. Ferrell, 22 W. Va. 759. FED.—United States v. Bowman, 2 Wash. 328, Fed. Cas. No. 14631.

4 Com. v. Miller, 79 Ky. 451.

5 IND.—State v. Noland, 29 Ind. 212. MASS.—Com. v. Doyle, 110 Mass. 103. PA.—Jacobs v. Com., 5 Serg. & R. 316. TEX.—Joel v. State, 28 Tex. 642; Kincaid v. State, 8 Tex. App. 465; Williams v. State, 12 Tex. App. 226; Goddard v. State, 14 Tex. App. 566; Lee v. State, 22 Tex. App. 547, 3 S. W. 89. VT.—State v. Munger, 15 Vt. 291; State v. Litch, 33 Vt. 67. See, infra, § 176.

6 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Wells v. Com., 78 Mass. (12 Gray) 326; State v. Woodman, 10 N. C. (3 Hawks) 384; State v. Fletcher, 13 R. I. 522. See, infra, § 167.

7 Myers v. Com., 79 Pa. St. 308. Compare: Supra, § 131.

Amendment to fix date before filing of indictment, permitted in State v. Cooper, 31 Kan. 505, 3 Pac. 429.

1 IND.—Pancake v. State, 81 Ind. 630. MD.—Hoover v. State, 56 Md. 584. MASS.—Com. v. Harrison, 77 Mass. (11 Gray) 308; Com. v. Hoyer, 125 Mass. 209. N. Y.—People v. Ball, 42 Barb. 324. N. C.—State v. Wood, 86 N. C. 708; State v. Drake, 64 N. C. 589; State v. Bryson, 90 N. C. 747. TENN.—State v. Eskridge, 31 Tenn. (1 Swan) 413. ENG.—R. v. Trehearne, 1 Mood. C. C. 298.

Compare: Werner v. State, 51 Ga. 426.

For proof, see Whart. Crim. Ev., § 106.

2 ARK.—Robinson v. State, 38

"Sabbath" for "Sunday" is said to be no variance.[3]

§ 164. "VIDELICET" MAY INTRODUCE A DATE TENTATIVELY. A videlicet (*i. e.*, "that afterwards, to-wit," etc.) was used by the old pleaders when they wished to aver a date or other fact tentatively, for information, without binding themselves to it as a matter of essential description, a variance in respect to which would be fatal. Hence it has been held in England (though there is some confusion in the authorities in this respect) that the videlicet can, if repugnant, be stricken out as surplusage, when there is enough remaining to make out the charge.[1] And as a rule the videlicet relieves the pleader from the necessity of proving a non-essential descriptive averment.[2]

After verdict, to support an indictment, and to show that the provisions of a statute have been complied with, dates laid under a videlicet may be taken to be true,[3] and as properly averred.[4]

Before verdict, however, and at common law, dates laid in a videlicet, when time is material, may be traversed; and hence, if laid insensibly, will vitiate the context. In other words, when an allegation is material, accuracy in stating it can not be dispensed with by thrusting it into a videlicet.[5]

§ 165. BLANK AS TO DATE IS FATAL. It is requisite, with some exceptions, to name both the day and year. The

Ark. 548. IND.—State v. Land, 42 Ind. 311. KY.—McGowan v. Com., 59 Ky. (2 Metc.) 3. MASS.—Com. v. Harrison, 77 Mass. (11 Gray) 308. MO.—Frazier v. State, 19 Mo. 678. ENG.—R. v. Trehearne, 1 Mood. C. C. 298.

3 State v. Drake, 64 N. C. 589.

1 Infra, § 201; Ryalls v. R. (in error), 11 Ad. & El. N. S. (11 Q. B.) 781, 18 L. J. M. C. 69, 63 Eng. C. L. 780.—Exch. Cham.

Compare: People v. Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449, and Mallett v. Stevenson, 26 Conn. 428, where the videlicet was held to narrow the preceding averment. —Whart. Crim. Ev., § 141.

2 1 Green. Ev., § 60; 1 Ch. Pl. 317; State v. Heck, 23 Minn. 551.

3 Infra, § 201; R. v. Scott, D. & B. C. C. 47.

4 State v. Murphey, 55 Vt. 547.

5 2 Saund. 291; 1 Chit. Crim. L. 226; State v. Phinney, 32 Me. 440; Paine v. Fox, 16 Mass. 129; State v. Haney, 8 N. C. (1 Hawks) 460.

month without the year is insufficient,[1] and so when the month is given but the day is left blank.[2] If the date be laid in blank the judgment will be arrested.[3] But in Pennsylvania, it has been determined that where the commencement of the indictment was "December Session, 1818," and the offense was charged to have been committed on the twelfth day of August, in the year aforesaid, the time was sufficiently expressed.[4] And it was said in another case that it was not fatal to aver the "first March," instead of the first day of March.[5] On the other hand, an indictment, not containing the year, but referring to the caption (which does contain the year) in this manner, "in the year of our Lord aforesaid," has been held to be bad, as the caption is no part of the indictment.[6]

§ 166. SUBSTANTIAL ACCURACY IS ENOUGH. It has been said that the omission of the phrase, "the year of our Lord," is fatal,[1] though it is ruled that A. D., in initials, will be sufficient;[2] and the better opinion is that both may be dispensed with.[3] The dates may be given in Arabic

1 Com. Dig. Ind., § 2; Com. v. Griffin, 57 Mass. (3 Cush.) 523.

"188—" alleged as date of offense, held to be a mere imperfect statement not invalidating indictment.—State v. Lammons, 95 Ind. 28.

2 Clark v. State, 34 Ind. 436.

3 State v. Beckwith, 1 Stew. 318, 18 Am. Dec. 46; Jane v. State, 3 Mo. 45; State v. Roache, 3 N. C. (92 Hayw.) 352, 2 Am. Dec. 626.

Under the Tennessee statute a blank as to day of month is not fatal.—State v. Parker, 73 Tenn. (5 Lea) 568.

4 Jacobs v. Com., 5 Serg. & R. (Pa.) 315.

Compare: Com. v. Hutton, 71 Mass. (5 Gray) 89, 66 Am. Dec. 352.

5 Simmons v. Commonwealth, 1 Rawle (Pa.) 142.

6 State v. Hopkins, 7 Blackf. (Ind.) 494.

1 Whitesides v. People, 1 Ill. (1 Breese) 4; State v. Dickens, 2 N. C. (1 Hayw.) 406.

Compare: State v. Haddock, 9 N. C. (2 Hawks) 461.

See, infra, § 323.

"&" for word "and" does not render the indictment fatally defective.—State v. McPherson, 114 Iowa 492, 87 N. W. 421; Malton v. State, 29 Tex. App. 527, 16 S. W. 423.

2 State v. Reed, 35 Me. 489, 58 Am. Dec. 727; Com. v. Hagarman, 92 Mass. (10 Allen) 401; State v. Hodgeden, 3 Vt. 481.

3 GA.—Hall v. State, 3 Kelley

figures.[4] It should be averred which figures designate the year. It is not enough to say "the fifteenth of June, 1855."[5]

In Massachusetts, a complaint which charges, in words at length, the time of the commission of an offense, is not affected by the addition, in figures, of the date when the complaint is made.[6]

§ 167. DOUBLE OR OBSCURE DATES ARE INADEQUATE. To aver that the defendant, on divers days, committed an

18. IND.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494. MINN.—State v. Munch, 22 Minn. 67. VT.—State v. Gilbert, 13 Vt. 647. ENG.—Broome v. R., 12 Ad. & El. N. S. (12 Q. B.) 834, 64 Eng. C. L. 834.

See, infra, § 323.

"Year of our Lord" may be omitted.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; Com. v. Doran, 80 Mass. (14 Gray) 37; Peters v. United States, 36 C. C. A. 105, 94 Fed. 127.

Gregorian calendar has been adopted by Christian nations generally, numbering the years from the birth of Christ. This is a fact historically known, and of which all courts in this country take judicial notice. "This is a Christian nation and state, and has adopted the same; and when a year is mentioned in our legislative or judicial proceedings, and no mention is made of the Jewish, Mohammedan, or other system of reckoning time, all understand the Christian calendar to be used."—Perkins, J., in Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

4 Infra, § 323. ALA.—State v. Raiford, 7 Port. 101. IOWA—State v. Seamons, 1 Iowa 418. LA.—State v. Egan, 10 La. Ann. 699. ME.—State v. Reed, 35 Me. 489, 68 Am. Dec. 727. MASS.—Com. v. Adams, 67 Mass. (1 Gray) 48; Com. v. Hagarman, 92 Mass. (10 Allen) 401. MISS.—Kelly v. State, 11 Miss. (3 Sm. & M.) 518. N. C.—State v. Dickens, 2 N. C. (1 Hayw.) 406; State v. Haddock, 9 N. C. (2 Hawks) 461; State v. Lane, 26 N. C. (4 Ired.) 113. TENN.—State v. Smith, 7 Tenn. (Peck) 165. VT.—State v. Hodgeden, 3 Vt. 481; State v. Jericho, 40 Vt. 121, 94 Am. Dec. 387. VA.—Lazier v. Com., 10 Gratt. 708; Cady v. Com., 10 Gratt. 776. FED.—Peters v. United States, 36 C. C. A. 105, 94 Fed. 127.

Otherwise at common law in New Jersey and Indiana.—Berrian v. State, 22 N. J. L. (2 Zab.) 9; State v. Voshall, 4 Ind. 590; Finch v. State, 6 Blackf. (Ind.) 533.

In both states this is corrected by statute.—Johnson v. State, 26 N. J. L. (2 Dutch.) 313. See, also, as to Indiana, Hizer v. State, 12 Ind. 330.

5 Com. v. McLoon, 71 Mass. (5 Gray) 91, 66 Am. Dec. 354; Com. v. Smith, 153 Mass. 97, 26 N. E. 436.

6 Commonwealth v. Keefe, 73 Mass. (7 Gray) 332.

offense, is bad; and so where two distinct days are averred;[1] but it is sufficient to state that on a day specified, as well as on certain other days, he kept a gaming-house, a tippling-house, or a common nuisance; the allegation, "certain other days," being rejected as surplusage.[2]

Continuando. In cases in which it is necessary that a continuando should be averred (*e. g.*, in cases of continuous bigamy, or continuous nuisance[3]) the periods between which the offense is charged to continue should be specified.[4] In such cases it is enough to say that the offense was committed on a day named, and on certain other days between two days named, or (when the statute requires) that the offense continued between two named days.[5] And it has been ruled that the offense must be

1 1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk., ch. 25, § 82; Cro. C. C. 36; 4 Mod. 101. IND.—Hampton v. State, 8 Ind. 336. MASS.—Com. v. Adams, 67 Mass. (1 Gray) 481. MO.—State v. Hayes, 24 Mo. 358 (corrected by statute, 1852, p. 368). N. C.—State v. Hendricks, 1 N. C. (Conf.) 369; State v. Brown, 7 N. C. (3 Murph.) 224; State v. Weller, 7 N. C. (3 Murph.) 229.

Under New York statute it is otherwise.—New York v. Mason, 4 E. D. Smith 142.

Averring a series of blows on successive days, resulting in death, is not bad.—Com. v. Stafford, 66 Mass. (12 Cush.) 619; and so as to successive adulterous acts, State v. Briggs, 68 Iowa 416, 27 N. W. 358. See Hutchinson v. State, 62 Ind. 553.

"On or about" a specified day does not vitiate.—State v. Harp, 31 Kan. 496, 3 Pac. 432; State v. Findlay, 77 Mo. 338.

2 Starkie's C. P. 60. GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. ME.—State v. Cofren, 48 Me. 365. MASS.—Com. v. Pray, 30 Mass. (13 Pick.) 359; Wells v. Com., 78 Mass. (12 Gray) 326. N. Y.—People v. Adams, 17 Wend. 475. N. C.—State v. Jasper, 15 N. C. (4 Dev.) 323; State v. May, 15 N. C. (4 Dev.) 328. FED.—United States v. La Costa, 2 Mas. C. C. 129, Fed. Cas. No. 15548.

3 See, infra, § 372.

4 As to effect of one convicted of continuous offense, see, infra, chapter on "Pleas," division VI, end of subd. 3.

5 See 2 Hawk. P. C., ch. 25, § 62. MASS.—Wells v. Com., 78 Mass. (12 Gray) 326; Com. v. Tower, 49 Mass. (8 Met.) 527; Com. v. Travers, 93 Mass. (11 Allen) 260. N. Y.—People v. Adams, 17 Wend. 475. VT.—State v. Munger, 15 Vt. 290; State v. Temple, 38 Vt. 37. FED.—United States v. Fox, 1 Low. 299, 301, Fed. Cas. No. 98; United States v. La Costa, 2 Mas. C. C. 129, 140, Fed. Cas. No. 15548.

As to fixing limit at day of find-

proved to have been committed within the period specified.[6] Nor is a continuando necessary unless for an essentially continuous offense.[7]

Without the allegation of a continuando, or a tantamount allegation of continuance, there can, on indictments for nuisance, be no abatement.[8]

The continuando, if unnecessary, may be rejected as surplusage.[9]

§ 168. DATE CAN NOT BE LAID BETWEEN TWO DISTINCT PERIODS. As a general rule, in other cases, it is incorrect to lay the offense between two days specified;[1] and, therefore, an indictment for battery, setting forth that the

ing and presentation of bill.—State v. Briggs, 68 Iowa 416, 27 N. W. 358; Com. v. Stone, 69 Mass. (3 Gray) 453.

Compare: Com. v. Adams, 70 Mass. (4 Gray) 27; Cf. State v. Nagle, 14 R. I. 331.

6 Com. v. Briggs, 52 Mass. (11 Met.) 574.

7 Swancoat v. State, 4 Tex. App. 105.

As to continuous offenses, see infra, § 372.

8 Kerr's Whart. Crim. Law, § 1692; R. v. Stead, 8 T. R. 142.

Allegation offense committed on a certain specified "day of September now passed," is not stated with sufficient certainty; Com. v. Griffin, 57 Mass. (3 Cush.) 523; and so of an indictment which charges the defendant with being a common seller of spirituous and intoxicating liquors from a day named "to the day of the finding, presentment, and filing of this indictment."—Com. v. Adams, 70 Mass. (4 Gray) 27.

In some jurisdictions, when the offense is stated to have been committed on a particular day, the words "on or about" are treated as mere surplusage. They could have made no difference, it has been argued, in the proof required, and could in no way have prejudiced the defendant's rights.—State v. Tuller, 34 Conn. 280; Hampton v. State, 8 Ind. 336.

At common law, this can not be accepted. FLA.—Morgan v. State, 13 Fla. 671. IND.—State v. Land, 42 Ind. 311; Effinger v. State, 47 Ind. 256. OHIO—Barnhouse v. State, 31 Ohio St. 39. VT.—State v. O'Keefe, 41 Vt. 691. FED.—United States v. Crittenden, Hemp. C. C. 61, Fed. Cas. No. 14890a; United States v. Winslow, 3 Sawy. 337, Fed. Cas. No. 16742.

9 State v. Nichols, 58 N. H. 41.

1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk., ch. 25, § 82; Cro. C. C. 36; Burn, J., Indict.; Williams, J., Indict. iv.; State v. Baker, 34 Me. 52; State v. Beaton, 79 Me. 314, 9 Atl. 728; State v. Temple, 38 Vt. 37; United States v. Patty, 9 Biss. C. C. 429, 2 Fed. 664.

defendant beat so many of the king's subjects between two specified days, is insufficient.[2]

§ 169. NEGLIGENCES SHOULD HAVE TIME AVERRED. In alleging a mere neglect or non-performance, it has been held to be unnecessary to specify either time or place.[1] But this, as a general principle, can not be sustained. The proper course is to aver that the defendant, at an assigned time, had a particular duty imposed on him, and that he, at that time, neglected to discharge that duty.[2]

§ 170. TIME MAY BE DESIGNATED BY HISTORICAL EPOCH. In England, it is the practice to specify the year of the king's reign, but it is enough if the time be designated by the calendar date.[1] And by the common law either the year of the reign, or the calendar date, has been sustained.[2] With us the uniform practice is to give the day and year of the Christian era according to the calendar rendering.[3]

§ 171. RECITALS OF TIME NEED NOT BE ACCURATE. The wrong recital of the date of a statute is immaterial;[1] and such is the case with all erroneous recitals except those of written or printed documents.

§ 172. HOUR NOT NECESSARY, UNLESS REQUIRED BY STATUTE. As a rule, it is unnecessary to state the hour at which the act was done, unless rendered so by the statute upon which the indictment is framed.[1] In burglary, indeed,

2 4 Mod. 101; 2 Hawk., ch. 25, § 82; Burn, J., Indict.; Williams, J., Indict. iv.; 1 Chit. Crim. Law 216.

1 Hawk. ch. 25, § 79; Starkie's C. P. 61. But see Archbold's C. P. 34; Com. v. Sheffield, 65 Mass. (11 Cush.) 178.

2 See Kerr's Whart. Crim. Law, §§ 162, 454 for cases; also State v. Behm, 72 Iowa, 533, 34 N. W. 319; State v. McDowell, 84 N. C. 798; Caldwell v. State, 14 Tex. App. 127, 171.

1 Kel., 10, 11; 2 Hawk., ch. 25, § 8; Burn, J., Indict.; Williams, J., Indict. iv.

2 Com. Dig. Indict. G. 2; 2 Hawk., chs. 25, 26, § 78.

3 Bac. Ab. Indict. G. 4.

1 People v. Reed, 47 Barb. (N. Y.) 235.

1 2 Hawk., ch. 25, § 76. And see

it is usual to state it; but alleging the offense to have been committed "in the night," without mentioning the hour, has been held to be sufficient,[2] though at common law the practice is to aver the hour.[3] If an hour in the night be stated, proof of any hour of the night will sustain the allegation.[4] In an indictment upon stat. 9 G. 4, c. 69, for unlawfully entering, or being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night.[5]

§ 173. Repetition may be by "then and there." When the time has been once named with certainty, it is afterwards sufficient to refer to it by the words then and there, which have the same effect as if the day and year were actually repeated.[1] The mere conjunction and, without adding then and there, is insufficient to constitute an adequate independent averment, though it may be otherwise when the sense is certain without the repetition.[2] Thus, in an indictment for robbery, the allegation of time must be attached to the robbery, and not merely to the assault;[3] and in a case of murder, it is

Combe v. Pitt, 3 Burr. 1434; R. v. Clarke, 1 Bulst. 204; 2 Inst. 318.

2 People v. Burgess, 35 Cal. 115; Com. v. Williams, 56 Mass. (2 Cush.) 582 (under statute); Leisnberger v. State, 60 Neb. 628, 84 N. W. 6.

3 1 Hale, 549; R. v. Waddington, 2 East P. C. 513; 2 Hawk., ch. 25; §§ 76, 77; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724. And see Kerr's Whart. Crim. Law, 1036; Whart. Crim. Ev., § 106.

4 Kerr's Whart. Crim. Law, § 1036; State v. Padgett, 58 N. H. 377.

5 Davis, V. R., 10 Barn. & C. 89, 21 Eng. C. L. 47, Archbold's C. P. 35.

"Afternoon" given as the hour is not error, though the hour shows the time to have been night.—People v. Husted, 52 Mich. 624, 18 N. W. 388.

1 2 Hale 178; 2 Stra. 901; Keil 100; 2 Hawk., ch. 23, § 88, ch. 25, § 78; Bac. Ab. Indict. G. 4; Williams, J., Indict. iv.; Comyns 480. IND.—State v. Williams, 4 Ind. 235. MO.—State v. Bailey, 21 Mo. 484. NEB.—Fisk v. State, 9 Neb. 62, 2 N. W. 381. N. H.—State v. Cotton, 24 N. H. (4 Foster) 143. PA.—Stout v. Com., 11 Serg. & R. 177.

"There situate" is a good description.—State v. Reid, 20 Iowa 413.

2 State v. Willis, 78 Me. 70, 2 Atl. 848.

3 Ibid.; 2 Hale, 173, 178; 2 Hawk., ch. 23, § 88; Cro. Eliz. 739.

not sufficient to allege that the defendant on a certain day made an assault and struck the party killed, but the words then and there must be introduced before the averment of the stroke, which will suffice.[4]

"*Then and there*" preceding every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts.[5] But "then and there" have been held only to relate to the day and place first stated, and not to a noctanter afterwards introduced.[6] And "then and there" is insufficient where it is necessary to prove, as part of the description of the offense, an act at some specific portion of a day, as where it is

See State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241; State v. Slack, 30 Tex. 354.

[4] Though see, Com. v. Bugbee, 70 Mass. (4 Gray) 206; State v. Price, 11 N. J. L. (6 Halst.) 210; Resp. v. Honeyman, 2 U. S. (2 Dall.) 228, 1 L. Ed. 359.

[5] 1 Leach, 529; Dougl. 412; State v. Johnson, 1 Miss. (Walker) 392. See infra, § 188.

If the indictment alleged that the defendant feloniously and of malice aforethought made an assault, and with a certain sword, etc., then and there struck, the previous omission will not be material, for the words feloniously and with malice aforethought, previously connected with the assault, are by the words then and there adequately applied to the murder. See 4 Co. 41, b; Dyer, 69, a; 1 East P. C. 346; 1 Ch. C. L. 221; Kerr's Whart. Crim. Law, § 662.

In an indictment for breaking a house with intent to ravish, "then and there" is not necessary to the intent.—Com. v. Doharty, 64 Mass. (10 Cush.) 52.

An indictment which avers that the defendant feloniously assaulted B., at a time and place named, and being then and there armed with a dangerous weapon, did actually strike him on his head with said weapon, is sufficient, without repeating the words "then and there" before the words "did actually strike"; the court rejected the English rule above stated requiring such repetition.—Com. v. Bugbee, 70 Mass. (4 Gray) 206.

This rule also applies to the averment of wounding.—State v. Freeman, 21 Mo. 481; State v. Bailey, 21 Mo. 484.

In North Carolina it has been held that an indictment may contain enough to induce the court to proceed to judgment, if the time and place of making the assault be set forth, though they be not repeated as to the final blow.—State v. Cherry, 7 N. C. (3 Murph.) 7. See Jackson v. People, 18 Ill. 264.

Rule is adopted in Indiana by statute.—Thayer v. State, 11 Ind. 287.

[6] Davis v. R., 10 Barn. & C. 89, 21 Eng. C. L. 47.

necessary to aver the possession of ten or more counterfeit bills at one time.[7]

§ 174. —— OTHER TERMS INSUFFICIENT. The word "being" (existens) will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offense; and, therefore, an indictment for a forcible entry, on land being the prosecutor's freehold, without saying "then being," was held insufficient.[1] It is otherwise when part of an independent adequate averment.[2]

Neither "instantly,"[3] nor "immediately,"[4] nor "whilst,"[5] being ambiguous terms, can supply the place of "then and there."

§ 175. "THEN AND THERE" CAN NOT CURE AMBIGUITIES. If, however, two times and places have been previously mentioned, and afterwards comes the reference "then and there," or if the antecedent averment is in any way ambiguous as to time or place, the indictment is defective, because it is uncertain to which it refers.[1]

§ 176. REPUGNANT, FUTURE, OR IMPOSSIBLE DATES ARE BAD. If the material facts be stated, as to the time or place, with repugnancy or uncertainty, the indictment will

7 Edwards v. Com., 36 Mass. (19 Pick.) 124.

1 Bac. Ab. Indict. G. 1; Cro. Jac. 639; 2 Lord Raymond, 1467, 1468; 2 Rol. Rep. 225; Com. Dig. Indict. G. 2.

2 R. v. Boyall, 2 Burr. 832.

3 1 Leach, 4th ed., 529; Chitty C. L. 221. MO.—Lester v. State, 9 Mo. 666; State v. Lakey, 65 Mo. 217; State v. Testerman, 68 Mo. 408; State v. Ward, 74 Mo. 253. N. C.—State v. Cherry, 7 N. C. (3 Murphy) 7. VA.—See Com. v. Ailstock, 3 Gratt. 650. ENG.—R. v. Brownlow, 11 Ad. & El. 119, 39 Eng. C. L. 87.

4 R. v. Francis, Cunning, 275; Jenks v. Bates, 2 Strange 1015, 93 Eng. Repr. 1003.

5 R. v. Pelham, 9 Ad. & El. N. S. (8 Q. B.) 959, 55 Eng. C. L. 957.

1 ME.—State v. Jackson, 39 Me. 291. MASS.—Edwards v. Com., 36 Mass. (19 Pick.) 124; Com. v. Butterick, 100 Mass. 12; Com. v. Goldstein, 114 Mass. 272. MO.—Storrs v. State, 3 Mo. 9; Jane v. State, 3 Mo. 61; State v. Hayes, 24 Mo. 358. ENG.—R. v. Devett, 8 Car. & P. 639, 34 Eng. C. L. 936.

be bad.[1] "The tenth of September last past," as we have seen, is inadequate, where there is nothing in the indictment designating the year.[2] And an indictment charging the offense to have been committed in November, 1801, and in the twenty-fifth year of American Independence, has been held defective, and the judgment arrested, because the offense was charged to have been committed in two different years.[3] And an indictment alleging the offense to have been committed on an impossible day,[4] or a day subsequent to the finding of the bill,[5] is defective. But an indictment may be found for a crime committed after the term commenced to which it is returned.[6]

§ 177. Record dates must be accurate. When, as in case of perjury, the time of the alleged false oath enters into the essence of the offense, and is to be shown by the records of the court where the oath was taken, a variance in the day is fatal;[1] thus, if the perjury is averred to have been committed at the Circuit Court on the 19th of May, and the record shows the court to have been holden on the 20th day of May, the indictment is

1 GA.—McMath v. State, 55 Ga. 303. IND.—Hutchinson v. State, 62 Ind. 556. MASS.—Jefferies v. Com., 94 Mass. (12 Allen) 145. MISS.—Serpentine v. State, 2 Miss. (1 How.) 260.

2 Com. v. Griffin, 57 Mass. (3 Cush.) 523. Supra, § 165.

3 State v. Hendricks, 1 N. C. (Conf.) 369.

4 MO.—Markley v. State, 10 Mo. 291. N. Y.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122. N. C.—State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584. S. C.—State v. Ray, 1 Rice L. 1, 33 Am. Dec. 90. TEX.—Collins v. State, 5 Tex. App. 37; Brewer v. State, 5 Tex. App. 248.

In Serpentine v. State, 2 Miss. (1 How.) 260, an indictment giving the date of A. D. 1033 as that of the commission of the offense, was held bad in error.

5 IND.—State v. Noland, 29 Ind. 212. MASS.—Com. v. Doyle, 110 Mass. 103. N. C.—State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584. PA.—Pennsylvania v. McKee, Add. 36; Jacobs v. Com., 5 Serg. & R. 316. S. C.—State v. Ray, 1 Rice L. 1, 33 Am. Dec. 90. TEX.—State v. Davidson, 36 Tex. 325. VT.—State v. Munger, 15 Vt. 291; State v. Litch, 33 Vt. 67.

6 Allen v. State, 5 Wis. 329.

1 Restall v. Stratton, 1 H. Bl. 49; Freeman v. Jacob, 4 Camp. 209; Woodford v. Ashley, 11 East 508; Pope v. Foster, 4 T. R. 590; Green v. Rennett, 1 T. R. 656.

bad;[2] and so where the assignment is pointed at an offense on a specific date.[3]

§ 178. DATES OF DOCUMENTS MUST BE CORRECTLY GIVEN. Dates of bills of exchange, and other written instruments, must be truly stated when necessarily set out.[1]

Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered.[2]

Sunday, as a designation, has been already noticed.[3]

§ 179. TIME SHOULD BE WITHIN LIMITATION. Where a time is limited by general statute for preferring an indictment, the time laid should ordinarily appear to be within the time so limited, or aver that the case falls within statutory exceptions.[1] Whether, when an exception takes the case out of the statute, this should be averred, will be hereafter discussed.[2]

§ 180. IN HOMICIDE, DEATH SHOULD OCCUR WITHIN A YEAR AND A DAY. As the author noted more fully in another

2 United States v. M'Neal, 1 Gall. C. C. 387, Fed. Cas. No. 15700; United States v. Bowman, 2 Wash. C. C. 328, Fed. Cas. No. 14631.

3 Com. v. Monahan, 75 Mass. (9 Gray) 119.

1 Whart. Crim. Ev., § 103 a; Archbold's C. P., 9th ed., § 90.

2 Ibid.

3 Supra, § 163.

1 Whart. Crim. Ev. § 105. ALA.—Shelton v. State, 1 Stew. & P. 208. ARK.—Gill v. State, 38 Ark. 524. CAL.—People v. Miller, 12 Cal. 291. FLA.—Anderson v. State, 20 Fla. 381. GA.—McLane v. State, 4 Ga. 335. ILL.—Lamkin v. People, 94 Ill. 101. IND.—State v. Rust, 8 Blackf. 195; Hatwood v. State, 18 Ind. 492. ME.—State v. Hobbs, 39 Me. 212. MICH.—People v. Gregory, 30 Mich. 371. MO.—State v. McGrath, 19 Mo. 678. N. H.—State v. Robinson, 29 N. H. (9 Fost.) 274; State v. Ingalls, 59 N. H. 88. TEX.—Shoefercater v. State, 5 Tex. App. 207. VT.—State v. J. P., 1 Tyl. 283; Vaughn v. Congdon, 56 Vt. 115, 48 Am. Rep. 759. WASH.—State v. Myrberg, 56 Wash. 386, 105 Pac. 624. FED.—United States v. Winslow, 3 Sawy. 337, Fed. Cas. No. 16742; State v. Owen, 13 Sawy. 57, 32 Fed. 537. ENG.—R. v. Brown, M. & M. 163, 22 Eng. C. L. 495.

Contra: State v. Ball, 30 W. Va. 386, 4 S. E. 645.

Bar of Statute need not be negatived in indictment.—Packer v. People, 26 Colo. 316, 57 Pac. 1087.

2 Infra, § 369. See Whart. Crim. Ev., § 105.

work,[1] the death in homicide should be laid on a day within a year and a day from the time at which the stroke is alleged to have been given.

VI. Place.[1]

§ 181. ENOUGH TO LAY VENUE WITHIN JURISDICTION OF COURT. In England, at common law, it was held necessary to lay as the place of the commission of the offense, beside the county, some particular vicinage, of such dimensions that all living in it might be supposed to have knowledge of the transaction to be inquired into.[2] By statute, however, it is now enough to aver the county as the place of the commission.[3]

In the United States, the latter practice is generally accepted wherever the county is conterminous with the jurisdiction of the court,[4] though it is otherwise when the jurisdiction of the court embraces but a fraction of the county.[5]

It is sufficient if the place stated correspond with the jurisdiction of the court.[6] This, however, is essential.[7]

1 See Kerr's Whart. Crim. Law, § 750.

1 As to conflict in cases of venue. See Kerr's Whart. Crim. Law, §§ 312 et seq.

As to whether venue is to be in the place where offense consummated, or in the place where the offender was at the time of the consummation. See ibid., and particularly § 330 note.

As to change of venue, see post, chapter on "Motion for Continuance," division V.

2 2 Hawk., ch. 22.

3 Stat. 6 Geo. 4; 14 & 15 Vict.

As to venue in caption, see supra, § 134.

4 See, supra, §§ 134, 149; infra, § 188; also People v. Lefuente, 6 Cal. 202; Thomas v. State, 71 Ga. 44; Buck v. State, 61 N. J. L. 525, 39 Atl. 919.

"County" is necessary. See People v. Gregory, 30 Mich. 371.

5 Infra, §§ 183, 184; 2 Hale P. C. 166; McBride v. State, 29 Tenn. (10 Humph.) 615.

Mutatis mutandis, as to towns.—Com. v. Springfield, 7 Mass. 9.

As to Texas. See criticism in Chivarrio v. State, 15 Tex. App. 335.

6 N. J.—State v. Jones, 7 N. J. L. (2 Halst.) 357. N. Y.—People v. Barrett, 1 John. 66. VT.—State v. G. S., 1 Tyl. 295, 4 Am. Dec. 724. ENG.—R. v. Stanbury, L. & C. 128.

See, supra, § 134.

7 Ibid.; Territory v. Do, 1 Ariz. 507, 25 Pac. 472; Cook v. State, 20

By statute in several jurisdictions, when an offense is committed near the boundary line between two counties, it may be averred to be in either county.[8]

Jurisdiction of the federal courts, where crimes have been committed at sea or abroad, is discussed at large in another work.[9] The indictment, when the offense is alleged to have been committed on the high seas, must be averred to have been out of the jurisdiction of any State of the United States.[10]

In such cases the trial of the offense is, by Act of April 30, 1790, to be "in the district where the offender is apprehended, *or* into which he may first be brought." Under this statute a person is triable in the Southern District of New York who, on a vessel owned by citizens of the United States, has committed on the high seas an offense made penal by act of Congress; has been then put in irons for safe keeping; has, on the arrival of the vessel at anchorage at the lower quarantine in the Eastern District of New York, been delivered to officers of the State of New York, in order that he may be forthcoming on trial; and has been by them carried into the Southern District, and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued.[11] But where the indictment charged that an assault with a dangerous weapon was committed on board a vessel in the harbor of Guantanamo, in the Island of Cuba, but there was no allegation that the place was out of the jurisdiction of any of the States, it was ruled that the omission of such an allegation was fatal, as whether the place of the offense was without the jurisdiction of any State was material in determining the question of juris-

Fla. 804; State v. Hinkle, 27 Kan. 308.

8 People v. Davis, 56 N. Y. 95; Kerr's Whart. Crim. Law, § 337.

9 Kerr's Whart. Crim. Law, §§ 307, 312 et seq.

10 United States v. Anderson, 17 Blatchf. C. C. 238, Fed. Cas. No. 14448.

11 United States v. Arwo, 86 U. S. (19 Wall.) 486, 22 L. Ed. 67.

diction, and was a question of fact for the jury.[12] "In Jackelow's case," [13] said Benedict, J., "it was held by the Supreme Court of the United States that the question whether a particular place be out of the jurisdiction of any State, when material in determining the question of the jurisdiction of a court, is a question of fact to be passed on by the jury; and in that case the Supreme Court set aside a special verdict, which found the offense to have been committed in the water adjoining the State of Connecticut, between Norwalk Harbor and Westchester County in the State of New York, at a point five miles eastward of Lyons' Point (which is the boundary between the States of New York and Connecticut), and one mile and a half from the Connecticut shore at low-water mark, on the ground that, in the absence of a finding by the jury that the place so described was out of the jurisdiction of any State, it was impossible for the court to determine such to be the fact."

§ 182. WHEN ACT IS BY AGENT, PRINCIPAL TO BE CHARGED AS OF PLACE OF SUCH ACT. We have discussed, in another volume,[1] the important question whether it is necessary to jurisdiction that the offender, at the time of the offense, should have been within the jurisdiction. We may here notice that where an offense is committed within a State by means of an agent, the employer is guilty as a principal, though he did not personally act in that State, and at the time the offense was committed was in another State.

The forum delicti commissi in such case has jurisdiction of the offense, and, if the offender comes within the limits of the State, has also jurisdiction of his person, and he may be arrested and brought to trial.[2] And the better opinion is that the place of the commission of the

12 United States v. Anderson, 17 Blatchf. C. C. 238, Fed. Cas. No. 14448.

13 United States v. Jackalaw, 66 U. S. (1 Black) 484, 17 L. Ed. 225.

1 Kerr's Whart. Crim. Law, §§ 323, 330.

2 See Kerr's Whart. Crim. Law, §§ 323 et seq., and 327.

offense, as distinguished from the place where the offender at the time stood, is, in cases of conflict, the proper venue.[3]

§ 183. WHEN COUNTY IS DIVIDED, JURISDICTION TO BE LAID IN COURT OF LOCUS DELICTI. Where an offense is committed within the county of A., and after the commission of the offense the county is divided, and the part of the county in which the offense was committed is created a new county called B., the latter county has jurisdiction over the offense.[1] In such case, however, the indictment may charge the perpetration in the former county while the trial is in the latter.[2]

3 **For full discussion,** see Kerr's Whart. Crim. Law, § 330 and note. See, also, Roberts v. People, 9 Colo. 458, 13 Pac. 630.

1 ARK.—McElroy v. State, 13 Ark. 708. CAL.—People v. Stokes, 103 Cal. 193, 42 **Am. St. Rep.** 102, 37 Pac. 207. GA.—Jordan v. State, 22 Ga. 545; Pope v. State, 124 Ga. 801, 110 **Am. St. Rep.** 197, 4 **Ann. Cas.** 551, 53 S. E. 384. KAN.—State v. Bunker, 38 Kan. 737, 17 Pac. 651. ME.—State v. Jackson, 39 Me. 291. MASS.—Com. v. Gay, 153 Mass. 29, 26 N. E. 571. MISS.—Murrah v. State, 51 Miss. 675. MO.—State v. Strathmann, 4 Mo. App. 583. N. J.—State v. Jones, 9 N. J. L. (4 Halst.) 357, 17 **Am. Dec.** 483. N. C.—State v. Fish, 26 N. C. (4 Ired.) 219. OKLA.—Moran v. Territory, 14 Okla. 544, 78 Pac. 111. TENN.—State v. Donaldson, 50 Tenn. (3 Heisk.) 48. TEX.—Searcy v. State, 4 Tex. 450; Nelson v. State, 1 Tex. App. 41. FED.—United States v. Dawson, 56 U. S. (15 How.) 467, 14 **L. Ed.** 775.

See, infra, § 189.

Criminal prosecution pending for the offense before the division of the county does not divest the new county of the jurisdiction of the case.—People v. Stokes, 103 Cal. 193, 42 **Am. St. Rep.** 102, 37 Pac. 207.

Indictment in old county at time of division and organization of new county will not divest courts of the new county of jurisdiction over the case.—Hernandez v. State, 19 Tex. App. 408.

New county attached to third county for jurisdictional purposes, indictment for a crime in the territory of new county, venue must be laid in third county.—Weller v. State, 16 Tex. App. 200.

New county organized to go into effect in future, courts of old county have jurisdiction of offenses until the new county is in fact established and in operation.—People v. McGuire, 42 Cal. 140. See State v. Hart, 26 N. C. (4 Ired. L.) 222.

2 Jordan v. State, 22 Ga. 545; McElroy v. State, 13 Ark. 708. See infra, § 188.

§ 184. When county includes several jurisdictions, particular jurisdiction must be specified. Where there are distinct judicial districts in the county, it is not sufficient that the indictment names the county. Therefore, where the offense in a District Court in North Carolina was laid to have been committed in Beaufort County, without adding in the District of Newbern, judgment was arrested.[1] And so in all cases where the jurisdiction is less than the county.[2] And when several counties are in the town, it is not enough to allege the town.[3]

The court will take judicial notice of statutory subdivisions of counties.[4]

§ 185. Name of state not necessary in indictment. Where the caption gives the name of the State, it need not be repeated in the indictment. And a complaint made "in behalf of the State," alleging an offense in a particular city and county (corresponding in name to a city and county of the State), against a statute the title and date of which are stated, and rightly describing a statute passed by the legislature of the State, sufficiently shows that the offense was committed within the State, without any caption, or venue in the margin.[1] And, generally, as the name of the State is assumed, in all the proceedings, it need not be given in the indictment.[2]

1 State v. Adams, 2 Battle's Dig. (N. C.) 729.

2 McBride v. State, 29 Tenn. (10 Humph.) 615; Taylor v. Com., 2 Va. Cas. 94.

See, supra, § 181.

3 Com. v. Springfield, 7 Mass. 9.

4 Ibid.; State v. Powers, 25 Conn. 48; Com. v. Springfield, 7 Mass. 9.

Averring a place to be at "W.," and not at the "city" or "town," of "W.," it is said, is not enough.—Com. v. Barnard, 72 Mass. (6 Gray) 488.

See, however, Tower v. Com., 111 Mass. 117, where it was held that it was enough, in error, to aver the town; the court taking notice that the town was in a particular county. Compare comments in Heard's Pleading, 81.

1 Commonwealth v. Quin, 71 Mass. (5 Gray) 478.

2 State v. Wentworth, 37 N. H. 196; State v. Lane, 26 N. C. (4 Ired.) 113.

§ 186. SUB-DESCRIPTION IN TRANSITORY OFFENSES IMMATERIAL. Of transitory offenses as they are called (e. g., offenses of which the object of the offense is not necessarily attached to a particular spot), a variance as to specification is not fatal if jurisdiction be correctly given.[1]

§ 187. —— BUT NOT AS TO MATTERS OF LOCAL DESCRIPTION. But where the case is stated by way of local description and not as a venue merely, a variance in what are called *local* offenses (e. g., where the object is necessarily attached to a place) is fatal;[1] as where, in an indictment for arson, the tenement was averred to be in the sixth ward, whereas it was in the fifth.[2] The same particularity is required in cases of stealing in a dwelling-house, of burglary,[3] of forcible entry and detainer, of arson, and in all cases where a statute makes a special locality essential. In such cases, where the situation of the premises is especially laid, the description must be strictly proved.[4] Under the same head are to be included injuries to

1 In the city of New York, the practice has been to charge the ward as part of the venue, thus: "In the First Ward of the city of New York"; in New Orleans, to name the parish. The same practice obtains elsewhere. If, however, the offense is shown to be within the jurisdiction of the court, the special place averred, if unnecessary, need not, when the offense is transitory, be proved.—2 Hale 179, 244, 245; 4 Bla. Com. 306; 2 Hawk., ch. 25, § 84; ch. 46, §§ 181, 182; 1 East P. C. 125; Holt 534. See: IND.—Carlisle v. State, 32 Ind. 55. MASS.—Com. v. Gillon, 84 Mass. (2 Allen) 502. MO.—State v. Ruth, 14 Mo. App. 226. PA.—Heikes v. Com., 26 Pa. St. 531. ENG.—R. v. Woodward, 1 Mood. C. C. 323. See, also, Whart. Crim. Ev., § 109.

1 IND.—Dennis v. State, 91 Ind. 291; Droneberger v. State, 112 Ind. 105, 13 N. E. 259. IOWA—State v. Crogan, 8 Iowa 523. N. H.—State v. Cotton, 24 N. H. (4 Fost.) 143. OHIO—Moore v. State, 12 Ohio St. 387.

See Whart. Crim. Ev., § 109.

2 Infra, § 190; People v. Slater, 5 Hill (N. Y.) 401.

3 R. v. St. John, 9 Car. & P. 40, 38 Eng. C. L. 36.

4 Archbold's C. P. 38. IOWA—Norris v. State, 3 Greene 513. KY.—Grimme v. Com., 44 Ky. (5 B. Mon.) 263. MINN.—See Chute v. State, 19 Minn. 271. N. H.—State v. Cotton, 24 N. H. (4 Fost.) 143. ENG.—R. v. Redley, Russ. & R. 515.

machinery permanently fixed, and buildings;[5] nuisances, when emanating from local sites;[6] houses of ill-fame.[7] Such specifications, though unnecessary, must be proved.[8]

§ 188. "COUNTY AFORESAID" GENERALLY ENOUGH—"THEN AND THERE." It is sufficient if the place be averred simply as "the county aforesaid," when the county is named in the commencement or caption as that for which the grand jurors were sworn.[1] It is otherwise when two counties are named.[2]

"County," even, may be left out in the statement of place, when it can be presumed from prior averments.[3] Thus it has been held enough, in an indictment against A. B., of the town of C., County of D., to aver that the offense was committed at C.[4]

"County" or "town" or "city," however, must somewhere appear; and it is not enough to aver the offense to have been committed in *C.* The indictment must say,

5 R. v. Richards, 1 Man. & Ry. 177.

6 Com. v. Heffron, 102 Mass. 148.

7 State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135.

8 Whart. Crim. Ev., § 109.

As to averment of place of death in murder, see Chapman v. People, 39 Mich. 549.

1 DEL.—State v. Smith, 5 Harr. 490. GA.—Wingard v. State, 13 Ga. 396. ILL.—Noe v. People, 39 Ill. 96; Harrahan v. State, 91 Ill. 142. IND.—Evarts v. State, 48 Ind. 422. IOWA—State v. Lillard, 59 Iowa 479, 13 N. W. 637. ME.—State v. Roberts, 26 Me. 263; State v. Conley, 39 Me. 78; State v. Baker, 50 Me. 45. MASS.—Com. v. Edwards, 70 Mass. (4 Gray) 1. MO.—State v. Ames, 10 Mo. 743; State v. Simon, 50 Mo. 370. N. Y.—Haskins v. People, 16 N. Y. 344. N. C.—State v. Lamon, 10 N. C. (3 Hawks.) 175; State v. Bell, 25 N. C. (3 Ired.) 506; State v. Tolever, 27 N. C. (5 Ired.) 452. TENN.—State v. Shull, 40 Tenn. (3 Head) 42.

Compare: 1 Wms. Saund. 308.

2 State v. McCracken, 20 Mo. 411.

3 See State v. Walter, 14 Kan. 375.

Where it was alleged that the defendant broke and entered "the city hall of the city of Charlestown"; this was held a sufficient averment that the property of the building alleged to be broken and entered is in the city of Charlestown.—Com. v. Williams, 56 Mass. (2 Cush.) 583.

4 Com. v. Cummings, 70 Mass. (6 Gray) 487.

either directly or by reference to the caption, that *C.* is a town or city or county.[5]

The effect of "then and there" has been already noticed. It implies identity of place as well as of time.[6]

§ 189. TITLE, WHEN CHANGED BY LEGISLATURE, MUST BE FOLLOWED. A change of local title, when enacted by the legislature, must be followed by the pleader. Thus in North Carolina, by an act of assembly, passed in 1842, a part of the county of Burke, and a part of the county of Rutherford were constituted a new county, by the name of M'Dowell; and by a supplemental act, jurisdiction of all criminal offenses committed in that part of M'Dowell taken from Burke was given to the Superior Court of Burke. It was held that an indictment for a criminal offense, alleging it to have been committed in Burke County, could not be supported by evidence showing the offense to have been committed in M'Dowell, after the establishment of the latter county.[1] By the same rule, it is not error to describe a county within which the offense was committed by the name belonging to it at the time of trial, even though it went by another name at the time when the act was committed.[2]

§ 190. VENUE NEED NOT FOLLOW FINE. Where a fine is payable, or penalty is special, to a subdivision of county, it has been said that the pleading should aver such subdivision, so as to guide the court in the application of the fine or penalty.[1] But it has been held in Pennsylvania,

5 Com. v. Barnard, 72 Mass. (6 Gray) 488.

See supra, § 184.

An indictment for burning a barn situate at a certain place, which was within the jurisdiction of the court, and alleged to be "within the curtilage of the dwelling-house of A.," need not also aver that the dwelling-house was at that place.—Commonwealth v. Barney, 64 Mass. (10 Cush.) 480.

6 Supra, § 173; State v. Hurley, 71 Me. 354; Sullivan v. State, 13 Tex. App. 462.

1 State v. Fish, 26 N. C. (4 Ired.) 219.

2 McElroy v. State, 13 Ark. (8 Eng.) 708; and see Jordan v. State, 22 Ga. 545. Supra, § 183.

1 State v. Smith, 5 Harr. (Del.) 490; Legori v. State, 16 Miss. (8

with better reason, that in an indictment for adultery, it is not necessary to mention the township in which the defendant resided, though of moment in the sentence, because the court may ascertain the place of the defendant's residence otherwise than by the verdict of the jury.[2]

§ 191. IN LARCENY, VENUE MAY BE IN PLACE WHERE GOODS ARE TAKEN. In larceny, the venue may be laid in any county in which the thief was possessed of the stolen goods.[1]

§ 192. OMISSION OF VENUE IS FATAL. Where an indictment omits to lay a venue or place of the offense charged, this is at common law a fatal defect on demurrer, on motion to quash, in arrest of judgment, or in error.[1]

In another volume the proof of place is discussed at large; and it is shown that the place of the offense must be proved to be within the jurisdiction of the court[2] though the proof of this may be inferential.[3] It will also be seen that when a place is stated as matter of description, a variance may be fatal.[4] The venue in homicide may be placed by statute in the place of death,[5] and that of conspiracy in the place of any overt act.[6]

VII. Statement of Offense.

§ 193. OFFENSE MUST BE SET FORTH WITH REASONABLE CERTAINTY. It is a general rule that the special matter of the whole offense should be set forth in the indictment

Sm. & M.) 697; Botto v. State, 26 Miss. 108; and cases cited, supra, § 187.

2 Duncan v. Com. 4 Serg. & R. (Pa.) 449.

1 See Kerr's Whart. Crim. Law, §§ 517, 1168; and see R. v. Peel, 9 Cox C. C. 220; Whart. Crim. Ev., § 111.

1 CAL.—People v. Craig, 59 Cal. 370. FLA.—Morgan v. State, 13 Fla. 671. MISS. — Thompson v. State, 51 Miss. 353. MO.—State v. Hartnett, 75 Mo. 251; State v. Burgess, 75 Mo. 541. TEX.—Searcy v. State, 4 Tex. 450.

2 Whart. Crim. Ev., § 107.

3 Whart. Crim. Ev., § 108.

4 Whart. Crim. Ev., § 109; see supra, § 187.

5 Whart. Crim. Ev., § 110; see Kerr's Whart. Crim. Law, §§ 339-341.

6 Whart. Crim. Ev., § 111; Kerr's Whart. Crim. Law, § 1571.

with such certainty, that the offense may judicially appear to the court.[1] When special facts are an essential part of an offense, they must be set out.[2] Thus, in indictments for murder or manslaughter, it is necessary to state that the death ensued in consequence of the act of the prisoner;[3] and in perjury it is necessary to set out the oath as an oath taken in a judicial proceeding, and before a proper person, in order to see whether it was an oath which the court had jurisdiction to administer.[4] And in the prosecution of a constable for not serving, it is requisite to set out the mode of his election, because if he was not legally elected to the office, he can not be guilty of a crime in refusing to execute his duties.[5] Certainty to common intent, it is said, is what is required; perfect certainty is unattainable, and the attempt to secure it would in almost every case lead to a variance.[6] An illus-

1 IOWA—State v. Stiles, 40 Iowa 148; State v. Murray, 41 Iowa 580. MASS.—Com. v. Perry, 114 Mass. 263. MO.—State v. Fancher, 71 Mo. 460. N. H.—Messenger v. State, 58 N. H. 348. TEX.—Garcia v. State, 19 Tex. App. 383. FED.—United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.

In United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, it was held that an indictment under the Act of May 31, 1870, prohibiting the intimidation of citizens, must contain the averment that the right hindered was one secured by the Constitution and laws of the United States.

See, to same effect, Biggs v. People, 8 Barb. (N. Y.) 547; People v. Taylor, 3 Den. (N. Y.) 91; State v. Philbrick, 31 Me. 401; Kit v. State, 30 Tenn. (11 Humph.) 167.

Doctrine of this branch of pleading is well stated by Judge Kane, in United States v. Almeida, Wh. Prec. 1061-2, Fed. Cas. No. 14433.

Indictment for procuring another to do a particular thing must give the name of such other person, or aver that the name was unknown.—United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.

Under statute, when a general form is substituted for the prior special forms, the court may require the prosecution to give notice of such special matter as is requisite for his information.—Infra, § 199. See Goersen v. Com., 99 Pa. St. 388.

2 State v. Hodges, 55 Md. 127; Com. v. Washburn, 128 Mass. 421.

3 State v. Wimberly, 3 McCord (S. C.) 190.

4 Cro. Eliz. 137; Cowp. 683; Kerr's Whart. Crim. Law, §§ 1509 et seq.

5 Cowp. 683; 5 Mod. 196.

6 See United States v. Ferro, 18 Fed. 901.

tration of the degree of certainty required may be found in indictments for bigamy. In such indictments a variance as to the second wife's name is fatal, it being necessary to individuate her, in order to determine the offense.[7] But the weight of authority is that it is not necessary to set forth the name of the first wife.[8] And if we lean on the analogy of indictments for receiving stolen goods, we should hold that the more general statement is enough. If we are forced to state in detail the marital relations of the parties, it would be necessary to go still further, and aver that the first wife or husband of the defendant was capable of consenting to marriage, and was not bound by other matrimonial ties. As, however, the first marriage in all its relations is simply matter of inducement, it is enough to state it in general terms, without specifying the details. If these are needed for justice, they can be supplied by a bill of particulars.[9] Where, however, the details of the first marriage are given, a variance in the name is fatal.[10] The certainty, in other words, must be such, so far as concerns the substance of the offense, as exhibits the truth according to its ordinary general acceptation; not the truth with its differentia scientifically and exhaustively displayed.[11]

§ 194. Omission of essential incidents is fatal. We may hold it to be a general rule that, where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists.[1] Hence, the omission of any fact or circumstance necessary to con-

7 R. v. Deeley, 4 Car. & P. 579, 19 Eng. C. L. 858, 1 Mood. C. C. 303.

8 Hutchins v. State, 28 Ind. 34; Com. v. Whaley, 69 Ky. (6 Bush) 266; State v. Loftin, 19 N. C. (2 Dev. & B.) 31.

9 Contra: State v. La Bore, 26 Vt. 265.

10 R. v. Gooding, Car. & M. 297, 41 Eng. C. L. 165.

11 See Buller, J., R. v. Lynne Regis, 1 Doug. 159; State v. Nicholson, 67 Md. 1, 8 Atl. 817.

1 2 Hawk., ch. 25, § 57; Bac. Ab. Indictment, G. 1; Cowp. 683; People v. Martin, 52 Cal. 201.

stitute the offense will be fatal; as, in an indictment for obstructing an officer in the execution of process, without showing that he was an officer of the court out of which the prosecution issued, and the nature of the official duty and of the process.[2] An indictment, also, for contemptuous or disrespectful words to a magistrate is defective without showing that the magistrate was in the execution of his duty at the time;[3] and an indictment against a public officer for non-performance of a duty without showing that he was such an officer as was bound by law to perform that particular duty,[4] though the title of an officer need not be alleged unless it be at issue; and any unnecessary averments of this class may be rejected as surplusage.[5] It is necessary, also, in an indictment for obtaining money under false pretenses, to show whose money it was.[6]

At the same time it is not necessary, when a minor offense is inclosed in a greater, to introduce the averments showing the defendant to have been guilty of the greater offense, though these should be proved by the evidence. The defendant, however, on such an indictment, can be convicted only of the minor offense.[7]

§ 195. TERMS MUST BE TECHNICALLY EXACT. Not only must all the circumstances essential to the offense be

2 McQuoid v. People, 8 Ill. (3 Gilm.) 76; Cantrill v. People, 8 Ill. (3 Gilm.) 356; State v. Burt, 25 Vt. 373; R. v. Everett, 8 Barn. & C. 114, 15 Eng. C. L. 64; R. v. Osmer, 5 East. 304.

3 R. v. Lease, Andr. 226.

4 5 T. R. 623.

5 Infra, § 200.

6 R. v. Norton, 8 Car. & P. 196, 34 Eng. C. L. 686.

In New York, where an attorney of the Court of Common Pleas was charged with extortion, and the indictment averred that on ——— he obtained a judgment in favor of one J. R. v. A. C., and that he did extort and receive from the said A. C. $11 over and above the fees usually paid for such service, and due in the suit aforesaid, etc., it was held that the indictment was not sufficiently precise, it not specifying how much he received on his own account, and how much on that of the officers and members of the court.—People v. Rust, 1 Cain. (N. Y.) 133.

7 See State v. Bowling, 29 Tenn. (10 Humph.) 52; Kerr's Whart. Crim. Law, §§ 33-38.

averred, but these averments must be so shaped as to include the legal characteristics of the offense. Thus, an indictment charging the defendant with forging a receipt against a book-account is defective when it does not bring the facts up to the definition of forgery.[1] So an indictment for fornication and bastardy must use the technical expressions which the statutes prescribe.[2] The main charges of guilt must be categorically made;[3] and can not be thrown into a participal form.[4] It is otherwise as to incidental assertions, e. g., scienter, which, though material, are in the nature of qualifications of such material charges.[5]

§ 196. —— NOT ENOUGH TO CHARGE CONCLUSION OF LAW. As the indictment must contain a specific description of the offense, it is not enough to state a mere conclusion of law.[1] Thus, it would be insufficient to charge the defendant with "stealing" or "murdering."[2] So it is bad to accuse him of being a common defamer, vexer, or oppressor of many men,[3] or a common disturber of the peace, and having stirred up divers quarrels,[4] or a common forestaller,[5] or a common thief,[6] or as to a common evil-

1 Infra, §§ 196, 269; State v. Dalton, 6 N. C. (2 Murph.) 379.

2 Com. v. Pintard, 1 Browne (Pa.) 59; Simmons v. Com., 1 Rawle (Pa.) 142.

3 Introduction of popular terms does not vitiate if these terms are surplusage or may be susceptible of a definite meaning, see Baker v. People, 105 Ill. 402; Began's case, 12 R. I. 309.

4 State v. Higgins, 53 Vt. 191.

5 R. v. Lawley, 2 Stra. 904; Com. v. Daniels, 2 Va. Cas. 402.

1 Infra, § 280. IND.—State v. Record, 56 Ind. 107. KAN.—State v. Boverlin, 30 Kan. 611, 2 Pac. 630; State v. Foster, 30 Kan. 365, 2 Pac. 628. MICH.—People v. Heffron, 53 Mich. 527, 19 N. W. 170. MISS.—Finch v. State, 64 Miss. 461, 1 So. 630. TEX.—Insall v. State, 14 Tex. App. 145, 154. FED.—And see United States v. Cruikshank, 92 U. S. 544, 23 L. Ed. 588.

2 1 Roll. Rep. 79; 2 Roll. Ab. 79; 2 Stra. 699; 2 Hawk., ch. 25, § 59; Com. Dig. Indictment, G. 3; Bac. Ab. Indictment, G. 1. Infra, § 280.

3 2 Roll. Ab. 79; 1 Mod. 71; 2 Stra. 848, 1246, 1247; 2 Hale. 182; 2 Hawk., ch. 25, § 59; Com. Dig. Indictment, G. 3; Bac. Ab. Indictment, G. 1.

4 Ibid. Infra, §§ 280, 281.

5 Moore, 302; 2 Hawk., ch. 25, § 59; Bac. Ab. Indictment, G. 1.

6 Ibid.; 2 Roll. Ab. 79; 2 Hale 182; Cro. C. C. 37.

doer,[7] or a common champertor,[8] or a common conspirator, or any other such vague accusation.[9] On the same reasoning, in an indictment for obtaining money by false pretenses, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply.[10] It is also not sufficient, generally, to charge "malicious mischief" or "malicious injury"; the facts of the injury must be given.[11] An indictment, on the same principle, charging a man with being a common cheat, or a common swindler or defrauder, is bad, and is not helped by an averment that, by divers false pretenses and false tokens, he deceived and defrauded divers good citizens of the said State.[12] A count, also, in an indictment charging that the defendant sold a lottery ticket, and tickets, in a lottery not authorized by the laws of the Commonwealth, is bad, not being sufficiently certain;[13] and so of an indictment for embezzlement charging unlawful loaning of State money, without stating how or to whom, is bad;[14] and so of a count charging the defendant with voting without having the legal qualifications of a voter;[15] and so of a charge that election officers "did commit wilful fraud in discharge of duties"

7 2 Hawk., ch. 25, § 59; Bac. Ab. Indictment, G. 1. Infra, §§ 280, 281.

8 2 Hale 182; 2 Hawk., ch. 25, § 59; Bac. Ab. Indictment, G. 1.

9 Ibid.; Com. v. Wise, 110 Mass. 181. See Kerr's Whart. Crim. Law, §§ 1695, 1713-1719.

10 2 M. & S. 379. See Kerr's Whart. Crim. Law, § 1480.

11 Kerr's Whart. Crim. Law, § 1331; and see, ibid., § 2197.

12 Kerr's Whart. Crim. Law, §§ 1392, 1713-1719, 1721; United States v. Royall, 3 Cranch C. C. 618, Fed. Cas. No. 16201.

13 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

14 State v. Brandt, 41 Iowa 593.

15 CAL.—People v. Neil, 91 Cal. 465, 27 Pac. 760. IND.—Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754. N. Y.—People v. Barber, 48 Hun 198; People v. Wilbur, 4 Park. Cr. Rep. 19. TENN.—Pearce v. State, 33 Tenn. (1 Sneed) 63, 60 Am. Dec. 135. TEX.—Gallagher v. State, 10 Tex. App. 469.

Compare: State v. Lockbaum, 38 Conn. 400.

See infra, §§ 280, 281.

is insufficient without setting out the particular acts;[16] and so of a count which charges the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to-wit, one pound of confectionery";[17] and so an indictment under statute for defrauding a hotel-keeper is insufficient, unless the nature and character of the acts and circumstances indicative of fraudulent intent are fully set forth;[18] and so an indictment for defrauding by means of divers false and fraudulent tokens, devices, pretenses, and representations, must make specific allegations as to the tokens, devices, pretenses, and representations, or it will be insufficient.[19]

Conspiracy to cheat one of lands and goods being charged, indictment need not state how accomplished,[20] because the object of the conspiracy being in itself unlawful, it is not necessary to set out how accomplished.[21]

§ 197. —— EXCEPTIONS IN CASE OF "COMMON BARRATORS," "COMMON SCOLDS," AND CERTAIN NUISANCES. There are, however, several marked exceptions to the rule requiring the offense, in each case, to be specifically set forth. Thus, an indictment charging one with being a "common barrator";[1] or, a "common scold";[2] or, a

Character of election must be described or sufficiently identified in the indictment.—Gaudy v. State, 82 Ala. 61, 2 So. 465.

Indictment for fraudulent registration which fails to show fraud, and which fails to state facts showing defendant not entitled to register, is bad.—United States v. Hirshfield, 13 Blatchf. 330, Fed. Cas. No. 15372.

16 State v. Krueger, 134 Mo. 262, 35 S. W. 604; State v. Mahaey, 19 Mo. App. 210; Com. v. Miller, 2 Pars. Sel. Eq. Cas. (Pa.) 480.

17 Com. v. Chase, 125 Mass. 202.

18 Com. v. Dennis, 1 Lehigh Valley Law Rep. 14.

19 Com. v. Brocken, 8 W. N. C. 280, 14 Phila. 342, 37 Phila. Leg. Int. 14.

20 People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Arnold, 46 Mich. 268, 9 N. W. 406.

21 People v. Willis, 34 App. Div. (N. Y.) 203, 54 N. Y. Supp. 642, 14 N. Y. Cr. Rep. 414.

1 6 Mod. 311; 2 Hale 182; 1 Russell 185; 1 Ch. C. L. 230; Kerr's Whart. Crim. Law, §§ 1713-1719, 1721; State v. Dowers, 45 N. H. 543; Com. v. Davis, 28 Mass. (11 Pick.) 432. See Penn. Rev. Act, 1860, tit. ii.

2 6 Mod. 311; 9 Stra. 1246; 2 Keb. 409; 1 Russell 302; Com. v.

"common night-walker,"[3] is good. The same rule applies to certain lines of nuisance, to describe which generic terms are adequate, as is the case with a "house of ill-fame"; a "disorderly house,"[4] and a "tippling-house."[5] So an indictment for betting at faro bank need not set out the particular nature of the game, nor the name of the person with whom the bet was made.[6] But an indictment, as has just been seen, charging the defendant as a common cheat, is bad.[7]

§ 198. MATTERS UNKNOWN MAY BE PROXIMATELY DESCRIBED. If a particular fact, or condition, which is one of the component parts of the offense, can not be accurately described, the indictment will be good, if it state that such fact or condition is unknown to the grand jury, provided that the fact or condition in question be described as accurately as possible.[1] But "this allegation, that the name or other particular fact is 'unknown to the grand jury,' is not merely formal; on the contrary, if it be shown that it was, in fact, known to them, then, the

Pray, 30 Mass. (13 Pick.) 362; James v. Com., 12 Serg. & R. (Pa.) 220; United States v. Royall, 3 Cr. C. C. 618, Fed. Cas. No. 16201.

3 State v. Dowers, 45 N. H. 543.

4 State v. Patterson, 29 N. C. (7 Ired.) 70, 45 Am. Dec. 506. See Kerr's Whart. Crim. Law, §§ 1713-1719, 1721.

5 1 Term R. 754; 1 Russell 301; State v. Collins, 48 Me. 217; Com. v. Pray, 30 Mass. (13 Pick.) 359; State v. Russell, 14 R. I. 506.

6 Pemberton v. State, 85 Ind. 507; State v. Ames, 1 Mo. 372.

See Kerr's Whart. Crim. Law, § 1742.

7 Supra, § 196; infra, §§ 280, 281; Kerr's Whart. Crim. Law, §§ 1128, 1391, 1392, 1713.

1 Whart. Crim. Ev., § 91 et seq. MASS.—Com. v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711; Com. v. Ashton, 125 Mass. 384; Com. v. Fenno, 125 Mass. 387; Com. v. Martin, 125 Mass. 394. MINN.—State v. Gray, 29 Minn. 142, 12 N. W. 455. N. H.—State v. Wood, 53 N. H. 484. N. Y.—People v. Taylor, 3 Den. 91.

As to instrument of death, see Com. v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711; Com. v. Fox, 73 Mass. (7 Gray) 585; Cox v. People, 80 N. Y. 500; State v. Williams, 52 N. C. (7 Jones) 446, 78 Am. Dec. 248; Kerr's Whart. Crim. Law, § 658.

As to lost writings, see Com. v. Martin, 125 Mass. 394. See, infra, § 220.

In Winston v. State, 9 Tex. App. 251, it was held that a certain "currency note to the jurors un-

excuse failing, it has been repeatedly held that the indictment was bad, or that the defendant should be acquitted, or the judgment arrested or reversed." [2]

§ 199. BILL OF PARTICULARS MAY BE REQUIRED. As will hereafter be more fully seen, whether a bill of particulars or specification of facts shall be required is exclusively within the discretion of the presiding judge.[1] In many cases of general charges (e. g., conspiracy, where the indictment merely avers a general conspiracy to cheat), such a specification on the part of the prosecution will be exacted.[2] As a general rule, the counsel for the prosecution are to be restricted, after such an order, to proof of the particulars stated in the bill, though this limitation may, in extraordinary cases, be relaxed at the discretion of the court.[3]

§ 200. SURPLUSAGE NEED NOT BE STATED; AND IF STATED MAY BE DISREGARDED. It is not requisite to charge in the indictment anything more than is necessary to accurately and adequately express the offense; and when unneces-

known" was not sufficient without averring the country in which the note was currency. And this holds good in all cases where there were means of ascertaining such country.

As to names, see, supra, § 146.

2 Christiancy, J., in Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314, citing: ARK.—Reed v. State, 16 Ark. 499. IND.—Blodget v. State, 3 Ind. 403. MASS.—Com. v. Hill, 65 Mass. (11 Cush.) 137. MO.—Hays v. State, 13 Mo. 246. ENG.—R. v. Walker, 3 Camp. 264; R. v. Robinson, Holt N. P. 595, 596, and 1 Chit. Crim. Law, p. 213.

1 Com. v. Snelling, 32 Mass. (15 Pick.) 321; Com. v. Giles, 67 Mass. (1 Gray) 466.

As to embezzlement, see Kerr's Whart. Crim. Law, § 1295.

As to conspiracy, see Kerr's Whart. Crim. Law, § 1653.

See, generally, Com. v. Davis, 28 Mass. (11 Pick.) 432; Com. v. Wood, 70 Mass. (4 Gray) 11.

2 People v. McKinney, 10 Mich. 54; Goersen v. Com., 99 Pa. St. 388; R. v. Kenrick, 5 Ad. & El. (Q. B.) 49, 48 Eng. C. L. 48; R. v. Hamilton, 7 Car. & P. 448, 32 Eng. C. L. 701; R. v. Brown, 8 Cox C. C. 69.

3 R. v. Esdaile, 1 F. & F. 213; R. v. Brown, 8 Cox C. C. 69.

sary averments or aggravations are introduced, they can be considered as surplusage, and as such disregarded.[1]

The following may be given as illustrations of surplusage:

The averment of "goods and chattels," when used to describe ownership of choses in action when this ownership is independently described;[2]

Ownership when immaterial;[3]

Intent, when unnecessary to the offense;[4]

Conclusions of law, summing up the offense unnecessarily; as where an indictment for taking a voluntary false oath, not amounting to perjury, concludes, and "so the said A. B. did commit perjury," etc.;[5]

1 See Whart. Crim. Ev., §§ 138 et seq. IND.—Kennedy v. State, 62 Ind. 136; Feigel v. State, 85 Ind. 589; Myers v. State, 92 Ind. 390; Trout v. State, 111 Ind. 499, 12 N. E. 1005; Ford v. State, 112 Ind. 373, 14 N. E. 241. MINN.—State v. Munch, 22 Minn. 67. N. Y.—People v. Casey, 72 N. Y. 393; People v. Polinsky, 73 N. Y. 65. N. C.—State v. Ballard, 6 N. C. (2 Murph.) 186. TENN.—State v. Belville, 66 Tenn. (7 Baxt.) 548. TEX.—Rivers v. State, 10 Tex. App. 177. VT.—State v. Murphy, 55 Vt. 547. W. VA.—State v. Miller, 26 W. Va. 110. FED.—United States v. Claflin, 13 Blatchf. C. C. 178, Fed. Cas. No. 14798.

Allegations, recitals, or averments showing grand jury acted in finding indictment upon a statute which has been repealed, such allegations, recitals, or averments, if erroneous, can not be rejected as surplusage, because it was the ground of this action. — United States v. Goodwin, 20 Fed. 237.

Greater particularity than required in indictment, it must be proved as laid; nothing connected with the offense is regarded as surplusage.—United States v. Brown, 3 McL. C. C. 233, Fed. Cas. No. 14666.

Matters of law need not be set forth in an indictment.—United States v. Rhodes, 1 Abb. U. S. 28, 7 Am. L. Reg. 233, Fed. Cas. No. 16151.

Statute need not be recited in indictment; but if indictment professes to recite the statute upon which it is founded, and materially varies therefrom, the recital can not be rejected as surplusage, but the variance is fatal.—Butler v. State, 3 McC. (S. C.) 383.

2 R. v. Radley, 1 Den. C. C. 450; Com. v. Bennett, 118 Mass. 452. Infra, § 238.

3 Pye's case, East P. C. 983; United States v. Howard, 3 Sumn. C. C. 19, Fed. Cas. No. 15204.

4 R. v. Jones, 2 Barn. & Ad. 611, 22 Eng. C. L. 256.

5 R. v. Hodgkiss, L. R. 1 C. C. 212.

Unnecessary aggravation;[6]

Falsity of the charge, in cases where the indictment is for conspiracy to charge with an indictable offense, and when the question of falsity is not at issue;[7]

Unnecessary terms of art, such as "feloniously";[8]

Redundant divisible offenses, one of which can be discharged, leaving the other sufficient;[9]

Specifications of ways of resisting an officer or of the authority under which he acted;[10]

All but a particular article in larceny, when this is relied on to the exclusion of others stated;[11]

Unnecessary predicates if divisible;[12]

Superfluous assignments in perjury and false pretenses;[13]

Cumulative intents;[14]

Cumulative descriptions of a person[15] or a thing;[16]

Cumulative averments of instruments.[17]

Surplusage is not ground for demurrer.[18] But even though an averment is more particular than it need be, yet if it can not be stricken out without removing an essential part of the case, it can not be regarded as surplusage; and if there be a variance in proving it, the prosecution fails.[19]

6 Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; Com. v. Randall, 70 Mass. (4 Gray) 36; Scott v. Com., 6 Serg. & R. (Pa.) 224.

See, infra, § 202.

7 R. v. Hollingberry, 4 B. & C. 329, 6 Dow. & Ry. 345.

8 Infra, § 310.

9 Whart. Crim. Ev., § 144. See Smith v. State, 85 Ind. 183; Dunham v. State, 9 Tex. App. 330.

10 Gunyon v. State, 68 Ind. 70; State v. Goss, 69 Me. 22; State v. Copp, 15 N. H. 212.

11 Whart. Crim. Ev., § 135, 145.

12 Whart. Crim. Ev., § 134; Ferrell v. State, 70 Tenn. (2 Lea) 25; Burke v. State, 5 Tex. App. 74; State v. Newson, 13 W. Va. 859.

13 Whart. Crim. Ev., § 131.

14 R. v. Hanson, 1 Car. & M. 334, 41 Eng. C. L. 185.

15 Supra, §§ 138 et seq. McCarney v. People, 83 N. Y. 408.

16 Ibid.

17 Kerr's Whart. Crim. Law, § 652; Trout v. State, 111 Ind. 499, 12 N. E. 1005; State v. Adams, 78 Me. 486, 7 Atl. 267.

See, also, infra, § 261.

18 Steph. Pl. 376.

19 ME.—State v. Noble, 15 Me. 476. MASS.—Com. v. Wellington, 89 Mass. (7 Allen) 299. FED.—

§ 201. VIDELICET IS THE POINTING OUT OF AN AVERMENT OF PROBABLE SPECIFICATION. A videlicet, in reference to statement of time, has been already considered.[1] The object of the videlicet, which may be extended to allegations of quantity, of distance, of localization, of differentiation, is to annex a specification, by way of definition, to a clause immediately preceding, and thus to separate, by a kind of bracketing, this specification from other clauses.[2] This "is a precaution which is totally useless when the statement placed after the videlicet is material, but which, in other cases, prevents the danger of a variance by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter."[3] But a videlicet can not be admitted to contradict, increase, or diminish the allegations with which it is connected.[4]

§ 202. ASSAULT MAY BE SUSTAINED WITHOUT SPECIFICATION OF OBJECT. Where an assault is duly averred, then the intent with which this assault was committed is matter of surplusage, and need not be proved in order to secure a conviction of the assault.[1] Even an assault with intent need not specify the facts necessary to constitute an offense whose actual and complete shape was not at the

United States v. Foye, 1 Curt. C. C. 364, Fed. Cas. No. 15157. ENG.—R. v. Deeley, 1 Mood. C. C. 303.

See Whart. Crim. Ev., §§ 109, 146.

1 Supra, § 164.

2 1 Stark. C. P. 251-2. MASS.—Com. v. Hart, 76 Mass. (10 Gray) 468. MINN.—State v. Heck, 23 Minn. 551. N. Y.—People v. Jackson, 3 Den. 101, 45 Am. Dec. 449; Crichton v. People, 6 Park. Crim. Rep. 363. ENG.—Ryalls v. R., 11 Ad. & El. N. S. (11 Q. B.) 781, 797, 63 Eng. C. L. 78, 795.

See, supra, § 165.

3 Heard's Pl. 141, citing 1 Smith's Lead. Cas. (16th Eng. ed.) 592.

4 Gould's Pleading, p. 68. State v. Brown, 51 Conn. 1.

1 R. v. Higgins, 2 East 5; though see R. v. Marsh, 1 Den. C. C. 505; Kerr's Whart. Crim. Law, § 834.

Even the word "assault" is not necessary, but may be supplied by terms by which it is implied.—Murdock v. State, 65 Ala. 520; Cole v. State, 11 Tex. App. 67.

Compare: Hays v. State, 77 Ind. 450.

time matured.[2] Thus, an indictment for an assault with an intent to steal from the pocket, without stating the goods or money intended to be stolen, is good;[3] nor is it necessary to aver that the prosecutor had anything in his pocket to be stolen.[4] In an indictment, also, for an assault with intent to murder, it is not necessary at common law to state the means made use of by the assailant, to effectuate the murderous intent,[5] though when required by statute and when the instrument is known to the pleader, it should be averred.[6] So in an indictment for breaking and entering a dwelling-house, with intent to commit a rape, it need not be alleged that the defendant "then and there" intended to commit the rape, nor need the offense of rape be fully and technically set forth.[7]

2 See Kerr's Whart. Crim. Law, § 843. CAL.—People v. Girr, 53 Cal. 629. TENN.—State v. Montgomery, 66 Tenn. (7 Baxt.) 100. TEX.—Morris v. State, 13 Tex. App. 65. WIS.—Cross v. State, 55 Wis. 262, 12 N. W. 425.

3 Com. v. Rogers, 5 Serg. & R. (Pa.) 463; Kerr's Whart. Crim. Law, § 834.

4 Com. v. McDonald, 59 Mass. (5 Cush.) 365; Com. v. Doherty, 64 Mass. (10 Cush.) 52; Durand v. People, 47 Mich. 332, 11 N. W. 184.

5 Kerr's Whart. Crim. Law, § 843 and cases cited. ALA.—Trexler v. State, 19 Ala. 21. IND.—State v. Hubbs, 58 Ind. 415. KAN.—State v. Miller, 25 Kan. 699. LA.—State v. Jackson, 37 La. Ann. 467. MD.—State v. Dent, 3 Gill. & J. 8. MICH.—Rice v. People, 15 Mich. 9. MO.—State v. Jordan, 19 Mo. 213; State v. Chandler, 24 Mo. 371, 69 Am. Dec. 432; State v. Steinemann, 162 Mo. 188, 62 S. W. 694; State v. Temple, 194 Mo. 237, 5 Ann. Cas. 954, 92 S. W. 869; State v. Payne, 194 Mo. 442, 92 S. W. 461. TEX.—State v. Johnson, 11 Tex. 22. VT.—State v. Daley, 41 Vt. 564. WIS.—Kilkelly v. State, 43 Wis. 604. FED.—United States v. Herbert, 5 Cr. C. C. 87, Fed. Cas. No. 15354.

The question depends, it may be observed, on the statute constituting the offense.—See State v. Munch, 22 Minn. 67.

In North Carolina it has been held that specification of weapon is necessary.—State v. Moore, 82 N. C. 659; State v. Hooper, 82 N. C. 663; State v. Benthall, 82 N. C. 664.

But in State v. Gainus, 86 N. C. 632, it was held that in an indictment for an assault with intent to murder the weapon need not be averred.

6 See State v. Miller, 25 Kan. 699; Porter v. State, 57 Miss. 300.

Required by statute in some states.

7 Com. v. Doherty, 64 Mass. (10 Cush.) 52.

Indictment for an assault with intent to commit a rape need not

The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.[8] It is otherwise, however, when the charge is a statutory aggravated assault, in which case the aggravation must be specially averred.[9] When, however, an *attempt* is averred, it is necessary that some act constituting such attempt (*e. g.*, an assault) should be laid,[10] as the *attempt* is not per se indictable, and needs extraneous facts to make it the subject of an indictment, while it is otherwise with an *assault*.[11] It is not necessary, however, to aver that which the grand jury could not have known, *e. g.*, what were the specific

allege that the intent was to "carnally and unlawfully know."—Singer v. People, 13 Hun (N. Y.) 418; affirmed 75 N. Y. 608.

8 MD.—State v. Dent, 3 Gill. & J. 8. N. Y.—Mackesey v. People, 6 Park. Cr. Rep. 114. FED.—United States v. Gooding, 25 U. S. (12 Wheat.) 473, 6 L. Ed. 693; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Ulrici, 3 Dill. C. C. 535, Fed. Cas. No. 16594.

9 State v. Beadon, 17 S. C. 55; Griffin v. State, 12 Tex. App. 423.

10 CONN.—State v. Wilson, 30 Conn. 503. LA.—State v. Womack, 31 La. Ann. 635. PA.—Randolph v. Com., 6 Serg. & R. 398. VA.—Clark's Case, 6 Gratt. 675.

As tending to a laxer view, see People v. Bush, 4 Hill (N. Y.) 133; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.

As to precision necessary in indictments for attempts, etc., see Kerr's Whart. Crim. Law, §§ 212 et seq.

In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, it is held that where a defendant is not charged with using a still, boiler, or other vessel himself, but with causing and procuring some other person to use them, the name of such person must be given in the indictment.

Indictment for distilling vinegar illegally, must set out that the apparatus was used for that purpose, and in the premises described, and the vinegar manufactured at the time the apparatus described was being used. The averment that defendant caused and procured the apparatus to be used for distilling implies with sufficient certainty that it was so used; it is not essential that its actual use shall be set out. See United States v. Claflin, 13 Blatchf. C. C. 178, Fed. Cas. No. 14798.

11 Thompson v. People, 96 Ill. 158; United States v. Wentworth, 11 Fed. 52.

goods the party attempted to steal,[12] or, it may be, particular poison the defendant intended to employ.[13]

§ 203. ATTEMPT TO COMMIT AN IMPOSSIBLE CRIME. Where the offense consists in the criminal intent, an indictment will lie for such attempt, and it need not be alleged that there was a possibility that the attempted crime could have been committed; in other words, there may be an indictment for an attempt to commit an impossible crime, where the intent with which the attempt is made is criminal. In such case the indictment must charge and the evidence show that the intent was in fact criminal.[1] Thus, there may be a criminal attempt to pick the pocket of another, notwithstanding the fact that there was nothing in the pocket at the time,[2] and for that reason the attempted crime was impossible of accomplishment;[3] or, again, there may be a criminal attempt to produce an abortion, although the woman is not at the time pregnant with child,[4] or the medicine administered

12 State v. Utley, 82 N. C. 556.

13 Watson v. State, 9 Tex. App. 237.

Term feloniously, in such cases, must ordinarily be used when the object is felonious. Infra, § 309.

1 Chelsey v. State, 121 Ga. 340, 49 S. E. 258.

See, also, infra, § 209.

2 In England it was formerly held that where a man put his hand into another's pocket, and there was nothing in the pocket to steal, he could not be convicted of an attempt to steal (Reg. v. Collins, 1 Leigh & C. 471); but this doctrine was overruled by Lord Coleridge in Reg. v. Brown, 24 Q. B. Div. 357.

In America this doctrine has never found favor. Butler, J., says in State v. Wilson, 30 Conn. 500, that "it would be a startling proposition that a known pickpocket might pass around in a crowd, in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present with intent to steal, and yet not be liable to arrest and punishment until the policeman had ascertained that there was in fact money or valuables in some one of the pockets upon which the thief had experimented."

3 Com. v. McDonald, 59 Mass. (5 Cush.) 365. The court in this case say: "A man may attempt to steal by breaking open a trunk, and be disappointed at not finding the object of pursuit, and so not steal in fact. Still he nevertheless remains chargeable with an act done towards the commission of the offense."

4 Reg. v. Whitchurch, 24 L. R. Q. B. Div. 420, 8 Am. Cr. Rep. 1.

harmless and incapable of effecting the purpose attempted.[5] And where the occupant of a building observed a policeman peeping through a hole he had made in the roof, for the purpose of determining from observation whether the occupant was conducting therein a gambling or lottery game, procured a pistol and fired at the spot, with intent to kill the officer, he is guilty of an assault with intent to commit murder, although the officer was not at the spot when the shot was fired.[6]

§ 204. ACT OF ONE CONFEDERATE MAY BE AVERRED AS ACT OF THE OTHER. As we shall have occasion to see at length when the proof of variance is discussed,[1] the act of an agent may be averred as the act of the principal, and that of one confederate as the act of the other.[2]

§ 205. DESCRIPTIVE AVERMENT MUST BE PROVED. When an averment is descriptive, it may so far enter into the designation of the offense that it must be specifically proved.[1]

§ 206. ALTERNATIVE STATEMENTS ARE INADMISSIBLE. The certainty required in an indictment precludes the adoption of an alternative statement.[1] Thus, if the indict-

5 State v. Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148, 3 Am. Cr. Rep. 1.

Rothrock, Chief Justice, says: "A party who, with the necessary criminal intent, uses any substance to produce a miscarriage, surely can not be held innocent because he mistakenly administered a drug or substance which did not produce the result intended. It is the intent and not the 'substance' used, that determines the criminality."

6 People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800.

In assault to kill there must be a present ability as well as an intent to do the injury.—State v. Smail, 8 Ind. 524, 65 Am. Dec. 772; State v. Napper, 6 Nev. 15; State v. Godfrey, 17 Ore. 300, 11 Am. St. Rep. 830, 20 Pac. 625.

1 Whart. Crim. Ev., § 102; State v. Basserman, 54 Conn. 89, 6 Atl. 185.

2 Supra, § 182.

1 Supra, § 200; Whart. Crim. Ev., §§ 109, 146. IND.—Dennis v. State, 91 Ind. 291. MASS.—Com. v. Moriarty, 135 Mass. 540. N. H.—State v. Sherburn, 59 N. H. 99. TEX.—Gray v. State, 11 Tex. App. 411.

1 ALA.—Danner v. State, 54 Ala. 125, 25 Am. Rep. 662 (indictment

ment charge the defendant with one or other of two offenses, in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged,[2] burned *or* caused to be burned,[3] sold spirituous *or* intoxicating liquors;[4] levavit, vel levari causavit,[5] conveyed *or* caused to be conveyed, etc., it is bad for uncertainty;[6] and the same, if it charge him in two different characters, in the disjunctive as quod A. existens servus sive deputatus, took, etc.;[7] and so where the defendant is

charging burglary of p l a c e "in which g o o d s, merchandise, or other valuable thing" etc.). ARK.—Thompson v. State, 37 Ark. 408. CAL.—People v. Hood, 6 Cal. 236 ("burn *or* cause to be burned"). IND.—State v. Stephenson, 83 Ind. 246. N. H.—State v. Naramore, 58 N. H. 273 (fraudulently concealing property to prevent "attachment *or* seizure" etc. "upon mesne process *or* execution"). TEX.—Tompkins v. State, 4 Tex. App. 161; Hammel v. State, 14 Tex. App. 326; Parker v. State, 20 S. W. 707 (carrying arms "on *or* about the person"). W. VA.—State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603 (charging sale of intoxicating liquors, without a license, "to be drunk in, upon or about the building *or* premises w h e r e sold"). ENG.—Ex parte Pain, 5 Barn. & C. 251, 11 Eng. C. L. 450, 29 Rev. Rep. 231, 15 Eng. Rul. Cas. 208, sub nom. Rex v. Pain, 7 Dowl. & Ry. 678; Rex v. Sadler, 2 Chit. 519, 18 Eng. C. L. 766 ("did kill, take and destroy, *or* attempt to kill, take and destroy"); Rex v. North, 6 Dowl. & Ry. 143, 28 Rev. Rep. 538 (charging selling "beer *or* ale").

"Or" used in sense of "to wit" held to be good pleading. See Brown v. Com., 8 Mass. 59 ("counterfeit bills or promissory notes"); Read v. People, 86 N. Y. 381 ("art or mystery"); State v. Gilbert, 13 Vt. 647 ("a mare of a bay or brown color").

Disjunctive statements in statutes, for this reason, are to be given conjunctively so. Infra, § 278.

2 2 Hawk., ch. 35, § 58. CAL.—People v. Tomlinson, 35 Cal. 503. KY.—Com. v. Perrigo, 60 Ky. (3 Metc.) 5. ENG.—R. v. Stocker, 1 Salk. 342, 371, 91 Eng. Repr. 300, 323.

As to averment of such disjunctive allegations, see, infra, § 278.

That such averments are divisible, see, infra, §§ 278, 300.

3 People v. Hood, 6 Cal. 236.

4 Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. But see Cunningham v. State, 5 W. Va. 508.

5 R. v. Stoughton, 2 Str. 900, 93 Eng. Repr. 927.

6 ALA.—Noble v. State, 59 Ala. 73. N. H.—State v. Gary, 36 N. H. 359; State v. Naramore, 58 N. H. 273. N. J.—State v. Drake, 30 N. J. L. (1 Vr.) 422. ENG.—R. v. Flint, Hardw. 370; R. v. Morley, 1 Y. & J. 221.

7 Smith v. Mall, 2 Roll. Rep. 263.

charged with having broken into a "barn *or* stable,"[8] with having sold "spirituous *or* intoxicating liquors," or with having administered a poison *or* drug.[9] So, generally, an indictment which may apply to either of two different offenses, and does not specify which, is bad.[10] On the other hand, alternatives have been permitted when they qualify an unessential description of the particular offense, and do not touch the offense itself.[11] Thus, in Vermont, it was held not to be a fatal objection, that an indictment charged the defendant with the larceny of a horse, described as being either of a "brown *or* bay color."[12] In Pennsylvania, indictments averring certain trees cut down not to be the property of the defendants "*or* either of them,"[13] and laying a nuisance to be in the "highway *or* road," etc., have been held good, the alternative being rejected as surplusage.[14] In several precedents in Massachusetts, the expression "as an innholder *or* victualler" formally occurs.[15] And in the United States Circuit Court for Michigan, it has been held that "cutting *or* causing to be cut" is not fatal.[16] The principle seems to be, that "or" is only fatal when it renders the statement of the offense uncertain, and not so when one term is used only as explaining or illustrating the

8 Horton v. State, 60 Ala. 72; see Pickett v. State, 60 Ala. 77.

9 GA.—Wingard v. State, 13 Ga. 396. N. J.—State v. Drake, 30 N. J. L. (1 Vr.) 422. PA.—Com. v. France, 2 Brewst. 568. TENN.—Whiteside v. State, 44 Tenn. (4 Cold.) 183; State v. Green, 50 Tenn. (3 Heisk.) 131.

10 Johnson v. State, 32 Ala. 583; Horton v. State, 60 Ala. 73; State v. Harper, 64 N. C. 129; R. v. Marshall, 1 Mood. C. C. 158.

11 Barnett v. State, 54 Ala. 579; State v. Newsom, 13 W. Va. 859.

12 State v. Gilbert, 13 Vt. 647. Infra, § 278.

13 Moyer v. Com., 7 Barr (Pa.) 439. See McGregor v. State, 16 Ind. 9.

14 ALA.—Kaisler v. State, 55 Ala. 64. CONN.—State v. Corrigan, 24 Conn. 286. MO.—State v. Ellis, 4 Mo. 474. PA.—Resp. v. Arnold, 3 Yeates 417.

15 Com. v. Churchill, 43 Mass. (2 Met.) 119, 125; Com. v. Thayer, 46 Mass. (5 Met.) 246.

"Did cause to be published, etc., in a certain paper *or* publication," seems to have escaped the vigilance of counsel who were concerned in the great case of People v. Crosswell, 3 John. Cas. (N. Y.) 338.

16 United States v. Potter, 6

other.[17] "Or," also, may be introduced in enumerating the negative averments required to exclude the exceptions of a statute.[18] And ordinarily the objections, if good, can not be taken after verdict.[19]

§ 207. DISJUNCTIVE OFFENSES IN STATUTE MAY BE CONJUNCTIVELY STATED. Where a statute disjunctively enumerates offenses, or the intent necessary to constitute such offenses, the indictment can not charge them disjunctively.[1] Thus, where a statute against unlawful shooting affixes a penalty when the act is done with intent to maim, disfigure, disable, or kill (in the disjunctive), the disjunctive statement of intent is bad.[2] Under statutes also, describing the several phases of forgery disjunctively, it is held fatal to say that the defendant forged, or caused to be forged, an instrument,[3] or that he carried and conveyed, or caused to be carried and conveyed, two persons having the smallpox, so as to burden a certain parish.[4] It is therefore error to state the successive gradations of statutory offenses disjunctively; and to state them conjunctively, when they are not repugnant, is allowable.[5]

McL. C. C. 186, Fed. Cas. No. 16078. See, also, State v. Richards, 23 La. Ann. 1294; State v. Ellis, 4 Mo. 474.

See, infra, § 278.

17 Brown v. Com., 8 Mass. 59; Com. v. Grey, 67 Mass. (2 Gray) 501; State v. Ellis, 4 Mo. 474; People v. Gilkinson, 4 Park. Cr. Rep. (N. Y.) 26; infra, § 278.

18 Ibid. KY.—Com. v. Hadscraft, 91 Ky. (6 Bush) 91. MO.—State v. Sundley, 15 Mo. 513. N. H.—State v. Burns, 20 N. H. 550. N. Y.—People v. Gilkinson, 4 Park. Cr. Rep. 25.

19 Johnson v. State, 50 Ala. 456.

1 N. J.—State v. Price, 11 N. J. L. (6 Halst.) 203. R. I.—State v. Colwells, 3 R. I. 284. S. C.—Jones v. State, 1 McM. 236, 36 Am. Dec. 257. TENN.—Whiteside v. State, 44 Tenn. (4 Cold.) 183. FED.—United States v. Armstrong, 5 Phila. Rep. 273, Fed. Cas. No. 14468.

See, infra, § 278.

2 Angel v. Com., 2 Va. Cas. 231.

3 1 Burr. 399; 1 Salk. 342, 371; 8 Mod. 32; 5 Mod. 137.

4 1 Sess. Cases 307.

5 Infra, § 300. CAL.—People v. Ah Woo, 28 Cal. 205. GA.—Wingard v. State, 13 Ga. 396. IND.—Keefer v. State, 4 Ind. 246; State v. Stout, 112 Ind. 245, 13 N. E. 715. MASS.—Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. MO.—State v. McCollum, 44 Mo. 343. N. J.—State v. Price, 11 N. J. L. (6 Halst.) 203. S. C.—

§ 208. —— OTHERWISE AS TO DISTINCT AND SUBSTANTIVE OFFENSES. When a statute in one clause makes several distinct and substantive offenses indictable, neither of which is included in the other, it has been held better to specify the actual offense committed.[1] Thus, where the language of the statute was, "any person who shall presume to keep a tippling-house, or sell rum, brandy, whisky, tafia, or other spirituous liquors, etc., shall be liable," etc.; and the indictment charged the defendant with selling the particular liquors in the aggregate without a license, it was held that the indictment was deficient in not defining the offense with sufficient precision.[2] Whether different designations of an object (e. g., "warrant," "order," "request") can be coupled will be hereafter noticed.[3]

§ 209. INTENT, WHEN NECESSARY, MUST BE AVERRED. The cases in reference to intent may be grouped under the following heads:

1. Where the intent is to be proved in order to indicate the character of the act, as when there is an attempt or assault to commit an offense, in which cases the intent must be averred;[1] and must be attached to all the material allegations.[2] And so as to the intent in forgery.[3]

Jones v. State, 1 McM. 236, 36 Am. Dec. 257; State v. Meyer, 1 Spears 305. VA.—Angel v. Com., 2 Va. Cas. 231; Rasnick v. Com., 2 Va. Cas. 356. FED.—United States v. Hull, 4 McCr. C. C. 273, 14 Fed. 324; United States v. Armstrong, 5 Phila. Rep. 273, Fed. Cas. No. 14468. ENG.—R. v. North, 6 Dow. & Ry. 143, 16 Eng. C. L. 258.

For other cases, see, infra, § 300.

1 But see Com. v. Ballou, 124 Mass. 26; State v. Locklear, 44 N. C. (Busb.) 205.

See, supra, § 193; infra, § 278.

2 State v. Raiford, 7 Port. (Ala.) 101; Miller v. State, 6 Miss. (5 How.) 250; R. v. Middlehurst, 1 Burr. 400.

3 Infra, §§ 242, 300.

1 CAL.—People v. Congleton, 44 Cal. 92. MASS.—Com. v. Hersey, 84 Mass. (2 Allen) 173. MINN.—State v. Garvey, 11 Minn. 154. TEX.—State v. Davis, 26 Tex. 201; Bartlett v. State, 21 Tex. App. 500, 2 S. W. 829. FED.—United States v. Wentworth, 11 Fed. 52.

2 Com. v. Boynton, 66 Mass. (12 Cush.) 500; Com. v. Dean, 110 Mass. 64; R. v. Rushworth, R. & R. 317.

3 See Kerr's Whart. Crim. Law, § 951.

2. Where the intent is to be prima facie inferred from the facts stated, in which case intent, unless part of the statutory definition, need not be specifically averred.[4] Thus, while intent must be averred in an indictment for an attempt to steal, it need not be averred in an indictment for larceny.[5]

3. Where intent is part of the statutory definition of the offense it must be averred, though it is otherwise in cases where it is not part of such statutory definition, and when the offense is punishable, no matter what was the intent.[6]

4. In negligent offenses, to allege intent is a fatal error, unless the allegation be so stated as to be capable of discharge as surplusage.[7]

§ 210. —— AND SO OF GUILTY KNOWLEDGE. Where guilty knowledge is not a necessary ingredient of the offense, or, where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary.[1] It is otherwise

Though see State v. Lurch, 12 Ore. 99, 6 Pac. 408.

4 See State v. Hurds, 19 Neb. 316, 27 N. W. 139.

5 Ibid.

6 Infra, § 269; State v. McCarter, 98 N. C. 637, 4 S. E. 553.

As to indictments for cheats and false pretenses, see Kerr's Whart. Crim. Law, § 1493; Stringer v. State, 13 Tex. App. 520.

7 See Kerr's Whart. Crim. Law, §§ 162 et seq.

As to surplusage, see, supra, § 200.

The Ohio statute which declares that it shall be sufficient in any indictment, where it is necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, is not in conflict with § 10 of the Bill of Rights, which requires the accused, on demand, to be furnished with "the nature and cause of the accusation against him." — Turpin v. State, 19 Ohio St. 540, 1869.

As to similar provision in Pennsylvania statute, see McClure v. Com., 86 Pa. St. 353; Kerr's Whart. Crim. Law, § 948.

1 2 East P. C. 51. CONN.—Barnes v. State, 19 Conn. 397. GA.—Phillips v. State, 17 Ga. 459. IND.—State v. Freeman, 6 Blackf. 248. IOWA—State v. Burgson, 53 Iowa 318, 5 N. W. 167. KY.—Com. v. Stout, 46 Ky. (7 B. Mon.) 247. ME.—State v. Goodenow, 65 Me. 30. MASS.—Com. v. Elwell, 43 Mass. (2 Met.) 190, 35 Am. Dec. 398; Com. v. Marsh, 48 Mass.

where guilty knowledge is not so implied and is a sub-

(7 Met.) 472; Com. v. Boynton, 66 Mass. (12 Cush.) 499; Com. v. Boynton, 84 Mass. (2 Allen) 160; Com. v. Farren, 91 Mass. (9 Allen) 489; Com. v. Nichols, 92 Mass. (10 Allen) 199; Com. v. White, 93 Mass. (11 Allen) 264, 87 **Am. Dec.** 711; Com. v. Raymond, 97 Mass. 567; Com. v. Smith, 103 Mass. 444; Com. v. Wentworth, 118 Mass. 441; Com. v. Smith, 166 Mass. 370, 44 N. E. 503. NEV.—State v. Trolson, 21 Nev. 419, 32 Pac. 930. N. H.—State v. White, 64 N. H. 42, 10 **Am. St. Rep.** 419, 13 Atl. 585; State v. Cornish, 66 N. H. 329, 11 **L. R. A.** 191, 21 Atl. 180; State v. Ryan, 70 N. H. 196, 85 **Am. St. Rep.** 629, 46 Atl. 49. OHIO—Turner v. State, 1 Ohio St. 422. S. C.—State v. Haines, 32 S. C. 170. VT.—State v. Bacon, 7 Vt. 219. FED.—United States v. Malone, 20 Blatchf. C. C. 137, 9 Fed. 897. ENG.—Lingham v. Riggs, 1 Bos. & P. 82, 86, 126 Eng. Repr. 790, 793; Reg. v. Gibbons, 12 Cox C. C. 237; Rex v. Philipps, 6 East 474; Rex v. Knight, 1 Hale P. C. 561; Reg. v. Prince, L. R. 1 C. C. 154; Reg. v. Hicklin, L. R. 3 Q. B. 360.

See, infra, § 321.

Statutory offenses may be alleged in the words of the statute, and a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to show that the statutory offense has been committed by the defendant, and to inform him of what is intended to be charged, is sufficient without an averment of guilty knowledge. See: ALA.—Lowenthal v. State, 32 Ala. 589; Huffman v. State, 89 Ala. 33, 8 So. 28. ARK.—Wood v. State, 47 Ark. 492, 1 S. W. 709. CAL.—People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Tomlinson, 66 Cal. 345, 5 Pac. 509. LA.—State v. Wolff, 34 La. Ann. 1153. MASS.—Com. v. Raymond, 97 Mass. 569; Com. v. Bennett, 118 Mass. 451. NEV.—State v. Logan, 1 Nev. 510; State v. Trolson, 21 Nev. 419, 32 Pac. 930. N. Y.—People v. Hennessey, 15 Wend. 150. TEX.—Golden v. State, 22 Tex. App. 2, 2 S. W. 531; Crump v. State, 23 Tex. App. 616, 5 S. W. 182. FED.—United States v. Gooding, 25 U. S. (12 Wheat.) 460, 472, 6 **L. Ed.** 693, 697.

See, also, Kerr's Whart. Crim. Law, § 1309.

Statute prohibiting an act, indictment need not allege knowledge, intent, or purpose; it is the defendant's duty to know the facts and the law in such a case, and he acts at his peril. See: MASS.—Com. v. Uhrig, 138 Mass. 492; Com. v. Savery, 145 Mass. 212, 13 N. E. 611. NEV.—State v. Zichfeld, 23 Nev. 304, 62 **Am. St. Rep.** 800, 34 **L. R. A.** 784, 46 Pac. 802. N. H.—State v. Campbell, 64 N. H. 402, 10 **Am. St. Rep.** 419, 13 Atl. 585; State v. Cornish, 66 N. H. 329, 11 **L. R. A.** 191, 21 Atl. 180; State v. Ryan, 70 N. H. 196, 85 **Am. St. Rep.** 629, 46 Atl. 49. R. I.—State v. Smith, 10 R. I. 258; State v. Hughes, 16 R. I. 403, 16 Atl. 911.

—Embezzlement being charged, indictment need not allege act of appropriating the property or money was wilful, or felonious, or with intent to steal.—State v. Trolson, 21 Nev. 419, 32 Pac. 930.

—Oleomargarine furnished guests by hotelkeeper, indictment

stantive ingredient of the offense.[2] Thus, in an indictment for selling an obscene book, a scienter is necessary,[3] and so in indictments for selling unwholesome water;[4] for illegal voting;[5] for subornation of perjury;[6] for passing counterfeit money;[7] and for assaulting officers;[8] though it has not been held necessary in an indictment for adultery.[9]

Under a statute, where the guilty knowledge is part of the statutory definition of the offense, it must be averred.[10] But in the large and important class of cases

need not allege or proof show guilty intent.—State v. Ryan, 70 N. H. 196, 85 Am. St. Rep. 629, 46 Atl. 49.

—Presence where gaming instruments found, indictment need not charge that defendant had knowledge either of their presence or of the character of the place.—Com. v. Smith, 166 Mass. 370, 44 N. E. 503.

Guilty knowledge substantive ingredient, the rule is otherwise, and to be sufficient indictment must aver guilty knowledge. See: ALA.—Stein v. State, 37 Ala. 123. ARK.—Gabe v. State, 11 Ark. 519, 54 Am. Dec. 217. MASS.—Com. v. Dean, 110 Mass. 64. MISS.—Morman v. State, 24 Miss. 54. N. H.—State v. Card, 34 N. H. 510. N. Y.—People v. Lohman, 2 Barb. 216. FED.—United States v. Buzzo, 85 U. S. (18 Wall.) 125, 21 L. Ed. 812.

—Unwholesome water charged as furnished by lessee of waterworks, indictment must aver defendant had knowledge of the unwholesomeness.—Stein v. State, 37 Ala. 123.

2 ALA.—Stein v. State, 37 Ala. 123. ARK.—Gabe v. State, 1 Eng. 519. IND.—Powers v. State, 87 Ind. 97. MASS.—Com. v. Dean, 110 Mass. 64. MISS.—Morman v. State, 24 Miss. 54. N. H.—State v. Card, 34 N. H. 510. N. Y.—People v. Lohman, 2 Barb. 216. FED.—United States v. Buzzo, 85 U. S. (18 Wall.) 125, 21 L. Ed. 812.

As to counterfeit money, see Kerr's Whart. Crim. Law, § 927.

3 Com. v. McGarrigall (Mass.), cited 1 Bennett & Heard's Lead. Cas. 551. See, also, Com. v. Kirby, 56 Mass. (2 Cush.) 577; State v. Brown, 2 Spears (S. C.) 129; State v. Carpenter, 20 Vt. 9.

4 Stein v. State, 37 Ala. 123.

5 United States v. Wadkinds, 7 Sawy. C. C. 85, 6 Fed. 152.

6 United States v. Dennee, 3 Woods C. C. 39, Fed. Cas. No. 14947.

7 Kerr's Whart. Crim. Law, § 927; Powers v. State, 87 Ind. 97; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

8 Kerr's Whart. Crim. Law, § 852; State v. Maloney, 12 R. I. 251; Horan v. State, 7 Tex. App. 183.

Compare: People v. Haley, 48 Mich. 495, 12 N. W. 671, a case of doubtful authority.

9 Com. v. Elwell, 43 Mass. (2 Met.) 190, 35 Am. Dec. 398. See Kerr's Whart. Crim. Law, § 2077.

10 N. H.—State v. Grove, 34 N. H.

elsewhere particularly discussed,[11] in which an act is made indictable irrespective of the scienter, the scienter is not to be averred in the indictment, since if it were it might be regarded as a descriptive allegation, which it is necessary to prove.[12]

510. N. J.—State v. Stimson, 24 N. J. L. (4 Zab.) 478. N. Y.—People v. Lohman, 2 Barb. 216. WIS.—State v. Bloedow, 45 Wis. 279. FED.—United States v. Schuler, 6 McL. C. C. 28, Fed. Cas. No. 16234. ENG.—R. v. Myddleton, 6 T. R. 739, 1 Stark. C. P. 196; R. v. Jukes, 8 T. R. 625.

As to adultery, see Kerr's Whart. Crim. Law, § 2077.

As to false pretenses, see Kerr's Whart. Crim. Law, § 1492.

As to incest, etc., see Kerr's Whart. Crim. Law, § 2099.

As to offenses on the high seas, see Kerr's Whart. Crim. Law, § 2132.

As to perjury, see Kerr's Whart. Crim. Law, § 1550.

As to poisoning, see Kerr's Whart. Crim. Law, § 657.

As to receiving stolen goods, see Kerr's Whart. Crim. Law, § 1235.

11 Kerr's Whart. Crim. Law, §§ 108-113.

12 GA.—Phillips v. State, 17 Ga. 459. ME.—State v. Goodenow, 65 Me. 30. MASS.—Com. v. Elwell, 43 Mass. (2 Met.) 110; Com. v. Thompson, 93 Mass. (11 Allen) 23; Com. v. Smith, 103 Mass. 444. VT.—State v. Bacon, 7 Vt. 219. ENG.—R. v. Gibbons, 12 Cox C. C. 237; R. v. Prince, L. R. 1 C. C. R. 154; R. v. Hicklin, L. R. 3 Q. B. 360.

In United States v. Bayaud, 21 Blatchf. 217, 16 Fed. 276, 21 Blatchf. 287, 23 Fed. 721, it was held that in an indictment for removing revenue stamps from casks without destroying them it is not necessary to aver a scienter. "Where a statute," said Benedict, J., "forbids the doing of a certain act under certain circumstances, without reference to knowledge or intent, any person doing the act mentioned is charged with the duty to see that the circumstances attending this act are such as to make it lawful, and under such statutes a conviction may be had upon proof of doing the forbidden act, without proof or knowledge by the accused of the circumstances specified in the statute.

Rule applied in many cases. See: CONN.—Barnes v. The State, 19 Conn. 399. MASS.—Com. v. Boynton, 84 Mass. (2 Allen) 160 (where selling liquor that was intoxicating was the offense); Com. v. Waite, 93 Mass. (11 Allen) 264, 87 Am. Dec. 711 (where the act charged was selling adulterated milk). MINN.—State v. Heck, 23 Minn. 594 (where selling liquor to an habitual drunkard was charged). N. J.—Halsted v. The State, 41 N. J. L. (12 Vr.) 552, 32 Am. Rep. 247. TEX.—Fox v. State, 3 Tex. App. 329, 30 Am. Dec. 144 (as within the rule). ENG.—Reg. v. Robbins, 1 Car. & K. 456, 47 Eng. C. L. 455 (where the crime was abducting an unmarried girl under sixteen years of age); Reg. v. Olifer, 10 Cox C. C. 402; Reg. v. Woodrow, 15 M. & W. 404 (where

Scienter, in case of poisoning, is implied, under the Massachusetts statute, from "wilfully and maliciously" with "intent to injure and kill C." [13]

§ 211. INDUCEMENT AND AGGRAVATION NEED NOT BE DETAILED. Matters of inducement or aggravation, as a general rule, do not require so much certainty as the statement of the gist of the offense.[1] And where the offense can not be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. We have this rule illustrated in cases of assaults already noticed. And in conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient.[2]

§ 212. PARTICULARITY REQUIRED FOR IDENTIFICATION AND PROTECTION. The degree of particularity necessary in setting out the offense can be best determined by examining the objects for which such particularity is required. These objects may be specified as follows:[1]

1. In order to identify the charge, lest the grand jury should find a bill for one offense and the defendant be put upon his trial for another.[2]

2. That the defendant's conviction or acquittal may

the offense was having in possession adulterated tobacco, and where it was found as a fact that the accused believed the tobacco to be unadulterated); Fitzpatrick v. Kelly, L. R. 8 Q. B. 337 (where the charge was selling adulterated butter); Russell on Crimes 93 (where the crime charged is inducing a soldier to desert).

The question in its substantive relations is discussed in Kerr's Whart. Crim. Law, §§ 108-113.

13 Com. v. Hobbs, 140 Mass. 443. But see Kerr's Whart. Crim. Law, § 657.

1 R. v. Wright, 1 Vent. 170; Com. Dig. Indict. G. 5.

As to evidence of surplusage of this kind, see Whart. Crim. Ev., §§ 138 et seq.

2 Com. v. Judd, 2 Mass. 329; 3 Am. Dec. 54; Com. v. Collins, 3 Serg. & R. (Pa.) 220; Com. v. Miffin, 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527; R. v. ———, 1 Chit. 698, 18 Eng. C. L. 380; R. v. Eccles, 1 Leach 274.

1 See 1 Starkie's C. P. 73, from which several of these points are taken.

2 Staunf. 181.

enure to his subsequent protection, should he be again questioned on the same grounds.

3. To warrant the court in granting or refusing any particular right or indulgence, which the defendant claims as incident to the nature of the case.[3]

4. To enable the defendant to prepare for his defense[4] in particular cases, and to plead in all;[5] or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.[6]

5. To enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment.

6. To instruct the court as to the technical limits of the penalty to be inflicted.[7]

7. To guide a court of error in its action in revising the record.[8]

VIII. Written Instruments.

1. Where the Instrument, as in Forgery and Libel, Must Be Set Out in Full.[1]

§ 213. WHEN WORDS OF DOCUMENT ARE MATERIAL THEY SHOULD BE SET FORTH. Where the words of a document

3 1 Stark. C. P. 73.

4 Fost. 194; Com. v. McAtee, 38 Ky. (8 Dana) 29; R. v. Hollond, 5 T. R. 623. See, to the same effect, People v. Taylor, 3 Den. (N. Y.) 91.

Certainty and precision in an indictment are required to that extent that will enable the defendant to judge whether the facts and circumstances stated constitute an indictable offense, that he may know the nature of the offense against which he is to prepare his defense; that he may plead a conviction or acquittal, in bar of another indictment; and that there may be no doubt as to the nature of the judgment to be given in case of conviction.—Biggs v. People, 8 Barb. (N. Y.) 547.

5 3 Inst. 41.

6 Cowper 672.

7 Cowper 672; 5 T. R. 623; 1 Starkie C. P. 73.

8 **This reason was considered the most important** in R. v. Bradlaugh, 38 L. T. (N. S.) 118, L. R. 3 Q. B. D. 607, 14 Cox C. C. 68; commented on infra, § 222.

1 **In Massachusetts,** by Gen. Stat. 1864, ch. 250, § 1, variance in writ-

are essential ingredients of the offense, as in forgery, passing counterfeit money, sending threatening letters, libel, etc., the document should be set out in words[2] and

ings or print is immaterial, if the identity of the instrument is manifest.

[2] 2 East P. C. 976. See: IND.—Rooker v. State, 65 Ind. 86. MASS.—Com. v. Stow, 1 Mass. 54; Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. N. J.—State v. Gustin, 5 N. J. L. (2 South.) 749; State v. Farrand, 8 N. J. L. (3 Halst.) 333. N. C.—State v. Twitty, 9 N. C. (2 Hawks) 248. OHIO—State v. Stephens, Wright 731. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Com. v. Sweney, 10 Serg. & R. 173. TEX.—Baker v. State, 14 Tex. App. 332; Smith v. State, 18 Tex. App. 399. FED.—United States v. Noelke, 17 Blatchf. C. C. 554, 1 Fed. 426; United States v. Wentworth, 11 Fed. 52; United States v. Warren, 17 Fed. 145. ENG.—R. v. Mason, 2 East 238; R. v. Powell, 1 Leach 77; R. v. Hart, 1 Leach 145.

Indorsement on counterfeit paper need not be set out.—Hess v. State, 5 Ohio 5, 22 Am. Dec. 767.

Marginal figures and emblems, materiality of. See: GA.—Haupt v. State, 108 Ga. 53, 75 Am. St. Rep. 19, 34 S. E. 313 (figures in margins, constituting no part of the contract, need not be set out). FLA.—Smith v. State, 29 Fla. 408, 10 So. 894 (indictment charging forgery of order for payment of money need not set out words and figures in margins of forged order). ME.—State v. Flye, 26 Me. 312 (words and figures in margins need not be set out in indictment for forgery of order for payment of money). MASS.—Com. v. Stevens, 1 Mass. 203 (number or words on top of forged bill need not be set out); Com. v. Taylor, 59 Mass. (5 Cush.) 605 (number and check-letters need not be set out in an indictment for forgery); Com. v. Wilson, 68 Mass. (2 Gray) 70 (name of state in upper margin of bill need not be set out in indictment for uttering and publishing forged bank bill); Com. v. Emigrant Indust. Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126 (number of bill in indictment for forgery need not be set out). N. H.—Carr v. State, 5 N. H. 367 (marginal figures on a bank bill no part of the bill). OHIO—Griffin v. State, 14 Ohio St. 55 (numbers and mottoes on margins of counterfeit bank note need not be set out); State v. Kinney, Tappan 167 (figures in margins of counterfeit note need not be set out). S. C.—State v. Waters, 2 Treadw. Const. 669 (material). FED.—United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572 (words and letters on counterfeit note need not be set out in indictment for counterfeiting).

Material parts of instrument alleged to be forged is all that need be set out.—Haupt v. State, 108 Ga. 53, 75 Am. St. Rep. 19, 34 S. E. 313.

Omission of dollar marks at the head of the columns in a report, in an indictment for forgery, does not vitiate the indictment.—State v. Bonney, 34 Me. 383.

Setting out instrument in hæc verba, indictment need not include anything therein which is not part of the contract.—Langdale v. People, 100 Ill. 263.

As to variance, see Whart. Crim. Ev., § 114.

As to forgery, see Kerr's Whart. Crim. Law, § 932.

In indictment for libel, the alleged libelous matter must be set out accurately, any variance being fatal. See: MASS.—Com. v. Tarbox, 55 Mass. (1 Cush.) 66. PA.—Com. v. Sweney, 10 Serg. & R. (Pa.) 173. S. C.—Walsh v. State, 2 McC. 248. TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. ENG.—Cartwright v. Wright, 1 Dow. & Ry. 230.

If the indictment does not on its face profess to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer, or in arrest of judgment.—State v. Twitty, 9 N. C. (2 Hawks) 248; State v. Goodman, 6 Rich. (S. C.) 387, 60 Am. Dec. 132, and cases cited to § 215.

It is not sufficient to profess to set it forth according to its substance or effect.—Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66; State v. Brownlow, 26 Tenn. (7 Humph.) 63.

Where the indictment alleged that the defendant published, etc., an unlawful and malicious libel, according to the purport and effect, and in substance as follows, it was ruled that the words between libel and as follows could not be rejected as surplusage.—Com. v. Wright, 55 Mass. (1 Cush.) 46. Infra, § 216.

—Matters not in the libelous passage, or of record, need not be exactly alleged. Thus, an indictment charging that the defendant published a libel on the twenty-first of the month, may be supported by proof of a publication on the nineteenth of the same month. But it is otherwise if the indictment has alleged that the libel was published in a paper dated the twenty-first of the month.—Com. v. Varney, 64 Mass. (10 Cush.) 402.

—Where parts are selected, they must be set forth thus: "In a certain part of which said," etc., "there were and are contained certain false, wicked, malicious, scandalous, seditious, and libelous matters, of and concerning," etc., "according to the tenor and effect following, that is to say:" "And in a certain other part," etc., etc. See 1 Camp. 350, per Lord Ellenborough; Archbold's C. P. 494; 1 Wms. Notes to Saund. 139. Infra, § 225.

—The date at the end of the libel need not be set forth.—Com. v. Harmon, 68 Mass. (2 Gray) 289.

Where it does not appear from the paper itself who its author was, nor the persons of and concerning whom it was written, nor the purpose for which it was written, these facts should be explicitly averred, for the consideration of the jury, in all cases in which they are material.—State v. Henderson, 1 Rich. (S. C.) 179.

Where the persons alleged to have been libeled are alluded to in ambiguous and covert terms, it is not sufficient to aver generally that the paper was composed and published "of and concerning" the persons alleged to have been

figures. The matter must be set out word for word.[3] Thus, the omission of a word in an indictment for forgery is fatal.[4] In such cases, however, it is not necessary to copy the vignettes, devices, seals, letters, or figures in the margin, as they make no part of the meaning;[5] and so of stamps.[6] But it has been held fatal to omit the name of the State in the upper margin of a copy of a bank note, when such name is not repeated on the body.[7]

libeled, with innuendoes accompanying the covert terms, whenever they occur in the paper as set out in the indictment, that they meant those persons, or were allusions to their names. There should be a full and explicit averment that the defendant, under and by the use of the covert terms, wrote of and concerning the persons alleged to be libeled.—State v. Henderson, 1 Rich. (S. C.) 179; State v. Brownlow, 26 Tenn. (7 Humph.) 63; R. v. Marsden, 4 Moore & Scott 164, and see, infra, § 227.

The court will regard the use of fictitious names and disguises, in a libel, in the sense that they are commonly understood by the public.—State v. Chace, 1 Miss. (Walker) 384.

Innuendoes and colloquiums necessary under a declaration which alleges the publication of a certain "libel concerning the plaintiff," but contains no innuendoes, colloquiums, or special averments of facts to connect the publication with the plaintiff, if no evidence be offered to connect him therewith, except the publication itself, the question whether the publication refers to the plaintiff is for the court, and not for the jury.—Barrows v. Bell, 73 Mass. (7 Gray) 301, 66 Am. Dec. 479. Innuendoes are hereafter discussed. Infra, § 227.

As to libel, see Kerr's Whart. Crim. Law, §§ 1421 et seq.

3 State v. Townsend, 86 N. C. 676; Com. v. Sweney, 10 Serg. & R. (Pa.) 173.

4 State v. Street, 1 N. C. (Tayl.) 158, 1 Am. Dec. 589, and see State v. Bradley, 2 N. C. (1 Hay) 403; State v. Coffey, 4 N. C. (Term R.) 272; United States v. Hinman, 1 Baldwin C. C. 292, Fed. Cas. No. 15370; United States v. Britton, 2 Mason C. C. 464, Fed. Cas. No. 14650.

5 FLA.—Smith v. State, 29 Fla. 408, 10 So. 894. MASS.—Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stephens, 1 Mass. 203; Com. v. Taylor, 59 Mass. (5 Cush.) 605. N. H.—State v. Carr, 5 N. H. 367. N. Y.—People v. Franklin, 3 John. Cas. 299. OHIO—Griffin v. State, 14 Ohio St. 55. PA.—Com. v. Searle, 2 Binn. 332, 4 Am. Dec. 446. VA.—Buckland v. Com., 8 Leigh 732. FED.—United States v. Bennett, 17 Blatchf. C. C. 357, Fed. Cas. No. 14572.

See Kerr's Whart. Crim. Law, § 937; infra, § 225.

6 Kerr's Whart. Crim. Law, § 882.

7 Landale v. People, 100 Ill. 263; Com. v. Wilson, 68 Mass. (2 Gray) 70.

In prosecutions for selling lottery tickets, in jurisdictions in which all lotteries are illegal, the weight of authority is that the ticket need not be set forth;[8] though, if there be a pretense of setting forth the ticket, a variance is fatal.[9] It has also been held not necessary to set forth, in an indictment for not destroying stamps, the stamps which should have been effaced.[10]

§ 214. —— In such case the indictment should claim to set forth the words. When it is necessary to set forth exactly a document,[1] it may be preceded by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following," for though the term "tenor," which imports an accurate copy,[2] has been considered to be the most technical way of introducing the document, yet it has been ruled that "as follows" is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if under such an allegation the prosecutor fails in proving the instrument verbatim, as laid, the variance will be fatal,[3] and where the indictment, by these or similar averments, fails to claim to set out a copy of the instrument in words and figures, it will be invalid.[4]

§ 215. "Purport" means effect; "tenor" means contents. Purport, it is said, means the effect of a document

8 Freligh v. State, 8 Mo. 613; People v. Taylor, 3 Den. (N. Y.) 99; United States v. Bayaud, 21 Blatchf. C. C. 287, 16 Fed. 376, cited supra, § 210; Kerr's Whart. Crim. Law, § 1779.

9 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

10 United States v. Bayaud, 21 Blatchf. C. C. 287, 16 Fed. 376.

1 1 Ch. C. L. 234; 2 Leach 661; 6 East 418-426; Kerr's Whart. Crim. Law, § 943.

2 2 Leach 660, 661; 3 Salk. 225; Holt 347-350, 425; 11 Mod. 96, 97; Douglass, 193, 194; Kerr's Whart. Crim. Law, § 943.

3 1 Leach 78; 2 Leach 660, 961; 2 East P. C. 976; 2 Bla. Rep. 787; Clay v. People, 86 Ill. 147; State v. Townsend, 86 N. C. 676; Kerr's Whart. Crim. Law, § 943.

4 2 Leach 597, 660, 661; State v. Bonney, 34 Me. 383; Com. v. Wright, 55 Mass. (1 Cush.) 46; Dana v. State, 2 Ohio St. 91; Kerr's Whart. Crim. Law, §§ 943 et seq., 1982.

as it appears on the face of it in ordinary construction, and is insufficient when literal exactness is required; tenor means an exact copy of it.[1] But if the instrument, in cases where only purport is required, does not "purport" to be what the indictment avers—*i. e.*, if its meaning is not accurately stated—the variance is fatal.[2] Purport may be rejected as surplusage when tenor is accurately given.[3] Nor when the document is set forth, and shows fraud on its face, need its prejudicial character be averred.[4]

§ 216. "MANNER AND FORM," "PURPORT AND EFFECT," "SUBSTANCE," DO NOT IMPLY VERBAL ACCURACY. The words "in manner and form following, that is to say," do not profess to give more than the substance, and are usual in an indictment for perjury;[1] but the word "aforesaid" binds the party to an exact recital.[2] "According to the purport and effect, and in substance," is bad, in cases where exactness of setting forth is required.[3] And so is "substance and effect."[4]

§ 217. ATTACHING ORIGINAL PAPERS IS NOT ADEQUATE. The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not sufficient indication that the paper is set out in the very words.[1]

§ 218. WHEN EXACT COPY IS REQUIRED, MERE VARIANCE OF A LETTER IS IMMATERIAL. A mere variance of a letter will

1 2 Leach 661; State v. Bommey, 34 Me. 383; State v. Witham, 47 Me. 165; Com. v. Wright, 55 Mass. (1 Cush.) 46; State v. Pullens, 81 Mo. 387.

2 Dougl. 300; State v. Carter, 1 N. C. (Conf.) 210; State v. Moller, 12 N. C. (1 Dev.) 263; State v. Wimberly, 3 McC. (S. C.) 190; Whart. Crim. Ev., § 114.

3 State v. Yerger, 86 Mo. 33.

4 State v. Maas, 37 La. Ann. 202; State v. Covington, 94 N. C. 91.

1 1 Leach 192; Dougl. 193, 194.

2 Ibid.; Doug. 97.

3 Com. v. Wright, 55 Mass. (1 Cush.) 46; Dana v. State, 2 Ohio St. 91; State v. Brownlow, 26 Tenn. (7 Humph.) 63.

4 Com. v. Sweney, 1 Serg. & R. (Pa.) 173.

Compare: Allen v. State, 74 Ala. 557.

1 Com. v. Tarbox, 55 Mass. (1 Cush., § 171) 66. See Kerr's Whart. Crim. Law, §§ 942 et seq.

not be fatal, even when it is averred that the tenor is set out, provided the meaning be not altered by changing the word misspelled into another of a different meaning;[1] thus, in an indictment for forging a bill of exchange, the tenor was "value received," and the bill as produced in evidence was "value reiceved"; the question being reserved, it was held that the variance was not material, because it did not change one word into another, so as to alter the meaning.[2] On the same principle, where, in an

1 Infra, § 322; Whart. Crim. Ev., § 114. ALA.—Butler v. State, 22 Ala. 48. CAL.—People v. Phillips, 70 Cal. 61, 11 Pac. 493. MO.—State v. Bibb, 68 Mo. 286. N. C.—State v. Coffee, 6 N. C. (2 Murph.) 320; State v. Weaver, 35 N. C. (13 Ired.) 491; State v. Leake, 80 N. C. 403. TEX.—Ham v. State, 4 Tex. App. 645; Baker v. State, 14 Tex. App. 332. VT.—State v. Bean, 19 Vt. 530. W. VA.—State v. Duffield, 49 W. Va. 274, 38 S. E. 577 (alleged forged note signature set out as "Dufield" instead of "Duffield"). FED.—United States v. Hinman, 1 Bald. C. C. 292, Fed. Cas. No. 15370 ("Jno. Hulse" for "Jna. Hulse"); United States v. Burroughs, 3 McL. C. C. 405, Fed. Cas. No. 14695. ENG.—R. v. Drake, 2 Salk. 660, 91 Eng. Repr. 563.

Literal correspondence between the instrument alleged to be forged and the document as set forth in hæc verba, or according to its "tenor," or "as follows" in the indictment is not necessary in order to render the instrument admissible in evidence. If the correspondence be such as to prevent the accused from being a second time put in jeopardy for the same cause should he be acquitted, it will be sufficient.—Butler v. State, 22 Ala. 48.

Insertion of word in instrument alleged to be forged as purporting to be set out in hæc verba in an indictment will not vitiate the indictment where such addition in no manner or for any purpose alters the signification of the instrument.—People v. Phillips, 70 Cal. 61, 11 Pac. 493 ("pay to A. B." instead of "pay A. B."); People v. Crane, 4 Cal. App. 145, 87 Pac. 240 (word "signed" added before signature to alleged forged check); Quigley v. People, 3 Ill. (2 Scam.) 301 ("B. Aymor or bearer" for "B. Aymor, bearer").

Omission of word from forged instrument purporting to be set out in hæc verba in indictment, is immaterial where the omission in no manner or for any purpose alters the significance of the instrument.—People v. Phillips, 70 Cal. 61, 11 Pac. 493; United States v. Mason, 12 Blatchf. C. C. 497, Fed. Cas. No. 15736 (omission of "to" from phrase "pay to the bearer").

Omission of a figure which changed the sense held to be fatal in State v. Street, 1 N. C. (Tayl.) 158, 1 Am. Dec. 589; Lee's Case, Leach 353; Cogan's Case, Leach 389.

2 1 Leach 145.

indictment for perjury, it was assigned for perjury that the defendant swore he "understood and believed," instead of "understood," the mistake was held to be immaterial.[3] So "promise" for "promised" was held not a fatal variance.[4] The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading.[5]

§ 219. UNNECESSARY DOCUMENT NEED NOT BE SET FORTH. Where the setting out of the document in an indictment can give no information in the court, it is unnecessary to set it out.[1]

§ 220. QUOTATION MARKS ARE NOT SUFFICIENT. Quotation marks by themselves are not sufficient to indicate tenor, unless there be something to show that the document within the quotation marks is that on which the indictment rests.[1]

3 1 Leach 133; Dougl. 193, 194. See Kerr's Whart. Crim. Law, §§ 1561, 1562.

4 Com. v. Parmenter, 22 Mass. (5 Pick.) 279.

5 See Heard's Crim. Pl. 215, citing 1 Taylor's Ev., § 234a, 6th ed. Infra, §§ 322-324; Whart. Crim. Ev., § 114; Kerr's Whart. Crim. Law, § 934.

"Bowling Starke" for "B. Starke": Where an indictment alleged that a forged certificate was signed by Bowling Starke, but the instrument was signed B. Starke, and the signer's true name was Bolling Starke, the variance was held fatal.—State v. Waters, 2 Tread. Const. (S. C.) 669; Murphy v. State, 6 Tex. App. 554; Com. v. Kearns, 1 Va. Cas. 109.

Contra: State v. Bibb, 68 Mo. 286.

"John McNicole" for "John McNicoll": Where the name of John McNicoll, signed to a forged instrument, was in the setting out of the forged instrument in the indictment written John McNicole; this was held no variance.—R. v. Wilson, 2 Car. & K. 527, 1 Den. C. C. 284, 2 Cox C. C. 426, 61 Eng. C. L. 527. But see fully Whart. Crim. Ev., §§ 114 et seq.

The subject of variance between the indictment and the evidence in this respect is more fully considered in another works.—Whart. Crim. Ev., § 114; Kerr's Whart. Crim. Law, § 934.

1 R. v. Coulson, 1 Eng. L. & E. 550, 1 T. & M. C. C. 332, 4 Cox C. C. 227.

1 Com. v. Wright, 55 Mass. (1 Cush.) 46.

§ 221. DOCUMENT LOST, OR IN DEFENDANT'S HANDS, NEED NOT BE SET FORTH. Where the document, bank-bill or note,[1] or coin,[2] on which the indictment rests is in the defendant's possession, or is lost or destroyed, it is sufficient to aver such special facts as an excuse for the non-setting out of the document, and then to proceed, either by stating its substance, or by describing it as a document which "the said inquest can not set forth by reason," etc., of its loss, destruction, or detention, as the case may be,[3] giving, however, the purport of the instrument as near as may be.[4]

Where the indictment excused want of particular description, by averring that the bond was with the defendant, it was held that this was sufficient.[5] Although it was said, in another case, the note is described as made on the ..... day of May, and the proof is that the forged note was dated on a particular day, a conviction will be sustained, notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment.[6]

The allegation of loss, however, will not supply the

1 See, post, § 235.

2 See, post, § 267.

3 Whart. Crim. Ev., §§ 118, 199. See People v. Bogart, 36 Cal. 245; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142.

See, also, infra, § 267.

4 Kerr's Whart. Crim. Law, §§ 933 et seq. ALA.—Du Bois v. State, 50 Ala. 139. ILL.—Wallace v. People, 27 Ill. 45. IND.—Hart v. State, 55 Ind. 599; Munson v. State, 79 Ind. 541. ME.—State v. Bonney, 34 Me. 223. N. Y.—People v. Badgeley, 16 Wend. 531. N. C.—State v. Davis, 69 N. C. 313. VT.—State v. Parker, 1 Chip. 294. FED.—United States v. Britton, 2 Mas. C. C. 464, 468, Fed. Cas. No. 14650. ENG.—R. v. Hunter, 4 Car. & P. 128, 19 Eng. C. L. 439; R. v. Haworth, 4 Car. & P. 254, 19 Eng. C. L. 502; R. v. Watson, 2 T. R. 200.

See fully Whart. Crim. Ev., §§ 118, 199.

5 CAL.—People v. Bogart, 36 Cal. 245. MASS.—Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666. N. Y.—People v. Kingsley, 2 Cow. 522. TENN.—Croxdale, 38 Tenn. (1 Head.) 139.

6 People v. Badgeley, 16 Wend. (N. Y.) 53; see State v. Squire, 1 Tyler (Vt.) 147.

want of the allegation of such extraneous facts as are essential to constitute indictability.[7]

§ 222. —— And so of obscene libel. It has also been ruled that if the grand jury declare of an indecent libel, "that the same would be offensive to the court here, and improper to be placed on the records thereof," the non-setting forth of the libel will be thereby sufficiently excused.[1] Thus, in an indictment for publishing an obscene book or picture, it is not necessary that the objectionable matter should be set out at large,[2] but in

7 Com. v. Spilman, 124 Mass. 237.

1 Com. v. Holmes, 17 Mass. 336; and see Kerr's Whart. Crim. Law, § 1930, for other cases, and cases given infra.

2 IND.—Thomas v. State, 103 Ind. 419, 2 N. E. 808. MASS.—Com. v. Holmes, 17 Mass. 336; Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652. MICH.—People v. Girardin, 1 Mann 90. N. Y.—People v. Kaufman, 14 App. Div. 305, 12 N. Y. Cr. Rep. 264, 43 N. Y. Supp. 1046. PA.—Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632; Com. v. Havens, 6 Pa. Co. Ct. 545. R. I.—State v. Smith, 17 R. I. 371, 22 Atl. 282. VT.—State v. Brown, 27 Vt. 619. FED.—Rosen v. United States, 161 U. S. 29, 40 L. Ed. 606, 16 Sup. Ct. Rep. 434; United States v. Bennett, 16 Blatchf. C. C. 338, Fed. Cas. No. 14571.

Contra: State v. Hayward, 83 Mo. 299, holding that an indictment or information in a prosecution relative to obscene literature must set out the obscene matter.

"Never required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it."—Com. v. Holmes, 17 Mass. 335.

The above rule is an exception to the general rule of pleading relative to libelous publications (Com. v. Wright, 55 Mass. (1 Cush.) 46), but it has been followed in many other cases. See ILL.—McNair v. People, 89 Ill. 441; Fuller v. People, 92 Ill. 182. KY.—Kinnaird v. Com., 134 Ky. 582, 121 S. W. 489. MICH.—People v. Girardin, 1 Mich. 90. R. I.—State v. Smith, 17 R. I. 371. TENN.—State v. Pennington, 73 Tenn. (5 Lea) 506. FED.—United States v. Bennett, 16 Blatchf. C. C. 338, Fed. Cas. No. 14571.

Indecent publications sent by mail this distinction is taken.—Bates v. United States, 11 Biss. C. C. 70, 10 Fed. 92; United States v. Benedict, 16 Blatchf. C. C. 338, Fed. Cas. No. 14571; United States v. Kaltmeyer, 16 Fed. 760.

See Kerr's Whart. Crim. Law, §§ 1930, 1988, 2179-2182.

Describing paper as obscene, merely, held to be insufficient in People v. Hollenbick, 52 How. Pr. (N. Y.) 502, 2 Abb. N. C. 66.

Indictment must show on its

such case it is necessary specifically to aver the reason of the omission.[3] And in any view it is proper on principle, that the obscene paper should be in some way individuated.[4]

face that matter charged to be obscene is in fact that which it is charged to be.—People v. Danihy, 63 Hun (N. Y.) 579, 10 N. Y. Cr. Rep. 194, 18 N. Y. Supp. 467.

Obscene portions of book relied upon must be specified.—Com. v. McCance, 164 Mass. 162, 29 L. R. A. 61, 41 N. E. 133. See Cazarra v. Medical Spurs, 24 App. D. C. 258; Rosen v. United States, 161 U. S. 37, 40 L. Ed. 608, 16 Sup. Ct. Rep. 434.

When the document is set forth, it may be left to speak for itself.—Smith v. State, 24 Tex. App. 1.

For form, see Forms Nos. 1729-1757.

[3] **Excuse must be given** for not setting out indecent language, or describing obscene or indecent prints, pictures, figures or descriptions.—Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652. See Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. See, also, authority ante, footnote 2.

[4] Com. v. Tarbox, 55 Mass. (1 Cush.) 66; Com. v. Wright, 139 Mass. 382, 1 N. E. 411; State v. Hayward, 83 Mo. 299; United States v. Kaltmeyer, 5 McCr. C. C. 260, 16 Fed. 760.

In England the position of the text is accepted as to indecent prints.—Dugdale v. R., Dears. C. C. 64.

In R. v. Bradlaugh, 38 L. T. (N. S.) 118, L. R. 3 Q. B. D. 607, 14 Cox C. C. 68, it was ruled that an indictment which did not give the words of an alleged obscene libel or excuse their omission was bad. In this case it was noticed by Bramwell, J., that the American authorities excuse the non-setting forth of the libel on the grounds of its obscenity, which allegation was omitted in R. v. Bradlaugh. It will not do to say that this excuse is surplusage. An indictment which excuses the non-setting forth of a document on the ground of its loss, or of its destruction by the defendant, is good, though without such an excuse the indictment would be defective. The excuse, therefore, is essential.

When such an excuse is made, the American cases present an almost unbroken line of authority to the effect that the obscene document need not be copied (see cases footnote 2, ante).—Com. v. Tarbox, 55 Mass. (1 Cush.) 66, reaffirms the principle of Com. v. Holmes (but holds that to paste the alleged obscene matter to the indictment is a defective mode of pleading), and so does Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652.

On the other hand, in State v. Hanson, 23 Tex. 232, an indictment for publishing an obscene document, without giving the words, was held bad. In this case, however, there was no excuse offered, as in Com. v. Holmes, 17 Mass. 336, for not setting out the libel.

§ 223. —— PROSECUTOR'S NEGLIGENCE DOES NOT ALTER THE CASE. Even where the prosecutor's negligence caused the loss, the loss will be an excuse for non-description, unless the misconduct was so gross as to imply fraud.[1]

§ 224. PRODUCTION OF A DOCUMENT ALLEGED TO BE "DESTROYED" IS A FATAL VARIANCE. When there is an allegation that a document is destroyed, as an excuse for its non-description, there is a fatal variance between the indictment and the proof if the destroyed instrument is produced on trial.[1]

§ 225. EXTRANEOUS PARTS OF DOCUMENT NEED NOT BE SET FORTH. Wherever the whole document is essential to the description of the offense, the whole must be set out in the indictment. It is otherwise, however, as to indorsements and other extraneous matter having nothing to do with the part of the document alleged to be forged.[1]

Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, was the case of an indecent picture, and the Supreme Court held that it was not necessary that the picture should be copied on the indictment. The reason, however, is the same as that given in Com. v. Holmes, 17 Mass. 336—that the court must preserve the "chastity" of its records, and not permit them to be used to perpetuate obscenities. It may be added to this that if an obscene publication were to be considered as exclusively a libel, it might be difficult to resist the conclusion that as a libel when indicted as such, it should be spread on the record, supposing that no legitimate excuse be given for the non-setting out. But there is much force in the position that an obscene publication is not so much a libel as an offense against public decency; and if it be the latter, the particularity required in setting forth libels is not necessary. If a mob, for instance, should gather about a religious assembly, disturbing its worship by profane and indecent language, it would not be necessary, it may well be argued, that those profane and indecent words should be set out. Nor is this the only illustration to which we may appeal. An indictment against a common scold need not set forth the words the "scold" was accustomed to use. See argument in Southern Law Rev. for 1878, p. 258.

1 State v. Taunt, 16 Minn. 109.

1 Smith v. State, 33 Ind. 159.

1 Kerr's Whart. Crim. Law, § 960. ARK.—McDonnell v. State, 58 Ark. 242, 24 S. W. 105. ILL.—Langdale v. People, 100 Ill. 263; Sampson v. State, 188 Ill. 592, 59 N. E. 427. IOWA—State v. Waterbury, 133 Iowa 135, 110 N. W. 328. MASS.—Com. v. Ward, 2 Mass.

And where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus: "8th March, 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written; this was ruled sufficient.[2] In other cases, where part only of a written instrument is included in the offense, that part alone is necessary to be set out. Thus, in cases where portions of publications are libelous and others not, it is only necessary, as is elsewhere noticed, to state those parts containing the libels; and if the libelous passages be in different parts of the publication, distinct from each other, they may be introduced thus: "In a certain part of which said libel there were and are contained the false, scandalous, malicious, and defamatory words and matter following, that is to say," etc. "And in a certain other part of which said libel there were and are contained," etc.[3] Where the indictment is for forging a note or bill, the indorsement, though forged, need not be set out.[4] And, as we have seen, it is not necessary to set forth vignettes or other embellishments, though if this be attempted a variance may be fatal.[5]

297; Com. v. Adams, 48 Mass. (7 Met.) 50. N. C.—State v. Gardiner, 23 N. C. (1 Ired.) 27. OHIO—Hess v. State, 5 Ohio 5, 22 Am. Dec. 767. TEX.—Labbiate v. State, 6 Tex. App. 257. VA.—Perkins v. Com., 7 Gratt. 651, 56 Am. Dec. 123; Buckland v. Com., 8 Leigh. 732. W. VA.—State v. Henderson, 29 W. Va. 147, 1 S. E. 225; State v. Duffield, 49 W. Va. 274, 38 S. E. 577.

Indictment for forging of check and of indorsement thereon, not void for duplicity.—Sprouse v. Com., 81 Va. 374.

2 R. v. Testick, 1 East 181 n.; Kerr's Whart. Crim. Law, §§ 935 et seq.

3 See Tabart v. Tipper, 1 Camp. 350; Kerr's Whart. Crim. Law, § 1982, and cases cited to § 213, ante.

4 MASS.—Com. v. Ward, 2 Mass. 297; Com. v. Adams, 48 Mass. (7 Met.) 50. OHIO—Simmons v. State, 7 Ohio 116. VA.—Perkins v. Com., 7 Gratt. 654, 56 Am. Dec. 123.

See Kerr's Whart. Crim. Law, §§ 937-939, and cases cited to § 221, ante.

5 Whart. Crim. Ev., § 114; Kerr's

An altered document, as is elsewhere seen, may be averred to be wholly forged.[6] But, if an alteration be averred, the alteration must be specified,[7] and an addition which is collateral to the document must, if forged, be specially pleaded.[8]

§ 226. FOREIGN OR INSENSIBLE DOCUMENT MUST BE EXPLAINED BY AVERMENTS. A document in a foreign language must be translated and explained by averments.[1] The proper course is to set out, as "of the tenor following," the original, and then to aver the translation in English to be "as follows."[2] And so where initials appear without averment of what they mean;[3] and where there is no averment of who the officer was whose name is copied in a forged instrument, there being no averment of what the instrument purports to be.[4]

In another volume it will be seen more fully that when "tenor" is set out, a variance is fatal;[5] that when the legal effect only of a document is averred, it is sufficient if the proof substantially conforms;[6] that when the variance is doubtful, the question is for the jury;[7] and that a lost or unobtainable document may be proved by parol.[8]

§ 227. INNUENDO CAN INTERPRET BUT NOT ENLARGE. An innuendo is an interpretative parenthesis, thrown into

Whart. Crim. Law, § 937. Supra, § 213.

6 Kerr's Whart. Crim. Law, § 941.

7 Ibid.

8 Com. v. Woods, 76 Mass. (10 Gray) 480.

1 R. v. Goldstein, R. & R. 473, 7 Moore 1, 10 Price 88; Kerr's Whart. Crim. Law, § 935.

2 Ibid. See, Wormouth v. Cramer, 3 Wend. (N. Y.) 394; R. v. Szudurskie, 1 Moody 429; R. v. Warshaner, 1 Mood. C. C. 466.

As to California, under special statute, allegation of instrument in foreign language, giving tenor and effect when translated into English.—People v. Ah Woo, 28 Cal. 205.

Translation incorrect the variance is fatal.—R. v. Goldstein, R. & R. 473, 7 Moore 1, 10 Price 88; and see K—— v. H——, 20 Wis. 239, 91 Am. Dec. 397.

3 R. v. Inder, 2 Car. & K. 635, 61 Eng. C. L. 635; R. v. Barton, 1 Moody C. C. 141.

4 R. v. Wilcox, R. & R. C. C. 50.

5 Whart. Crim. Ev., § 114.

6 Ibid., § 116.

7 Ibid., § 117.

8 Ibid., § 118.

the quoted matter to explain an obscure term. It can explain only where something already appears upon the record to ground the explanation; it can not, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It can interpret, but can not add or extend meaning[1] unless by ref-

1 See 3 Salk. 512, Cowp. 684; CONN.—Mix v. Woodward, 12 Conn. 262. MASS.—Goodrich v. Cooper, 97 Mass. 1, 93 Am. Dec. 49; Adams v. Stone, 131 Mass. 433. MISS.—Bradley v. State, 1 Miss. (Walk.) 156. N. Y.—Van Vechten v. Hopkins, 5 John. 211, 4 Am. Dec. 339. N. C.—State v. Neese, 4 N. C. (Term) 270. PA.—Stitzell v. Reynolds, 59 Pa. 488. S. C.—State v. Henderson, 1 Rich. L. 179. VA.—Hansbrough v. Stinnett, 25 Gratt. 495. FED.—Beardsley v. Taffan, 1 Blatchf. C. C. 588, Fed. Cas. No. 1188. ENG.—Le Fanu v. Malcomson, 1 H. of L. Cas. 637; Solomon v. Lawson, 8 Ad. & El. N. S. (8 Q. B.) 825, 55 Eng. C. L. 824.

Explanation needed to show falsity may be by innuendo.—United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 Sup. Ct. Rep. 512.

It was held in Pennsylvania, in 1870, that where no new essential fact is requisite to the frame of an indictment for libel, which requires to be found by the grand jury as the ground of a colloquium, and where the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone.—Com. v. Keenan, 67 Pa. St. 203. See, further, note to § 213.

"He burnt my barn," in an action on the case against a man for saying of another "He has burnt my barn," the plaintiff cannot, by way of innuendo, say, "meaning my barn full of corn" (Barham v. Nethersal, 4 Co. 20a) because this is not an explanation derived from anything which preceded it on the record, but is the statement of an extrinsic fact not previously stated. But if in the introductory part of the declaration it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete.—Archbold's C. P. 494; 4 R. Ab. 83, pl. 7; 85, pl. 7; 2 Ro. Rep. 244; Cro. Jac. 126; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3; Alexander v. Angle, 1 Car. & J. 143, 7 Bing. 119, 20 Eng. C. L. 61; Goldstein v. Foss, 9 Dow. & Ry. 197, 6 Barn. & C. 154, 13 Eng. C. L. 81; Clement v. Fisher, 1 Mann. & Ry. 281; R. v. Tutchin, 5 St. Tr. 532.

erence to matter of inducement.[2] It may serve as an explanation, but not as a substitute.[3] Extrinsic facts, if requisite to the sense, must be averred in the introductory part of the indictment.[4] Thus, in an action for the words "he is a thief," the defendant's meaning in the use of the word "he" can not be explained by an innuendo "meaning the said plaintiff," or the like, unless something appear previously upon the record to ground that explanation; but if the words had previously been charged to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for when it is alleged that the defendant said of the plaintiff "he is a thief," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he."[5]

"*When the language is equivocal and uncertain,* or is defamatory only because of some latent meaning, or of its allusion to extrinsic facts and circumstances, then an inducement or innuendo or both are indispensable to express and render certain precisely what the libel is of which the defendant is accused."[6] But extrinsic facts need not be averred unless necessary to make out the

2 CAL.—Grand v. Dryfus, 122 Cal. 58, 54 Pac. 389. ILL.—Ulery v. Chicago Live Stock Co., 54 Ill. App. 233. IOWA—Quinn v. Providential Ins. Co., 116 Iowa 522, 90 N. W. 349. MICH.—Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 485. N. H.—Nelson v. Sweet, 8 N. H. 256. N. Y.—Gunning v. Appleton, 58 How. Pr. 471. ORE.—Cole v. Neustadter, 22 Ore. 191, 29 Pac. 550. PA.—Gosling v. Morgan, 32 Pa. St. 273. R. I.—Hackett v. Providence Telegram Pub. Co., 18 R. I. 589, 29 Atl. 143. VA.—Hogan v. Grant, 16 Gratt. 80. WIS.—Cramer v. Noonan, 4 Wis. 231; K— v. H—, 20 Wis. 239, 91 Am. Dec. 397; Bradley v. Cramer, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268.

3 Com. v. Meeser, 1 Brest. (Pa.) 492; State v. Spear, 13 R. I. 326; State v. Atkins, 42 Vt. 252.

Compare: Com. v. Keenan, 67 Pa. St. 203.

4 1 Saund. 121, 6th ed.; Com. v. Snelling, 32 Mass. (15 Pick.) 321.

5 Archbold's C. P. 494; State v. White, 28 N. C. (6 Ired.) 418.

6 Durfee, C. J., in State v. Corbett, 12 R. I. 288. Citing State v. Mott, 45 N. J. L. (16 Vr.) 494; People v. Isaacs, 1 N. Y. Cr. Rep. 148; State v. Henderson, 1 Rich. L. (S. C.) 179.

sense,[7] or when necessary to show the operation upon the rights or property of another of an instrument alleged to have been forged.[8]

2. Where the Instrument, as in Larceny, etc., May Be Described Merely by General Designation.[1]

§ 228. STATUTORY DESIGNATIONS MUST BE FOLLOWED. By State as well as by federal legislation, statutes have been enacted making the larceny of bank notes, bonds, and other writings for the payment of money, highly penal. Questions constantly arise whether certain articles alleged to be stolen are included within these statutes. The adjudications are too numerous to be here detailed; and we can only, within the limits assigned to us, fall back upon the general principle that documents stolen, to bring them within the statute, must be described by the statutory terms.[2]

7 State v. Shelters, 51 Vt. 102, 31 Am. Rep. 679.

Averment by innuendo. Where the plaintiff averred, by way of innuendo, that the defendant, in attributing the authorship of a certain article to a "celebrated surgeon of whiskey memory," or to a "noted steam doctor," meant by these appellations the plaintiff, it was held notwithstanding the innuendo, that the declaration was bad, for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect.—Miller v. Maxwell, 16 Wend. (N. Y.) 9.

Business to be averred when an alleged libel affects the prosecutor only in his business standing.—Com. v. Stacey, 8 Phila. (Pa.) 617.

Question of truth of innuendoes is for the jury; and they must be supported by evidence, unless they go to matters of notoriety or of which the court takes judicial notice. See cases cited supra; also, Com. v. Keenan, 67 Pa. St. 203; State v. Perrin, 2 Brev. (S. C.) 474; State v. Atkins, 42 Vt. 252.

8 State v. Shelters, 51 Vt. 102, 31 Am. Rep. 679.

Forgery of railroad ticket or pass charged, indictment must set out the extrinsic circumstances, showing the authority of the officer whose name is forged, and the obligations of the railroad company to honor it.—State v. Weaver, 84 N. C. 836, 55 Am. Dec. 647. See Com. v. Ray, 69 Mass. (3 Gray) 441; Reg. v. Boult, 3 Car. & K. 604.

1 **As to lumping descriptions** of notes in larceny, see infra, § 255.

2 **As to variance** in such cases see Whart. Crim. Ev., § 116.

§ 229. THOUGH GENERAL DESIGNATION IS SUFFICIENT, YET IF INDICTMENT PURPORTS TO GIVE WORDS, VARIANCE IS FATAL. When a general designation of a document is all that is required, then it is ordinarily sufficient to give the statutory designation, and it is enough if this is sufficiently accurate to identify the document.[1] But if the pleader undertakes to give the words of the document, then a variance as to such words is at common law fatal.[2] On the other hand, it is said that if the words are accurately given, an erroneous designation may be treated as surplusage.[3] Nor will the indictment be defective for want of accuracy of specification, where this specification is the best the pleader could give. This is eminently the case in prosecutions for larceny of bank bills from the person, when the bank bills have not been recovered.[4]

"*Purporting to be*" is not a necessary qualification of the designation.[5]

1 Bonnell v. State, 64 Ind. 498.

2 See cases supra; and see Powers v. State, 87 Ind. 97; United States v. Keen, 1 McL. C. C. 429, Fed. Cas. No. 15510; United States v. Lancaster, 2 McL. C. C. 431, Fed. Cas. No. 15556; R. v. Craven, R. & R. 14.

3 Infra, § 230.

In an indictment for falsely pretending a paper to be a valid promissory note, it is sufficient to designate it, setting it forth not being necessary.—Com. v. Coe, 115 Mass. 481; R. v. Coulson, T. 7 M. 332, 1 Den. C. C. 592, 4 Cox. C. C. 332.

4 Infra, §§ 234 et seq.; Wilson v. State, 69 Ga. 591.

5 Kerr's Whart. Crim. Law, § 944; infra, § 230; State v. Gardiner, 23 N. C. (1 Ired.) 27; R. v. Birch, 2 W. Bl. 790, 96 Eng. Repr. 464, 1 Leach 79.

Rulings under statutes: The following references to rulings under statutes may be of value:

Alabama: See Wilson v. State, 1 Port. 118; Sallie v. State, 39 Ala. 691.

Connecticut: Where an information for theft described the property alleged to be stolen as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank, in this State," it was held that this description was sufficiently certain.—Salisbury v. State, 6 Conn. 101.

Georgia: See State v. Allen, Charlt. 518.

Maryland: In an indictment founded upon the Act of 1809, ch. 138, for stealing a bank note, it is sufficient to describe the note as a bank note, for the payment of, etc., and of the value of, etc. Nothing more is required than to

charge the offense in the language of the act.—State v. Cassel, alias, Baker, 2 Har. & G. 407.

Massachusetts: An indictment under the Act of March 15, 1785, for larceny, alleging that the defendant stole "a bank note of the value of ...., of the goods and chattels of ....," is sufficient, without a more particular description of the note.—Com. v. Richards, 1 Mass. 337.

"Divers bank-bills, amounting in the whole to ...., etc., and of the value of, etc., of the goods and chattels," etc., has been held sufficient.—Larned v. Com., 53 Mass. (12 Met.) 240; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; see other cases, infra, §§ 235, 254.

"Certain moneys, to wit, divers promissory notes, current as money in said Commonwealth."—Com. v. Ashton, 125 Mass. 384; see, for other cases, infra, § 236.

"Sundry bank-bills and sundry promissory notes issued by the United States, commonly called legal tender notes, all said bills and notes together amounting to ninety dollars, and of the value of ninety dollars," is not an adequate description of the United States treasury notes.—Com. v. Cahill, 94 Mass. (12 Allen) 540.

"For the payment of money" need not be averred of a promissory note.—Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95.

Mississippi: See Damewood v. State, 2 Miss. (1 How.) 262; Greeson v. State, 6 Miss. (5 How.) 33.

National notes are not correctly described as "$150 in the United States currency."—Merrill v. State, 45 Miss. 651; see infra, § 236.

Missouri: It is not necessary to allege that the bank is chartered.—McDonald v. State, 8 Mo. 283.

New Hampshire: Hamblett v. State, 18 N. H. 384.

New Jersey: "Bank notes," pleaded as such, are not goods and chattels under the statute.—State v. Calvin, 22 N. J. L. (2 Zab.) 207.

New York: A contract not under seal is incorrectly described as a bond, and the error is fatal.—People v. Wiley, 3 Hill 194.

Where the indictment stated that the defendant stole "four promissory notes, commonly called bank notes, given for the sum of fifty dollars each, by the Mechanics' Bank in the city of New York, which were due and unpaid, of the value of two hundred dollars, the goods and chattels of P. C., then and there found," etc., it was held a sufficient description without saying they were the property of P. C. The word chattels denotes property and ownership.—People v. Holbrook, 13 John. 90; see, also, People v. Jackson, 8 Barb. 637.

North Carolina: In an indictment for stealing a bank note, a description of the note in the following words: "one twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars," is good.—State v. Williamson, 6 N. C. (3 Murph.) 216; State v. Rout, 10 N. C. (3 Hawks) 618; State v. Fulford, 61 N. C. (1 Phil.) 563.

Ohio: See McMillan v. State, 5 Ohio 269; Grummond v. State, 10 Ohio 510.

Pennsylvania: Under the Act of 15th April, 1790, an indictment

3. What General Legal Designation Will Suffice.

§ 230. IF DESIGNATION BE ERRONEOUS, VARIANCE IS FATAL —"PURPORTING TO BE." The pleader may aver the instrument to be of the class prohibited, or he may aver that it "purports to be," etc.; *e. g.*, he may say that the defendant forged "a certain will," or "a certain false, etc., paper writing *purporting to be* the last will," etc.,[1] though, as has just been seen, "purporting to be" may be omitted.[2] At common law, however, great care is necessary in this respect, since, if the document turns out in proof not to be what the indictment declares it purports to be, the variance is fatal.[3] But, as has been already observed, when the tenor is correctly given, the general designation of the document may be rejected

for stealing bank notes must lay them as promissory notes for the payment of money, and therefore an indictment for stealing a "ten dollar note of the President, Directors, and Company of the Bank of the United States," is bad.—Com. v. Boyer, 1 Binn. 201.

Under Act of 1810, see Spangler v. Com., 3 Binn. 533; Stewart v. Com., 4 Serg. & R. 194; Com. v. McLaughlin, 4 Rawle. 464; Com. v. McDowell, 1 Browne 360.

By the revised Act of 1860, Pamph. 435, it is sufficient if the instrument be averred by the name by which it is generally known.—See Com. v. Henry, 2 Brewst. 566; Com. v. Byerly, 2 Brewst. 568.

Tennessee: See Hite v. State, 17 Tenn. (9 Yerg.) 357.

United States Courts: Money and bank notes, and coin, are "personal goods," within the meaning of the sixteenth section of the Crimes Act of 1790, ch. 36, respecting stealing and purloining on the high seas. See United States v. Hinman, 1 Baldw. C. C. 292, Fed. Cas. No. 15370; United States v. Lancaster, 2 McL. C. C. 431, Fed. Cas. No. 15556; United States v. Moulton, 5 Mas. C. C. 537, Fed. Cas. No. 15827.

1 2 East P. C. 980; State v. Gardiner, 23 N. C. (1 Ired.) 27; R. v. Birch, 1 Leach C. C. 79; Kerr's Whart. Crim. Law, §§ 933 et seq.

2 Supra, § 229.

3 MO.—Dowing v. State, 4 Mo. 572. N. Y.—People v. Holbrook, 13 John. 90. N. C.—State v. Williamson, 7 N. C. (3 Murph.) 216; State v. Weaver, 94 N. C. 836, 55 Am. Rep. 647. OHIO—Grummond v. State, 10 Ohio 510. TEX.—Conlee v. State, 14 Tex. App. 222. ENG.—R. v. Jones, 1 Doug. 300, 1 Leach C. C. 204; R. v. Edsall, 2 East P. C. 984, 1 Bennett & Heard's Lead. Cas. 318; R. v. Reading, 2 Leach C. C. 590, 2 East P. C. 952; R. v. Gilchrist, 2 Leach C. C. 657.

And see fully Whart. Crim. Ev., § 116; Kerr's Whart. Crim. Law, §§ 933 et seq.

as surplusage.[4] In libel, it is not necessary to aver that the publication was in a newspaper.[5]

§ 231. "RECEIPT" INCLUDES ALL SIGNED ADMISSIONS OF PAYMENT. "Settled, Sam. Hughes," at the foot of a bill of parcels, was held to support an allegation of a receipt without any explanatory averment.[1] Anything that admits payment, and is signed, is enough to bring the instrument within the term "receipt."[2] But if the fact of payment does not either appear on the instrument or is not averred,[3] or the name of the receiptor is wanting, or is obscure and is not helped out by averments,[4] the term "receipt" is not sustained.[5] And such explanatory matter must not only be averred, but proved.[6]

§ 232. "ACQUITTANCE" INCLUDES DISCHARGES FROM DUTY. Acquittance is a term used in some statutes as cumulative with receipt, and all receipts may be regarded as acquittances;[1] but all acquittances are not receipts, as an acquittance may consist in an instrument simply discharging another from a particular duty.[2]

4 Com. v. Castle, 75 Mass. (9 Gray) 123; Com. v. Coe, 115 Mass. 581; R. v. Williams, T. & M. 382; 2 Den. C. C. 61, 4 Cox C. C. 356.

Though see Mr. Greaves's criticism, 2 Rus. on Cr., 4th ed., 811, note; Heard's Cr. Pl. 213.

5 Rattray v. State, 61 Miss. 377.

1 R. v. Martin, 1 Moody C. C. 483; 7 Car. & P. 549, 32 Eng. C. L. 752; R. v. Rogers, 9 Car. & P. 41, 38 Eng. C. L. 36; R. v. Boardman, 2 Moody & R. 147.

2 R. v. Houseman, 8 Car. & P. 180, 34 Eng. C. L. 578; Testick's Case, 2 East P. C. 925; R. v. Moody, Leigh & Cave, 173.

Under peculiar Massachusetts statute, see Com. v. Lawless, 101 Mass. 32.

3 Clark v. State, 8 Ohio St. 630; State v. Humphreys, 29 Tenn. (10 Humph.) 442; R. v. West, 2 Car. & K. 496, 61 Eng. C. L. 495, 1 Den. C. C. 258; R. v. Pries, 6 Cox C. C. 165; R. v. Goldstein, R. & R. C. C. 473; R. v. Harvey, R. & R. 227.

See Kerr's Whart. Crim. Law, § 946.

4 R. v. Hunter, 2 Leach C. C. 624, 2 East P. C. 997; R. v. Boardman, 2 Mood. & R. 147; Kerr's Whart. Crim. Law, § 946.

5 Com. v. Lawless, 101 Mass. 32.

6 See infra, §§ 239, 240; and see Kerr's Whart. Crim. Law, §§ 933 et seq., 946.

1 See R. v. Atkinson, 2 Moody 215.

2 Com. v. Ladd, 15 Mass. 526.

A certificate by a society that a member has paid up all his dues, and is honorably discharged, is, under the English statute, neither an acquittance nor a receipt;[3] nor is a scrip certificate in a railway company.[4]

§ 233. "BILL OF EXCHANGE" TO BE USED IN ITS TECHNICAL SENSE. If the drawer's, payee's, or drawee's name be wanting or be insensible; if the engagement is on its face conditional;[1] if the amount be uncertain, or if it be not expressed in money, the instrument will not sustain the technical description.[2] And so if there be an obscurity or error in the "acceptance,"[3] or the indorsement;[4] and so where the instrument was made payable to ——— *or* order.[5] That a bill drawn by a person in his own favor, and by him accepted and indorsed, is a "bill of exchange," is asserted in Massachusetts,[6] though in England the inclination of authority is the other way.[7] It is not necessary, in New York, to aver that there was money due on the bill.[8] A "cheque" is a bill of exchange under the statute.[9]

3 R. v. French, L. R. 1 C. C. R. 217. See Com. v. Lawless, 101 Mass. 32.

4 Clark v. Newsam, 1 Exch. 13; R. v. West, 1 Den. C. C. 258, 2 Cox C. C. 437.

1 R. v. Harper, 44 L. T. (N. S.) 615.

2 People v. Howell, 4 Johns. (N. Y.) 296; R. v. Hart, 6 Car. & P. 106, 25 Eng. C. L. 345; R. v. Mopsey, 11 Cox C. C. 143; R. v. Curry, 2 Moody 218; R. v. Smith, 2 Mood. 295; R. v. Butterwick, 2 Mood. & R. 196; R. v. Bartlett, 2 Moody & R. 362; R. v. Wicks, R. & R. 149; R. v. Randall, R. & R. 195; R. v. Birklett, R. & R. 251.

Whether drawee's name can be dispensed with, if place of payment be given, see R. v. Smith, 2 Mood. 295; R. v. Snelling, Dears. 219, 22 Eng. L. & E. 597. See Kerr's Whart. Crim. Law, §§ 945 et seq.

3 R. v. Cooke, 8 Car. & P. 582, 34 Eng. C. L. 903; R. v. Rogers, 8 Car. & P. 629, 34 Eng. C. L. 930.

4 R. v. Arscott, 6 Car. & P. 408, 25 Eng. C. L. 499.

Payable to drawer's own order, neither indorsement nor acceptance is needed.—R. v. Smith, 2 Moody 295; R. v. Wicks, R. & R. 149.

5 R. v. Randall, R. & R. 195.

6 Com. v. Butterick, 100 Mass. 12.

7 R. v. Smith, 2 Moody 295.

8 Phelps v. People, 13 N. Y. Sup. Ct. 401; Phelps v. People, 72 N. Y. 334, 372.

9 State v. Pierson, 59 Iowa 271, 13 N. W. 291; Hawthorn v. State,

§ 234. "PROMISSORY NOTE" USED IN A LARGER SENSE. Great liberality has been shown in the interpretation of this term when used in statutes making the forgery or larceny of "promissory notes" penal. Thus, it has been held to include bank notes,[1] where the statute does not specifically cover "bank notes," though it seems to be otherwise when it does;[2] while it does not include silver certificates.[3] It is not necessary, in prosecutions for larceny, that the note be locally negotiable,[4] or be anything more than a mere due bill.[5] It was at one time ruled in Pennsylvania, that if a note be not averred or implied to be still due and unpaid, it will not be within the statute,[6] though it is enough if on the face of the paper it appears still outstanding.[7] And though an instrument signed by M. and payable to his order is not a promissory note until indorsed, an allegation that D., in forging the indorsement, forged the indorsement of a promissory note, may be sustained.[8]

§ 235. "BANK-NOTE" INCLUDES NOTES ISSUED BY BANKS. In England, in an indictment under the 2 Geo. 2, c. 25, the instrument stolen must be expressly averred to be a bank note, or a bill of exchange, or some other of the

56 Md. 530; Whart. on Cont., §§ 834, 840.

1 MASS.—Com. v. Paulus, 77 Mass. (11 Gray) 305; Com. v. Ashton, 125 Mass. 384. MO.—Hobbs v. State, 9 Mo. 855. N. Y.—People v. Jackson, 8 Barb. 637. PA.—Com. v. Boyer, 1 Binn. 201.

Contra: Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357.

2 Damewood v. State, 2 Miss. (1 How.) 262; Spangler v. Com., 3 Binn. (Pa.) 533.

3 Stewart v. State, 62 Md. 413.

4 Story on Bills, § 60; Sibley v. Phelps, 60 Mass. (6 Cush.) 172; People v. Bradley, 4 Park. Crim. Rep. (N. Y.) 245.

What is not negotiable in one country may be negotiable in another.—Whart. Confl. of Laws, § 447.

5 People v. Finch, 5 John. (N. Y.) 237.

6 Stewart v. Com., 4 Serg. & R. (Pa.) 194; Com. v. M'Laughlin, 4 Rawl. (Pa.) 464.

7 Ibid.; Com. v. Richards, 1 Mass. 237. See Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Phelps v. People, 72 N. Y. 334; State v. Rout, 10 N. C. (3 Hawks) 618.

8 Com. v. Dallinger, 118 Mass. 439.

securities specified; and, therefore, it is insufficient to charge the defendant with stealing a certain note, commonly called a bank note, for none such is described in the act.[1] And in the case of a bank note, it is sufficient to describe it generally as a bank note of the Governor and Company of the Bank of England, for the payment of one pound, etc., the property of the prosecutor; the said sum of one pound thereby secured, then being due and unsatisfied to the proprietor.[2] In Massachusetts, a bank note is sufficiently described as a "bank bill" in an indictment on Rev. Sts. c. 126, § 17, for stealing it.[3] And an indictment charging the larceny of "sundry bank bills of some banks respectively, to the jurors unknown, of the value of," etc., is good.[4]

An unnecessarily minute description of a bank note may be fatal; as where an indictment for stealing a bank note alleged it to be "signed for the Governor and Company of the Bank of England, by J. Booth," and no evidence of Booth's signature was given, the judges held the prisoner entitled to an acquittal.[5]

"Bank bill or note" refers exclusively to bank paper, and does not include an ordinary promissory note.[6] It includes, however, notes redeemed by the bank, and in its agents' hands.[7]

Whether it is necessary to aver the bank to have been incorporated has been already considered.[8] Under the

1 Craven's Case, 2 East P. C. 601.

2 Starkie's C. P. 217. See Com. v. Richards, 1 Mass. 337; Larned v. Com., 53 Mass. (12 Met.) 240; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; People v. Holbrook, 13 John. (N. Y.) 10; State v. Williamson, 7 N. C. (3 Murph.) 216, and other cases cited, Whart. Crim. Ev., § 116a.

3 Eastman v. Com., 70 Mass. (4 Gray) 416; Com. v. Stebbins, 74 Mass. (8 Gray) 493.

"Bank-note" and "bank-bill" are synonymous.—State v. Hays, 21 Ind. 176.

4 See State v. Hoppe, 39 Iowa 468; Com. v. Grimes, 76 Mass. (10 Gray) 470.

5 R. v. Craven, Russ. & Ry. 14; Whart. Crim. Ev., § 116.

6 State v. Stimson, 24 N. J. L. (4 Zab.) 9.

7 Com. v. Rand, 48 Mass. (7 Met.) 475, 41 Am. Dec. 455.

8 Supra, § 152.

Maine statute it is not necessary to aver either genuineness or the name of the bank.[9]

§ 236. Treasury note and United States currency. "National bank currency notes" has been held an adequate description;[1] and so of "two five dollar United States treasury notes, issued by the treasury department of the United States government, for the payment of five dollars each and of the value of five dollars."[2] "One promissory note issued by the treasury department of the United States," has been also held sufficient;[3] and so of "four promissory notes of the United States for the payment of money;"[4] and so of "fifty dollars in national currency of the United States, the exact denomination of which is to the grand jury unknown;"[5] and so of ——— "dollars in paper currency of the United States of America."[6] In Massachusetts, it is held that "three bonds of the United States, each of the value of ten thousand dollars," is a good description;[7] and so of "divers promissory notes current as money in said Commonwealth, of the amount and value of eighty-seven dollars, a more particular description of which is to

9 State v. Stevens, 62 Me. 284.

1 United States v. Bennett, 17 Blatchf. C. C. 357, Fed. Cas. No. 14572. See Levy v. State, 79 Ala. 259.

2 State v. Thomason, 71 N. C. 146.

3 See Sallie v. State, 39 Ala. 691; State v. Fulford, 61 N. C. (1 Phill.) 563; Wells v. State, 4 Tex. App. 21.

4 Hummel v. State, 17 Ohio St. 628. See State v. Liord, 30 La. Ann., Part II, 867.

5 ALA.—DuBois v. State, 50 Ala. 139; Grant v. State, 55 Ala. 201. TEX.—Martinez v. State, 41 Tex. 164; Ridgeway v. State, 41 Tex. 231. VA.—Dull v. Com., 25 Gratt. 965.

Compare: Merrill v. State, 45 Miss. 651.

"One five dollar bill circulating medium current as money," has been sustained in Texas.—Reside v. State, 10 Tex. App. 675. See, supra, § 221.

As to paper currency, see Riggs v. State, 104 Ind. 261, 3 N. E. 886; State v. Graham, 65 Iowa 617, 22 N. W. 897; State v. Shiver, 20 S. C. 392.

6 State v. Carro, 26 La. Ann. 377; State v. Shonhausen, 26 La. Ann. 421.

7 Com. v. White, 123 Mass. 430, 25 Am. Rep. 116. See Kearney v. State, 48 Md. 16.

the jurors unknown,"[8] nor is it a variance that the notes were "three tens, eleven fives, and one two," and might have been so known by the grand jury.[9] "Divers promissory notes, of the amount and of the value in all of five thousand dollars, a more particular description of which is to the jurors unknown," is sufficient, and is sustained by proof of bank notes.[10] "Divers promissory notes payable to the bearer on demand, current as money in the said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown," is also good, unless it should appear that the grand jury had at the time of the finding a full description of the notes.[11] But "sundry bank bills," "commonly called legal tenders," has been held insufficient.[12] "Certain money and bank bills," to-wit, "six dollars and eighty-five cents in bank bills usually called United States legal tender notes, as follows: one bill of the denomination of five dollars, one bill of the value of one dollar, and eighty-five cents in currency, usually known and called postal currency," was held in New York in 1870 not to be an averment sufficiently accurate to sustain a conviction for stealing national bank notes and United States fractional cur-

8 Com. v. Green, 122 Mass. 333.

"Divers promissory notes" sufficiently describes bank notes. See Com. v. Jenks, 138 Mass. 484.

9 Ibid. See Com. v. Hussey, 111 Mass. 432.

10 Com. v. Butts, 124 Mass. 449. See McQueen v. State, 82 Ind. 72.

11 Com. v. Gallagher, 126 Mass. 54; S. P., Com. v. Ashton, 125 Mass. 354.

Indictment under Mass. Gen. Stats., ch. 160, § 24, charging the robbery of several "promissory notes then and there of the currency current in said commonwealth," is sustained by proof that the notes stolen were either bank bills or treasury notes. The words "of the currency current in this commonwealth" are equivalent to "current as money in this commonwealth."—Com. v. Griffiths, 126 Mass. 252.

12 Com. v. Cahill, 94 Mass. (12 Allen) 540; Territory v. Shipley, 4 Mont. 468, 2 Pac. 313; Hamblett v. State, 18 N. H. 384.

"Divers United States treasury notes, and national bank notes and fractional currency notes, amounting in the whole to $158.00, and of the value of $158.00," is sufficient.—State v. Hurst, 11 W. Va. 54.

rency.[13] It was conceded that to charge the notes simply as "current bank bills of the value of ———," etc., would have been enough. But it was insisted that when surplus descriptive matter, varying the character of the thing stolen, is introduced, this must be proved.[14] But "$275 in money, lawful money of the United States, and of the value of $275," is now held sufficient.[15]

§ 237. "MONEY" IS CONVERTIBLE WITH CURRENCY. Under the general term "money," bank notes, promissory notes, or treasury warrants can not be included, unless they be made a legal tender.[1] In England, however, it has been held that bank notes, when a legal tender, are properly described in an indictment for larceny as "money," although at the time they were stolen they were not in circulation, but were in the hands of the bankers themselves.[2] Whatever is currency is money.

§ 238. "GOODS AND CHATTELS" INCLUDES PERSONALTY, EXCLUSIVE OF CHOSES IN ACTION. Under "goods and chattels," it has been ruled that bank notes can not be in-

13 People v. Jones, 5 Lansing (N. Y.) 340.

14 IND.—Hickey v. State, 23 Ind. 21, 334, 340. LA.—State v. Carson, 20 La. Ann. 48. MASS.—Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65. MINN.—State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. N. Y.—People v. Loop, 3 Park. Cr. Rep. 559; People v. Quinlan, 6 Park. Cr. Rep. 9. S. C.—State v. Evans, 15 Rich. 31. WIS.—McEntee v. State, 24 Wis. 43.

15 People v. Reavey, 38 Hun (N. Y.) 418.

1 ARK.—Wells v. Cole, 27 Ark. 603 (state scrip not included). IND.—Colson v. State, 7 Blackf. 590. MISS.—Williams v. State, 20 Miss. (12 Smed. & M.) 58. N. C.—State v. Jim, 7 N. C. (3 Murph.) 3. OHIO—Johnson v. State, 11 Ohio St. 324. S. C.—Lange v. Kohue, 1 McC. 115 (paper scrip issued by state under state statute making it a tender at treasury, not included). TENN.—McAuley v. State, 15 Tenn. (7 Yerg.) 526. TEX.—Hale v. State, 8 Tex. 171; Davidson v. State, 12 Tex. App. 214. VA.—Com. v. Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512. ENG.—R. v. Major, 2 East P. C. 118; R. v. Hill, R. & R. 190.

2 R. v. West, 7 Cox C. C. 183, 40 Eng. Law & Eq. 564; Dears. & B. 109; R. v. Godfrey, Dears. & B. 426.

cluded,[1] nor bonds and mortgages,[2] nor coin.[3] But, be this as it may, it seems that in such case the words "goods and chattels" may be discharged as surplusage, and a conviction sustained without them.[4] And the tendency is to embrace in the term all movables, e. g., poultry and other live stock;[5] and grain in a stable.[6] Indeed, it would seem as if whatever is subject to common law larceny should be embraced in the term unless restricted by statute.[7]

§ 239. "WARRANT" IS AN INSTRUMENT CALLING FOR PAYMENT OR DELIVERY. "Warrant" is now held to include any instrument calling for the payment of money or delivery of goods, on which, if genuine, a prima facie case of recovery could be made.[1]

1 MASS.—Com. v. Eastman, 68 Mass. (2 Gray) 76. N. J.—State v. Calvin, 22 N. J. L. (2 Zab.) 207. N. C.—State v. Jim, 7 N. C. (3 Murph.) 3. VA.—Com. v. Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512.

Contra: People v. Kent, 1 Doug. (Mich.) 42.

As to English practice, see R. v. Mead, 4 Car. & P. 535, 19 Eng. C. L. 637 (halves of bank-notes sent by mail held "goods and chattels"); Anon., 1 Crawf. & Dix. C. C. 152; R. v. Crone, Jebb 47; R. v. Dean, 2 Leach 693 (merely holds notes to be "money").

Railway ticket has been said to be a "chattel."—R. v. Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 61 Eng. C. L. 917.

Compare: R. v. Kilham, L. R. 1 C. C. 264; Steph. Dig. C. L., art. 288, doubting.

And whenever term "goods and chattels" is used as nomen generalissimum in statutes, and is not connected with the terms "money" and "property," it should have this general construction.

2 R. v. Powell, 14 Eng. Law & Eq. 575, 2 Den. C. C. 403.

3 R. v. Radley, 3 Cox C. C. 460, 1 Den. C. C. 450; R. v. Davidson, 1 Leach 241.

Though see Hall v. State, 3 Ohio St. 575; United States v. Moulton, 5 Mas. C. C. 537, Fed. Cas. No. 15827.

4 Ibid.; Com. v. Eastman, 68 Mass. (2 Gray) 76; Com. v. Eastman, 75 Mass. (4 Gray) 416; Com. v. Bennett, 118 Mass. 452; R. v. Morris, 1 Leach C. C. 109.

See, also, supra, §§ 200, 229.

5 2 East P. C. 748; R. v. Whitney, 1 Moody 3.

6 State v. Brooks, 4 Conn. 446.

7 State v. Bonwell, 2 Har. (Del.) 529.

1 R. v. Vivian, 1 Car. & K. 719, 47 Eng. C. L. 719; 1 Den. C. C. 35; R. v. Dawson, 2 Den. C. C. 75, 5 Cox C. C. 220, 1 Eng. Law & Eq. 589.

A "dividend" warrant falls under this head.—R. v. Autey, Dears. &

§ 240. "ORDER" IMPLIES MANDATORY POWER. "Order" implies beyond this, a mandatory power in the drawer.[1] *Under statute,* in some of the states, an "order" does

B. 294, 7 Cox C. C. 329; and so does a letter of credit.—R. v. Raake, 2 Moody 66; and so, distinctively, of any letters authorizing but not commanding a particular act; and this constitutes the chief differentia between warrant and order. Perhaps the only cases, therefore, to which "order" does not apply, but "warrant" does, are those in which there is a discretionary power reserved to the drawee.

An authority to a correspondent to advance funds if he thinks best, is a "warrant" but not an "order." See R. v. Williams, 2 East P. C. 581.

Warrants include also (as has been seen) instruments where the drawer assumes mandatory power; e. g., besides the cases just mentioned, post-office drafts (R. v. Gilchrist, 2 Leach 657, 2 M. C. C. 233, C. & M. 224) and bills of exchange.—R. v. Willoughby, 2 East P. C. 581.

1 McGuire v. State, 37 Ala. 161; R. v. Williams, 2 Car. & K. 51, 61 Eng. C. L. 50.

Prima facie case is enough; and though the drawer has neither money nor goods in the drawee's hands, and there is no privity between them, yet, as the instrument could be none the less on its face the basis of a suit, it does not, from such latent defects, lose the qualities of a forgeable order. See People v. Way, 10 Cal. 336; R. v. Carte, 1 Car. & K. 741, 47 Eng. C. L. 741; R. v. Lockett, 1 Leach 110.

But a prima facie drawer and drawee are necessary; and the drawer must occupy, on the face of the instrument, the attitude of "ordering," and the drawee the relation of being "ordered." See cases just cited, and People v. Farrington, 14 John. (N. Y.) 348; R. v. Curry, 2 Moody 218; R. v. Cullen, 5 Car. & P. 116, 24 Eng. C. L. 481; R. v. Richards, R. & R. 193.

Yet that there may be cases where a drawee's name can be dispensed with is on reason clear. An order on the keeper of a prison, for instance, or on the sheriff of a county, is no less an order because the drawee's name is not given; and so we can conceive of an order by a factory treasurer on the factory storekeeper, to which the same remark would apply. As sustaining this may be cited Com. v. Butterick, 100 Mass. 12; Noakes v. People, 25 N. Y. 380; R. v. Snelling, Dears. 219, 22 Eng. L. & Eq. 597; R. v. Gilchrist, 2 Moody 233.

Defectiveness, or elliptical obscurity does not destroy the forgeable character of the instrument as an "order," if it can be proved to be an order by parol. But if so, the wanting links must be supplied by special averment in the indictment. See, supra, § 226; Kerr's Whart. Crim. Law, §§ 887 et seq. Yet when this is done, our courts have not been so fastidious, as appears to have been sometimes the case in England, as to require each "order" to come up to a preconceived legal stan-

not mean an act imparting a right on the part of the person who is supposed to have made it, and imposing a duty upon the person to whom directed, but it may be a mere request to pay money or deliver goods to a designated person.[2]

§ 241. "REQUEST" INCLUDES MERE INVITATION. "Request" is wider still, and includes a mere invitation, and is technically proper in cases where the party supposed to draw is without authority to draw;[1] nor is it necessary that a drawer should be specified.[2] Cheques, drafts,

dard. This, perhaps (besides our emancipation from the numbing effect on old English judges of the consciousness of the death penalty in forgery), may be attributed to the fact that in this country everybody does business in every sort of way, while in England the class is comparatively limited, and restricted to settled forms. As sustaining the American liberalization of the rule, see: ALA.—McGuire v. State, 37 Ala. 361; Jones v. Staye, 50 Ala. 161. CONN.—State v. Cooper, 5 Day 250. GA.—Hoskins v. State, 11 Ga. 92; Johnson v. State, 62 Ga. 299. MASS.—Com. v. Fisher, 17 Mass. 46; Com. v. Butterick, 100 Mass. 12. N. Y.—People v. Shaw, 5 John. 236; People v. Farrington, 14 John. 348.

"Order for money" has a well-understood meaning, and consists of a direction made to one who is indebted to the maker of the order, to pay the money owing, or a designated portion thereof, to a person named.—People v. Smith, 112 Mich. 192, 67 Am. St. Rep. 392, 70 N. W. 466, followed in Leslie v. State, 10 Wyo. 10, 69 Pac. 2.

2 Hoskins v. State, 11 Ga. 92.

"Request" as an "order": The following was held to be an "order for the payment of money," although the party addressed was not indebted to the supposed drawer, or bound to comply: "Mr. Campbell, please give John Kepper $10, Frank Neff."—Com. v. Kepper, 114 Mass. 278.

Even in England a note from a merchant asking that the bearer should be permitted to test wine in London docks, is an "order" for the delivery of goods.—R. v. Illedge, 2 Car. & K. 871, 61 Eng. C. L. 871, T. & M. 127, 3 Cox C. C. 552.

1 R. v. Walters, Carr. & M. 588, 41 Eng. C. L. 320; R. v. Evans, 5 Car. & P. 553, 24 Eng. C. L. 704; R. v. James, 8 Car. & P. 292, 34 Eng. C. L. 740; R. v. White, 9 Car. & P. 282, 38 Eng. C. L. 173; R. v. Thomas, 2 Moody 16; R. v. Newton, 2 Moody 59; R. v. Kay, L. R. 1 C. C. 257.

2 R. v. Pulbrook, 9 Car. & P. 37, 38 Eng. C. L. 34.

and bills of exchange fall under either head.[3] The writing need not be of a business character, nor negotiable.[4]

§ 242. TERMS MAY BE USED CUMULATIVELY. When the pleader is doubtful as to the class in which the instrument falls, it seems that instead of averring the instru-

[3] People v. Howell, 4 John. (N. Y.) 296; State v. Nevins, 23 Vt. 519; R. v. Shepherd, 2 East P. C. 944; R. v. Willoughby, 2 East P. C. 944.

So is a post-dated check.—R. v. Taylor, 1 Car. & K. 213, 47 Eng. C. L. 213.

But not a warrant for wages.—R. v. Mitchell, 2 F. & F. 44.

[4] 2 Russ. on Crimes 514.

A forged instrument of writing was in the following terms:

"Mr. Davis: Wen. 19th.

"pleas let the boy have $6.00 dolers for me. B. W. Earl."

It was held that such instrument is prima facie an "order for the payment of money" within the meaning of the statute.—Evans v. State, 8 Ohio St. 196, 70 Am. Dec. 98.

Many subtleties formerly existed in the English law as to the distinctions between these several designations. The following cases are generally referred to under this head: R. v. Roberts, Car. & M. 682; R. v. Williams, 2 Car. & K. 51, 61 Eng. C. L. 50; R. v. Hart, 6 Car. & P. 106, 25 Eng. C. L. 345; R. v. Dawson, 2 Den. C. C. 75, 5 Cox C. C. 220, 1 Eng. L. & Eq. 589; R. v. McIntosh, 2 East P. C. 942; R. v. Anderson, 2 Moody & R. 469.

The pleader has been relieved from most of these by a more recent case (1850), where it was held that if the instrument be set out in hæc verba, a misdescription will be immaterial, at least if it fall within one of several terms used to designate it.—R. v. Williams, 2 Den. C. C. 61, 4 Cox C. C. 356, cited, supra, §§ 230, 239, 240.

The intimation was even thrown out that where the indictment sets forth the forged instrument, the court will see whether it is within the statute (when the indictment is under a statute), and if so, will sustain a conviction, although it was not specifically averred to be an instrument which the statute covered. Thus, where the indictment charged the defendant to have forged a certain warrant, order, and request, in the words and figures following, to wit: "Mr. Bevan, S—— Pleas to send by bearer a quantity of basket nails," etc., the Court of Criminal Appeal, Lord Campbell presiding, sustained the conviction, apparently on the ground that if there was a technical misnomer of the instrument, this was cured by its being fully set forth, and thus speaking for itself.—R. v. Williams, 2 Den. C. C. 61, 4 Cox C. C. 356, 2 Eng. Law & Eq. 633. See other cases cited supra, §§ 230, 239.

"W. Trim, 2s.," simply, is insensible and incurable.—R. v. Ellis, 4 Cox C. C. 258.

ment, as in the case last cited, to be "a certain warrant, order, and request," the better course is to aver the uttering of one warrant, one order, and one request. But it is doubtful whether even this is not duplicity, where the words do not each describe the object,[1] and hence, where there is a question whether the document is an "order," or "request," or "warrant," it is safe to give to each designation a separate count.[2]

§ 243. DEFECTS MAY BE EXPLAINED BY AVERMENTS. If the writing, on its face, comes short of being either an order, warrant, request, or other statutory term, averment may be made, and evidence received, bringing it up to the required standard, as where the name of the party addressed is omitted;[1] or where the body of the writing is on its face insensible.[2] And where the fraudulent or illegal character of the document does not appear on its face, this must be helped out by averments.[3]

Innuendoes have been already discussed.[4]

§ 244. A "DEED" MUST BE IN WRITING UNDER SEAL PASSING A RIGHT—"BONDS." To sustain the averment of a deed, there must be a writing under seal, purporting to pass some legal right from one party to another, either mediately or immediately; and hence a power of attorney

1 R. v. Gilchrist, 2 M. C. C. 233, Car. & M. 224, 41 Eng. C. L. 126; R. v. Crowther, 5 Car. & P. 316, 24 Eng. C. L. 583. See Com. v. Livermore, 70 Mass. (4 Gray) 18.

Sed quære whether the unnecessary cumulation could not be discharged as surplusage. Compare State v. Corrigan, 24 Conn. 286; Whart. Crim. Ev., § 138.

2 See, supra, §§ 207, 208; infra, § 300.

1 R. v. Pulbrook, 9 Car. & P. 37, 38 Eng. C. L. 34; R. v. Rogers, 9 Car. & P. 41, 38 Eng. C. L. 36; R. v. Carney, 1 Mood. 351. See, supra, § 231.

2 R. v. Atkinson, Car. & M. 325, 41 Eng. C. L. 181; R. v. Walters, Car. & M. 588, 41 Eng. C. L. 320; R. v. Pulbrook, 9 Car. & P. 37, 38 Eng. C. L. 34; R. v. Hunter, 2 Leach C. C. 624; R. v. Cullen, 1 Moody 300. See State v. Crawford, 13 La. Ann. 300; Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668; Carberry v. State, 11 Ohio St. 410; Kerr's Whart. Crim. Law, §§ 933 et seq.

3 Ibid.; Com. v. Hinds, 101 Mass. 209; Com. v. Costello, 120 Mass. 359.

4 Supra, § 226.

to sell stock is a deed under the statutes.[1] Nor is it necessary that a deed should rigorously pursue the statutory form.[2] Prima facie validity is enough. The averment of the "deed" need not give the grantee's name.[3] "Bond" includes a municipal certificate of indebtedness.[4]

§ 245. "OBLIGATION" IS AN UNILATERAL ENGAGEMENT. Under statutes based, as those of Louisiana, on the Roman law, an obligation is an unilateral engagement by which one party engages himself to another to do a particular thing. The English common law authorities sometimes speak as if the term is limited to bonds with penalties. But when the term is used in a statute as nomen generalissimum, it must be construed in its most liberal sense.[1]

§ 246. —— AND SO IS "UNDERTAKING." As to "undertaking," the same remark is to be made. Where, however, either term is used to represent a subordinate species or class, then the instrument must be proved to belong to this species or class.[1]

§ 247. A "GUARANTEE" AND AN I. O. U. ARE UNDERTAKINGS. A "guarantee" is an undertaking;[1] and so is a bare "I. O. U." without any expressed consideration.[2]

1 R. v. Fauntleroy, 1 Car. & P. 421, 12 Eng. C. L. 247, 1 Moody 52.

2 R. v. Lyon, R. & R. C. C. 255.

In R. v. Morton, 12 Cox C. C. 456; L. R. 2 C. C. R. 22, it was held that the forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict., ch. 98, § 20.

3 State v. Hall, 85 Mo. 669.

4 Bishop v. State, 55 Md. 138.

1 See Fogg v. State, 17 Tenn. (9 Yerg.) 392.

1 R. v. West, 1 Den. C. C. 258; 2 Car. & K. 496; S. P., Clark v. Newsam, 1 Exch. 131.

1 R. v. Joyce, 10 Cox C. C. 100, L. & C. 576; R. v. Reed, 2 Moody 62.

2 R. v. Chambers, L. R. 1 C. C. 341.

Valid acknowledgment of indebtedness.—Kenney v. Flynn, 2 R. I. 319.

§ 248. "PROPERTY" IS WHATEVER MAY BE APPROPRIATED. "Property," it needs scarcely be said, includes whatever may be appropriated to individual use. Money necessarily falls within this definition.[1]

§ 249. "PIECE OF PAPER" IS SUBJECT OF LARCENY. It has been sometimes the practice to aver, in larceny, the stealing of "one piece of paper, of the value of one dollar," etc., as the case may be; and it has been thought that in this way the difficulty as to setting out doubtful instruments could be avoided. How far this is the case will be considered hereafter.[1] A "piece of paper," it may be generally said, if of any value, is the subject of larceny.[2]

§ 250. "CHALLENGES" TO FIGHT NEED NOT BE SET FORTH. A written letter, if merely the inducement or introduction to an oral communication, conveying a challenge, need not be set forth. Thus, where T., in a letter to N., used expressions implying a challenge, and by a postscript referred N., the challenged party, to one H. (the bearer of the letter), if any further arrangements were necessary, it was held that the letter was only evidence of the challenge, and need not be specially pleaded; and that N. might give testimony of the conversation between H., the bearer of the letter, and himself.[1] Even when a statute makes sending a challenge indictable, it has been held not necessary to set out a copy of the challenge;[2] and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, in no way altering the meaning, this is cured by verdict.[3]

1 People v. Williams, 24 Mich. 156, 9 Am. Rep. 119.

1 Infra, § 262; Kerr's Whart. Crim. Law, § 1115. See R. v. Bingley, 5 Car. & P. 602, 24 Eng. C. L. 729.

2 R. v. Perry, 1 Car. & K. 727, 47 Eng. C. L. 726; R. v. Perry, 1 Den. C. C. 69; R. v. Clark, R. & R. 181.

1 State v. Taylor, 3 Brev. (S. C.) 243.

2 State v. Farrier, 8 N. C. (1 Hawks) 487; Brown v. Com., 2 Va. Cas. 516.

3 Ivey v. State, 12 Ala. 276. See Heffren v. Com., 61 Ky. (4 Met.) 5.

IX. Words Spoken.

§ 251. WORDS SPOKEN MUST BE SET FORTH EXACTLY, THOUGH SUBSTANTIAL PROOF IS ENOUGH. Where words are the gist of the offense, they must be set forth in the indictment with the same particularity as a libel; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office;[1] or for blasphemous or seditious or obscene or abusive words,[2] or for perjury.[3] It is not enough, in such case, to lay the substance of the words alleged to have been spoken. The words themselves must be laid, but only the substance need be proved.[4] But the meaning must be evidently and clearly the same, without the help of any implication or anything extrinsic.[5] Should any substantial difference exist between the words proved and those laid, even if laid as spoken in the third person and proved to have been spoken in the second,[6] the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offense, it will be sufficient.[7] And when the words do not

1 R. v. Bagg, 1 Rolle 79, 81 Eng. Repr. 341; R. v. How, 2 Str. 699, 93 Eng. Repr. 793.

2 MISS.—Walton v. State, 64 Miss. 207, 8 So. 171. N. C.—State v. Brewington, 84 N. C. 783. TEX.—McMahone v. State, 13 Tex. App. 220. ENG.—R. v. Sparling, 2 Str. 497, 93 Eng. Repr. 658; R. v. Popplewell, 2 Str. 686, 93 Eng. Repr. 783.

Contra: Ex parte Foley, 62 Cal. 508.

3 See Kerr's Whart. Crim. Law, § 1561; Whart. Crim. Ev., § 120a.

4 MASS.—Com. v. Kneeland, 37 Mass. (20 Pick.) 206. MINN.—State v. Clarke, 31 Minn. 207, 17 N. W. 344. PA.—Undegraph v. Com., 11 Serg. & R. 394. TENN.—Bell v. State, 31 Tenn. (1 Swan.) 42.

See Kerr's Whart. Crim. Law, §§ 1924-1928, 1937.

Indictments for threatening with intent to extort money the words need not be set out exactly. The substance is enough. — Com. v. Goodwin, 122 Mass. 19.

5 People v. Warner, 5 Wend. (N. Y.) 271; State v. Bradley, 2 N. C. (1 Hayw.) 403, 463; State v. Coffey, 4 N. C. (Term. R.) 272; State v. Ammons, 7 N. C. (3 Murph.) 123.

6 Com. v. Moulton, 108 Mass. 308; R. v. Berry, 4 T. R. 217.

See Kerr's Whart. Crim. Law, §§ 1924-1928, 1937.

7 Com. v. Kneeland, 37 Mass. (20 Pick.) 206.

constitute the gist of the offense, as where the charge is attempt to extort by threats, then it is enough to set forth the substance.[8] When, also, it is not the words but their tendency that is at issue, it is enough to set forth such tendency; and hence an indictment for "threatening to murder" need not set out the words of the threat.[9] But, where slanderous words, spoken in the presence of third parties, are made specifically indictable by statute, they must be substantially set forth and the presence of third parties must be averred.[10]

§ 252. —— IN TREASON ENOUGH TO SET FORTH SUBSTANCE. When words are laid as an overt act of treason, it is sufficient to set forth the substance of them,[1] for they are not the gist of the offense, but proofs or evidences of it merely.

X. *Personal Chattels.*

1. In General.

§ 253. SCOPE OF TREATMENT. In this connection it is proposed to treat the pleading of personal chattels only so far as necessary for the purpose of a demurrer, or a motion in arrest of judgment. The question of variance between the description and the evidence will be considered in a separate volume.[1]

2. Indefinite, Insensible, or Lumping Descriptions.

§ 254. PERSONAL CHATTELS, WHEN SUBJECTS OF AN OFFENSE, MUST BE SPECIFICALLY DESCRIBED. When, as in larceny, or receiving stolen goods, personal chattels are the

8 Com. v. Moulton, 108 Mass. 308; Com. v. Goodwin, 122 Mass. 19.

9 State v. O'Mally, 48 Iowa 501.

As to common scolding, see Kerr's Whart. Crim. Law, § 1713.

As to form of indictment of common scold, see Form No. 638.

10 State v. Brewington, 84 N. C. 783; Wiseman v. State, 14 Tex. App. 7, citing Lagrone v. State, 12 Tex. App. 426, and McMahan v. State, 13 Tex. App. 220. S. P., Conlee v. State, 14 Tex. App. 222.

1 Fost 194; R. v. Layer, 8 Mod. 93; 6 St. Tr. 328.

1 Whart. Crim. Ev., §§ 121 et seq.

subject of an offense, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated;[1] thus, for instance: "one coat of the value of twenty shillings; two pairs of boots, each pair of the value of thirty shillings; two pairs of shoes, each pair of the value of twelve shillings; two sheets, each of the value of thirteen shillings; of the goods and chattels of one J. S.," or "one sheep of the price of twenty shillings," etc., and the like. If the description were "twenty wethers and ewes," the indictment would be bad for uncertainty; it should state how many of each;[2] and so of an indictment charging the stealing of "one case of merchandise."[3] But an indictment charging the defendant with feloniously taking three head of cattle has been held sufficiently certain under a statute, without showing the particular species of cattle taken.[4]

When several articles are stated, it is not necessary to separate them by the connecting word "and."[5]

Larceny of "six handkerchiefs" charged, the indictment is good, though the handkerchiefs were in one piece, the pattern designating each handkerchief;[6] and so of an indictment charging the stealing of a "pair of pants";[7] or three hundred pairs of shoes.[8]

The distinctions as to variance of instruments of death are elsewhere discussed.[9]

1 See 2 Hale 182, 183; People v. Coon, 45 Cal. 672; Whart. Crim. Ev., §§ 121-6.

2 2 Hale 183, Archbold's C. P. 45. Otherwise in Texas.—State v. Murphy, 39 Tex. 46.

3 State v. Dawes, 75 Me. 51.

4 People v. Littlefield, 5 Cal. 355. "Four calves" held sufficient in People v. Warren, 130 Cal. 683, 63 Pac. 86. See State v. Stelly, 48 La. Ann. 1480. "Two mares," larceny of charged, indictment held sufficient.—State v. Rathbone, 8 Idaho 167, 67 Pac. 187.

5 State v Bartlett, 55 Me. 200.

6 6 Term. R. 267; 1 Ld. Raym. 149; Whart. Crim. Ev., § 121.

7 State v. Johnson, 30 La. Ann., Part II, 904.

8 Com. v. Shaw, 145 Mass. 349, 14 N. E. 159.

9 Whart. Crim. Ev., §§ 91-4; Kerr's Whart. Crim. Law, §§ 652, 653.

§ 255. WHEN NOTES ARE STOLEN IN A BUNCH, DENOMINATIONS MAY BE PROXIMATELY GIVEN. When several notes are stolen in a bunch, it is rarely that the prosecutor can designate their respective amounts and values. As a matter of necessity, therefore, an indictment charging the larceny of "sundry bank bills, of some banks respectively to the jurors unknown,[1] of the value of $38," etc., is sufficient.[2] And there is even authority to the effect that it is enough to say "divers bank bills, amounting in the whole to, etc., and of the value of, etc., of the goods and chattels," etc.[3]

§ 256. CERTAINTY MUST BE SUCH AS TO INDIVIDUATE OFFENSE. The common acceptation of property is to govern its description, and there must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject-matter of the offense charged.[1]

1 People v. Bogart, 36 Cal. 245; Lang v. State, 42 Fla. 595, 28 So. 856; State v. McAnulty, 26 Kan. 533.

2 Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; Com. v. Grimes, 75 Mass. (10 Gray) 470, 71 Am. Dec. 666.

3 Larned v. Com., 53 Mass. (12 Met.) 240; Com. v. O'Connell, 94 Mass. (12 Allen) 451; Com. v. Cahill, 94 Mass. (12 Allen) 540; State v. Taunt, 16 Minn. 109. Other cases are given, supra, § 236.

Contra: Hamblett v. State, 18 N. H. 384; Low v. People, 2 Park. Cr. Rep. (N. Y.) 37.

1 Whart. Crim. Ev., § 121; Com. v. James, 18 Mass. (1 Pick.) 376; People v. Jackson, 8 Barb. (N. Y.) 657; Reed's Case, 2 Rodger's Rec. 168; Com. v. Wentz, 1 Ashm. (Pa.) 269.

"One hide, of the value of," etc., sufficiently certain.—State v. Dowell, 3 Gill & J. (Md.) 310.

"One watch," etc., held sufficient. —Widner v. State, 25 Ind. 234.

"One mule," held sufficient in State v. King, 31 La. Ann. 179.

"Certain cattle beast," held sufficient in State v. Credle, 91 N. C. 646.

An indictment charging A. with stealing a printed book, of the value, etc., is correct, and the title of the book need not be stated.—Turner v. State, 102 Ind. 425, 1 N. E. 869; State v. Dowell, 3 Gill & J. (Md.) 310; State v. Logan, 1 Mo. 377.

A count charging manslaughter

§ 257. "DEAD" ANIMALS MUST BE AVERRED TO BE SUCH —— "LIVING" ANIMALS MUST BE INTELLIGENTLY DESCRIBED. When animals are stolen alive, it is not necessary to state them to be alive, because the law will presume them to be so unless the contrary be stated; but if when stolen the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal.[1] But if an animal have the same appellation whether it be alive or dead, and it makes no difference as to the charge whether it were alive or

on the high seas, by casting F. A. from a vessel, whose name was unknown, is sufficiently certain; and so of a count charging the offense to have been committed from a long-boat of the ship W. B., belonging, etc.—United States v. Holmes, 1 Wall. Jr. C. C. 1, Fed. Cas. No. 15383. See Com. v. Strangford, 112 Mass. 289.

"Lot of Lumber," "Parcel of Oats," "Mixtures."—In Louisiana judgment was arrested on an indictment which charged the defendant with s t e a l i n g a "lot of lumber," a "certain lot of furniture," and "certain tools."—State v. Edson, 10 La. Ann. R. 229.

On the other hand, in North Carolina, a "parcel of oats" was adjudged a sufficient description of the stolen property.—State v. Brown, 12 N. C. (1 Dev.) 137, 17 Am. Dec. 562.

The reason of this distinction is, that in the first case a closer description was possible; in the second, not so. And a general description in larceny is enough. This doctrine is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not, therefore, enabled to give a minute description; and principally, because, notwithstanding the general description, it is made certain to the court, from the face of the indictment, that a crime has been committed, if the facts be true.—State v. Scribner, 2 Gill & J. (Md.) 246.

Substances mechanically mixed should not be described in an indictment as a "certain mixture consisting of," etc., but by the names applicable to them before such mixture, though it is otherwise with regard to substances chemically mixed.—R. v. Bond, 1 Den. C. C. 517.

It has been held in Massachusetts that where brandy was feloniously drawn from a cask, and then bottled, it could not be described in the indictment as "bottles of brandy."—Com. v. Gavin, 121 Mass. 54, 23 Am. Rep. 255.

As to variance in pleading instrument of d e a t h, see Kerr's Whart. Crim. Law, §§ 652, 653.

As to variance of goods, see Whart. Crim. Ev., § 121.

[1] Com. v. Beaman, 70 Mass. (8 Gray) 497; R. v. Halloway, 1 Car. & P. 127, 12 Eng. C. L. 84; R. v. Williams, 1 Mood. C. C. 107; R. v. Edwards, R. & R. 497.

dead, it may be called, when dead, by the appellation applicable to it when alive.[2]

Whether a description is sufficient depends in statutory cases largely on the statute.[3] It has been held that "one sheep" is a sufficiently exact description;[4] and so is "a chestnut sorrel horse,"[5] and "one beef steer,"[6] and "one black pig, white listed, and one white pig, with a blue rump, both without ear-marks, of the value of $2."[7] But "a yearling" is not a sufficient description.[8] A "pig" four months old may be called a "hog,"[9] and "chickens" may be called "hens."[10] But "cattle" does not include "sheep" or "goats."[11]

When a dead animal, or part of an animal, has a distinctive name, it may be described as such. Hence an indictment charging the stealing of "one ham," of the value of ten shillings, of the goods and chattels of T. H., was held good, although it did not state the animal of which the ham had formed a part.[12] But an indictment for stealing "meat" is bad for generality.[13]

Variance as to animals is discussed in another volume.[14] In a future section it will be seen that the question

See Kerr's Whart. Crim. Law, § 1106.

In State v. Donovan, 1 Houst. (Del.) 43, it was held that an averment of the stealing of "two fishes commonly called shad" was good, though the proof was they were dead.

2 Smith v. State, 7 Tex. App. 382; R. v. Puckering, 1 Mood. C. C. 242.

Contra: Com. v. Beaman, 70 Mass. (8 Gray) 497.

See, infra, § 287; Whart. Crim. Ev., § 124; Kerr's Whart. Crim. Law, § 1109.

3 Infra, § 287.

4 State v. Pollard, 53 Me. 124; Whart. Crim. Ev., § 824.

5 Taylor v. State, 44 Ga. 263.

6 Short v. State, 36 Tex. 644.

7 Brown v. State, 44 Ga. 300.

8 Stollenwerk v. State, 55 Ala. 142.

9 Lavender v. State, 60 Ala. 50. See People v. Stanford, 64 Cal. 27, 28 Pac. 106.

10 State v. Bassett, 34 La. Ann. 1108.

11 McIntosh v. State, 18 Tex. App. 285.

12 R. v. Gallears, 2 Car. & K. 981, 61 Eng. C. L. 980, 1 Den. C. C. 501.

13 State v. Patrick, 79 N. C. 656; State v. Morey, 2 Wis. 494, 60 Am. Dec. 439.

14 Whart. Crim. Ev., § 124.

of specification depends largely on the terms of the statute.[15]

§ 258. When certain articles only of a class are subjects of indictment, then individuals must be described. Specification is necessary when certain members of a class are subjects of indictment, and certain others not. Thus, an indictment for stealing "three eggs" has been ruled to be bad, because only the eggs of animals domitæ naturæ are the subject of larceny.[1] But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, although the female of foxes and some other animals, as well as of dogs, are so called.[2] In larceny this would be bad, as the term would not indicate whether or no the animal was larcenous.[3] In bestiality this distinction is immaterial.

§ 259. Minerals and vegetables must be averred to be severed from realty. An indictment charging the stealing of certain "gold-bearing quartz rocks," is bad. It should appear that the rock was severed from the realty.[1] "A cabbage" or other vegetable must, at common law, be shown not to have been growing on the field.[2]

§ 260. Variance in number or value immaterial. The prosecutor is bound by the description of the species of goods stated; thus, for instance, an indictment for stealing a pair of shoes can not be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles is immaterial, provided the verdict rests on an article which is one of the number averred,

15 Infra, § 237.

1 R. v. Cox, 1 Car. & K. 494, 47 Eng. C. L. 493; 1 Den. C. C. 502; sed quære. See Kerr's Whart. Crim. Law, § 1105.

2 R. v. Allen, 1 Car. & K. 495, 47 Eng. C. L. 495.

3 Kerr's Whart. Crim. Law, §§ 1104-1106.

1 People v. Williams, 35 Cal. 671; State v. Burt, 64 N. C. 619; Kerr's Whart. Crim. Law, § 1165.

2 State v. Foy, 82 N. C. 679.

and which is sufficient to sustain a conviction.[1] So if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest.[2] But it was held otherwise where five certificates of stock of a particular number were alleged to be stolen, and it appeared that only one certificate of that number had been issued.[3]

§ 261. INSTRUMENT OF INJURY MAY BE APPROXIMATELY STATED. An instrument of injury must be substantially described; though when the effect produced by the instrument averred and that used is virtually the same, a mere variance in name will not vitiate.[1] The question of the effect of the instrument is one of fact for the jury under the direction and supervision of the court.[2] Such agencies may be cumulatively laid.[3] Ordinarily the adoption of the statutory description is sufficient.[4] If the instrument be unknown, this may be so averred.[5]

3. Value.

§ 262. VALUE MUST BE ASSIGNED WHEN LARCENY IS CHARGED. It is necessary that some specific value should be assigned to whatever articles are charged as the sub-

1 CONN.—State v. Fenn, 41 Conn. 590. MASS.—Hope v. Com., 50 Mass. (9 Met.) 134; Com. v. Cahill, 94 Mass. (12 Allen) 540. N. C.—State v. Martin, 82 N. C. 672. ENG.—R. v. Forsyth, R. & R. 274.

2 Infra, § 301; Whart. Crim. Ev., § 145; Com. v. Williams, 56 Mass. (2 Cush.) 583; Com. v. Eastman, 68 Mass. (2 Gray) 76; People v. Wiley, 3 Hill (N. Y.) 194; State v. Martin, 82 N. C. 672. **Under Texas statute,** see Pittman v. State, 14 Tex. App. 576.

3 People v. Coon, 45 Cal. 672.

1 See Whart. Crim. Ev., §§ 91-3.

2 Ibid. DEL.—State v. Townsend, 1 Houst. 337. GA.—Tatum v. State, 59 Ga. 638. N. Y.—People v. Casey, 72 N. Y. 393. N. C.—State v. Gould, 90 N. C. 659. TEX.—McReynolds v. State, 4 Tex. App. 327; Briggs v. State, 6 Tex. App. 144; Hunt v. State, 6 Tex. App. 663.

3 Supra, § 200; Kerr's Whart. Crim. Law, § 652; State v. McDonald, 67 Mo. 13; People v. Casey, 72 N. Y. 393.

4 State v. Morrissey, 70 Me. 401; State v. Chumley, 67 Mo. 41. Infra, § 269.

5 Supra, § 198.

jects of larceny.[1] An indictment can not be sustained for stealing a thing of no intrinsic or artificial value.[2]

§ 263. LARCENY OF "PIECE OF PAPER" MAY BE PROSECUTED. A count for stealing "one piece of paper, of the value of one cent," may be good, when a count for stealing a bank note fails[1] in consequence of the instrument described being void, but not, it is said, where it is valid.[2]

§ 264. VALUE ESSENTIAL TO RESTITUTION AND ALSO TO MARK GRADES. It has been said that the object of inserting value is either to distinguish grand from petit larceny, or to enable the court to be guided as to imposing fines or restitution; and that when neither of these conditions exists (*e. g.*, where a statute punishes horse-stealing, irrespective of value), then value need not be

1 Roscoe's Crim. Ev., p. 512. ALA.—State v. Wilson, 1 Port. (Ala.) 118; Sheppard v. State, 42 Ala. 531. CONN.—State v. Fenn, 41 Conn. 590. FLA.—Morgan v. State, 13 Fla. 671; Porter v. State, 26 Fla. 56, 7 So. 145. GA.—State v. Allen, Charlton 518. KAN.—State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; People v. Belcher, 58 Mich. 325, 25 N. W. 303. N. H.—State v. Goodrich, 46 N. H. 186. N. J.—State v. Stimson, 24 N. J. L. (4 Zab.) 9. N. Y.—People v. Payne, 6 John. 103. S. C.—State v. Smart, 4 Rich. L. 356, 55 Am. Dec. 683; State v. Thomas, 2 McC. 527; State v. Tillery, 1 Nott. & McC. 9.

See, also, supra, § 254; Whart. Crim. Ev., § 126; Kerr's Whart. Crim. Law, § 1190.

Contra as to money.—State v. King, 37 La. Ann. 91. See State v. Pierson, 59 Iowa 271, 13 N. W. 291.

—Value need not be alleged in current coin.—People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185.

"Lawful currency of the United States of denominations and issue to the jurors unknown," held to be a sufficient description in State v. Shirer, 20 S. C. 392. See Lang v. State, 42 Fla. 595, 28 So. 856.

"Twenty-five dollars in money, the property of" a person named, without an allegation of its value, or any excuse for want of a more particular description, held to be fatally defective in State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370.

2 State v. Bryant, 4 N. C. 249, 269, 2 Car. Law. Repos. 617.

1 R. v. Perry, 1 Car. & K. 727, 47 Eng. C. L. 725; R. v. Perry, 1 Den. C. C. 69; R. v. Clark, R. & R. 181, 2 Leach 1039.

2 Kerr's Whart. Crim. Law, § 1115.

averred.[1] But this is doubtful law; though the amount of value is only material in those cases in which an offense is graduated in conformity to the value of the thing taken.[2] And where the value of a thing which is the subject of the offense is necessary to fix the grade of the offense, it is a proper mode of stating it to aver that the thing is of or more than the value prescribed by the statute.[3] But where the offense is intent to steal goods, the value of the goods need not ordinarily be given.[4]

§ 265. LEGAL CURRENCY NEED NOT BE VALUED. An averment of the value of bank notes, not legal tender, is always necessary, but not so of government coins, which are values themselves.[1]

§ 266. WHEN THERE IS LUMPING VALUATION, CONVICTION CAN NOT BE HAD FOR STEALING FRACTION. A collective or lumping valuation, so far as demurrer or arrest of judgment is concerned, is always permissible.[1] And it is said

1 Ritchey v. State, 7 Blackf. (Ind.) 168. See Sheppard v. State, 42 Ala. 531; Collins v. State, 20 Tex. App. 199.

See Kerr's Whart. Crim. Law, §§ 1190, 1191.

2 People v. Belcher, 58 Mich. 325, 25 N. W. 303; People v. Stetson, 4 Barb. (N. Y.) 151; People v. Higbee, 66 Barb. (N. Y.) 131; State v. Gillespie, 80 N. C. 396; Lunn v. State, 44 Tex. 85.

3 Phelps v. People, 72 N. Y. 334.

4 Green v. State, 21 Tex. App. 64.

1 Grant v. State, 55 Ala. 201; State v. Ziord, 30 La. Ann. (Pt. I) 867; State v. Stimson, 24 N. J. L. (4 Zab.) 9.

See, also, infra, § 267; supra, § 236.

A description in an indictment in these words, "ten five-dollar bank bills of the value of five dollars each," is sufficiently definite. —Eyland v. State, 36 Tenn. (4 Sneed) 357. Supra, § 236.

1 ALA.—Grant v. State, 55 Ala. 210 (statement of aggregate value of bank notes). CAL.—People v. Robles, 34 Cal. 591. FLA.—Lang v. State, 42 Fla. 595, 28 So. 856 (stating value of stolen coin, denomination unknown). KAN.—State v. McAnulty, 26 Kan. 533 (stating collective value of stolen coins). ME.—State v. Hood, 51 Me. 363. MASS.—Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666; Com. v. Collins, 138 Mass. 483.

Indictment for concealing mortgaged personalty by mortgagor describing goods of each class without statement of value of each article or quantity and description of mortgage, held to be sufficient in Com. v. Strangford, 112 Mass. 289.

that where several articles, all of one kind, are described, their value may be alleged in the aggregate or collectively, and the defendant may be convicted of stealing a part of less value than the whole, if there be anything on the record to attach to the articles on which the conviction was had a value sufficient to sustain the conviction.[2]

Articles of different kinds, e. g., "sundry bank-bills, and sundry United States treasury notes," being thus lumped with a common value, the indictment can not be sustained by proof of stealing only a part of the articles enumerated.[3] Nor can a conviction for stealing a part of the articles charged be sustained unless to such part sufficient value is assigned or implied.[4]

4. Money and Coin.

§ 267. MONEY MUST BE SPECIFICALLY DESCRIBED. Money is described as so many pieces of the current gold or silver coin of the country, called ..... Foreign coin should be specified,[1] but as to our own coin, it has been

2 Com. v. O'Connell, 94 Mass. (12 Allen) 451; but see Hamblett v. State, 18 N. H. 384.

In Com. v. O'Connell, supra, the indictment was for "a quantity of bank notes current within this commonwealth, amounting together to one hundred and fifty dollars, and of the value of one hundred and fifty dollars." It was said by the court that "it is not perceived that the description of bank bills as 'a quantity,' instead of 'divers and sundry,' constitutes an error. And the statement of the aggregate of the property stolen, where all the articles are of one kind, has been sanctioned by the court."—Com. v. Sawtelle, 65 Mass. (11 Cush.) 142.

Upon such an indictment, when the articles are all of one class, the defendant may be convicted of stealing a less sum than that charged in the indictment.—Com. v. O'Connell, 94 Mass. (12 Allen) 451. See, further, supra, § 236.

3 Whart. Crim. Ev., § 126, and see Hope v. Com., 50 Mass. (9 Met.) 134; Com. v. Cahill, 94 Mass. (12 Allen) 540; Com. v. Lavery, 101 Mass. 207, cited in Whart. Crim. Ev., § 126.

4 ALA. — Sheppard v. State, 42 Ala. 531. ILL.—Collins v. People, 39 Ill. 233. MASS.—Com. v. Smith, 1 Mass. 245. N H.—Hamblett v. State, 18 N. H. 384; Lord v. State, 20 N. H. 404, 51 Am. Dec. 231; State v. Goodrich, 46 N. H. 186. N. Y.—Low v. People, 2 Park. Cr. Rep. 37. TEX.—Meyer v. State, 4 Tex. App. 121.

1 R. v. Fry, R. & R. 482; Wade

said to be sufficient to aver "of silver and gold coin of the United States";[2] however, a strong line of opinions is to the effect that the particular denomination or species of coin must be set forth.[3]

The subject of variance is elsewhere discussed.[4]

"Twenty-five dollars in money," or a similar designation, is not a sufficiently exact designation.[5]

"Bank-notes" have been already noticed.[6]

"United States gold coin" is equivalent to "gold coin of the United States"; such coin being current by law, both court and jury know, without allegation, that a gold coin of the denomination and value of ten dollars is an eagle.[7]

Charging the conversion of $19,000 of money, and $19,000 of bank notes, count is bad for uncertainty.[8]

v. State, 35 Tex. Cr. Rep. 173, 32 S. W. 772. See R. v. Warshoner, 1 Mood. C. C. 466.

As to description in forgery, see Kerr's Whart. Crim. Law, § 958.

"Silver coin of the value of," etc., is sufficient under statute. See State v. Jackson, 26 W. Va. 250.

2 CAL.—People v. Green, 15 Cal. 513 (aggregate value of coin, only, given). IND.—McKane v. State, 11 Ind. 195. TEX.—Bravo v. State, 20 Tex. App. 177. W. VA.—Jackson v. State, 26 W. Va. 250. FED.—United States v. Rigsby, 2 Cr. C. C. 364, Fed. Cas. No. 5895.

3 ARK.—Barton v. State, 29 Ark. 68. CAL.—People v. Ball, 14 Cal. 101, 73 Am. Dec. 631. IND.—Whitson v. State, 160 Ind. 510, 67 N. E. 265. KAN.—State v. Tilney, 38 Kan. 714, 17 Pac. 606. NEV.—In re Waterman, 29 Nev. 300, 11 L. R. A. (N. S.) 424, 89 Pac. 295. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39.

Denomination of bank bills should be alleged as well as value. —52 Ind. 283, 21 Am. Rep. 176.

Particular kind of money should be specified.—Barton v. State, 29 Ark. 72; State v. Tilney, 38 Kan. 716, 17 Pac. 606.

4 Whart. Crim. Ev., § 122.

5 IND.—Smith v. State, 33 Ind. 159; Whitson v. State, 160 Ind. 510, 67 N. E. 265. KAN.—State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370. LA.—State v. Green, 27 La. Ann. 598. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Libby v. People, 29 Mich. 232. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39. N. M.—Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 586. TEX.—Lavarre v. State, 1 Tex. App. 685; Dukes v. State, 22 Tex. App. 192, 2 S. W. 590.

6 Supra, § 235.

7 Daily v. State, 10 Ind. 536. See Whart. Crim. Ev., § 122.

8 State v. Stimson, 24 N. J. L. (4 Zab.) 9.

Generality of description, however, may be excused by an averment that the precise character and value of the coin or notes are unknown to the grand jury.[9]

§ 268. WHEN MONEY IS GIVEN TO CHANGE, AND CHANGE IS KEPT, INDICTMENT CAN NOT AVER STEALING CHANGE. It should be kept in mind, that if the indictment charges stealing a particular note or piece of coin and the evidence is that such note or coin was given to the defendant to change, who refused to return the change, the defendant, even under the statutes making such conversion larceny, can not be convicted of stealing the change; for there is a fatal variance between the description in the indictment and the proof.[1] But an indictment charging the larceny of the note or coin actually given to the defendant may be good.[2]

9 Supra, §§ 198, 235 et seq.; State v. McAnulty, 26 Kan. 533, citing Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666.

An indictment for larceny from the person of "sundry gold coins, current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors can not give, as they have no means of knowledge," and containing similar allegations as to bank bills and silver coin, is sufficiently specific to warrant a judgment upon a general verdict of guilty.—People v. Bogart, 36 Cal. 245; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; Com. v. Butts, 124 Mass. 449.

And so a fortiori as to an averment of "four hundred and fifty dollars in specie coin of the United States, the denomination and description of which is to the grand jury unknown."—Chisholm v. State, 45 Ala. 66.

Pieces charged to be stolen should be specifically designated where practical.—Murphy v. State, 6 Ala. 845; People v. Ball, 14 Cal. 101, 73 Am. Dec. 631; Leftwich v. Com., 20 Gratt. (Va.) 716.

"Of the moneys of the said M. N." sufficiently describes ownership.—R. v. Godfrey, D. & B. 426; Kerr's Whart. Crim. Law, § 1214.

1 R. v. Jones, 1 Cox C. C. 105; R. v. Wast, D. & B. 109, 7 Cox C. C. 183; R. v. Bird, 12 Cox C. C. 257, and other cases cited supra. See Whart. Crim. Ev., § 123.

Not necessary, however, to introduce averments in a statute, which do not individuate an offense.—Ex parte Helbing, 66 Cal. 215, 5 Pac. 103.

2 Com. v. Barry, 124 Mass. 325.

XI. Offenses Created by Statute.

§ 269. USUALLY SUFFICIENT AND NECESSARY TO USE WORDS OF STATUTE. Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offense in the words of the statute,[1] and for this pur-

[1] ARK.—Lemon v. State, 19 Ark. 171; State v. Moser, 33 Ark. 140; State v. Snyder, 41 Ark. 227. CAL.—People v. Lewis, 61 Cal. 366; People v. Sheldon, 68 Cal. 634, 9 Pac. 457; People v. Marseiler, 70 Cal. 98, 11 Pac. 503. COLO.—Cohen v. People, 7 Colo. 274, 3 Pac. 385; Schneider v. People, 30 Colo. 493, 71 Pac. 369. CONN.—Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; State v. Holmes, 28 Conn. 230; State v. Lockbaum, 38 Conn. 400; State v. Cady, 47 Conn. 44; State v. Schweitzer, 57 Conn. 532, 6 L. R. A. 125, 18 Atl. 787; State v. Carpenter, 60 Conn. 97, 22 Atl. 497. GA.—Camp v. State, 3 Kelly 419; Lassiter v. State, 67 Ga. 739. ILL.—Allen v. People, 82 Ill. 610; Cole v. People, 84 Ill. 216; Ker v. People, 110 Ill. 627, 51 Am. Rep. 706; Thomas v. People, 113 Ill. 99; Seacord v. People, 121 Ill. 623, 13 N. E. 194; Loehr v. People, 132 Ill. 504, 24 N. E. 68. IOWA—United States v. Dickey, 1 Morr. 412; State v. Seamons, 1 Greene 418; Buckley v. State, 2 Greene 162; State v. Smith, 46 Iowa 662. KAN.—State v. Armell, 8 Kan. 288; State v. Boverlin, 30 Kan. 611, 2 Pac. 630; State v. Foster, 30 Kan. 365, 2 Pac. 628. KY.—Com. v. Tanner, 68 Ky. (5 Bush) 316; Davis v. State, 76 Ky. (13 Bush) 318. MD.—Bixler v. State, 62 Md. 354. MASS.—Com. v. Barrett, 108 Mass. 302; Com. v. Malloy, 119 Mass. 347; Com. v. Burlington, 136 Mass. 438; Com. v. Brown, 141 Mass. 78, 6 N. E. 377. MICH.—People v. Murray, 57 Mich. 396, 24 N. W. 118; People v. O'Brien, 60 Mich. 8, 26 N. W. 795. MINN.—State v. Comfort, 22 Minn. 271. MO.—State v. Chumley, 67 Mo. 41; State v. Hayward, 83 Mo. 299; State v. Rueker, 93 Mo. 88, 5 S. W. 609; State v. Miller, 93 Mo. 263, 6 S. W. 57. N. H.—State v. Beckman, 57 N. H. 174; State v. Kenester, 59 N. H. 36; State v. Perkins, 63 N. H. 368. N. J.—State v. Hickman, 8 N. J. L. (3 Halst.) 299; Titus v. State, 49 N. J. L. 36, 7 Atl. 621. N. Y.—People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 1 L. R. A. 293, 18 N. E. 245; People v. Dorthy, 20 App. Div. 308, 13 N. Y. Cr. Rep. 173, 46 N. Y. Supp. 970; People v. Seldner, 62 App. Div. 357, 71 N. Y. Supp. 35; People v. Adams, 85 App. Div. 390, 17 N. Y. Cr. Rep. 443, 83 N. Y. Supp. 481; People v. Corbalis, 86 App. Div. 531, 17 N. Y. Cr. Rep. 469, 83 N. Y. Supp. 782; People v. Burns, 53 Hun 274, 7 N. Y. Cr. Rep. 92, 6 N. Y. Supp. 611; People v. Webster, 17 Misc. 410, 11 N. Y. Cr. Rep. 340, 40 N. Y. Supp. 1135. PA.—Res. v. Tryer, 3 Yeates 451; Com. v. Chapman, 5 Whart. 427, 34 Am. Dec. 565; Williams v. Com., 91 Pa. St. 493. R. I.—State v. Marchant, 15 R. I. 539, 9 Atl. 902. S. C.—State v. Williams, 2 Strob.

pose it is essential that these words should be used.[2] In such case the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment.[3] Whether this can be done

L. 474; State v. Blease, 1 McMul. 472. TENN.—State v. Ladd, 32 Tenn. (2 Swann) 226; Hall v. State, 43 Tenn. (3 Cold.) 125. TEX.—Linney v. State, 5 Tex. App. 344. UTAH—United States v. Cannon, 4 Utah 422, 7 Pac. 369. VT.—State v. Little, 1 Vt. 331; State v. Cocke, 38 Vt. 437; State v. Pratt, 54 Vt. 484. VA.—Com. v. Hampton, 3 Gratt. 590; Helfrick v. Com., 29 Gratt. 844. W. VA.—State v. Riffe, 10 W. Va. 794. WIS.—Bonneville v. State, 53 Wis. 680, 11 N. W. 427. FED.—United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 Sup. Ct. 512; United States v. Northway, 120 U. S. 327, 30 L. Ed. 664, 7 Sup. Ct. 580; United States v. Jacoby, 12 Blatchf. C. C. 491, Fed. Cas. No. 15462; United States v. Batchelder, 2 Gall. C. C. 15, Fed. Cas. No. 14490.

Exception where words do not give notice of what is charged.—Schneider v. People, 30 Colo. 493, 71 Pac. 369.

2 1 Hale 517, 526, 535; Fost. 423, 424. ALA.—State v. Click, 2 Ala. 26; Lodono v. State, 25 Ala. 64; Mason v. State, 42 Ala. 534. CAL.—People v. Martin, 32 Cal. 91; People v. Burk, 34 Cal. 661; People v. Murray, 67 Cal. 103, 7 Pac. 178. GA.—State v. Calvin, Charlt. 151; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Sharp v. State, 17 Ga. 290; Jackson v. State, 76 Ga. 551. KY.—Com. v. Turner, 71 Ky. (8 Bush) 1. LA.—State v. Pratt, 10 La. Ann. 191. ME.—State v. Gurney, 37 Me. 149. MASS.—Com. v. Fenno, 125 Mass. 387. MO.—State v. Comfort, 5 Mo. 357; State v. Shiflet, 20 Mo. 415, 64 Am. Dec. 190; State v. Vaughan, 26 Mo. 29; State v. Davis, 70 Mo. 460; State v. Buster, 90 Mo. 514, 2 S. W. 834. NEB.—Denton v. State, 21 Neb. 448, 32 N. W. 222. N. H.—State v. Rust, 35 N. H. 438. N. J.—State v. Gibbons, 4 N. J. L. (1 South.) 51. N. Y.—People v. Allen, 5 Den. 76; Phelps v. People, 72 N. Y. 334. N. C.—State v. Ormond, 18 N. C. (1 Dev. & B.) 119; State v. Stanton, 23 N. C. (1 Ired.) 424. S. C.—State v. Schuler, 19 S. C. 140. TEX.—Kinney v. State, 21 Tex. App. 348, 17 S. W. 423. VT.—State v. Hoover, 58 Vt. 496, 4 Atl. 226. VA.—Com. v. Hampton, 3 Gratt. 590; Howell v. Com., 5 Gratt. 664. FED.—United States v. Pond, 2 Curt. C. C. 265, Fed. Cas. No. 16067; United States v. Lancaster, 2 McL. C. C. 431, Fed. Cas. No. 15556; United States v. Andrews, 2 Paine C. C. 451, Fed. Cas. No. 14455. ENG.—R. v. Ryan, 7 Car. & P. 854, 2 Moody 15, 32 Eng. C. L. 907.

3 ALA.—State v. Duncan, 9 Port. 260. ILL.—Chambers v. People, 5 Ill. (4 Scam.) 351. IND.—State v. Noel, 5 Blackf. (Ind.) 548. MISS.—Ike v. State, 23 Miss. 525. MO.—State v. Mitchell, 6 Mo. 147; State v. Helm, 6 Mo. 263. NEV.—State v. On Gee How, 15 Nev. 184. S. C.—State v. O'Banson, 1 Bail 144; State v. Foster, 3 McC. 442;

by a mere transcript of the words of the statute depends in part upon the structure of the statute, in part upon the rules of pleading adopted by statute or otherwise, in the particular jurisdiction. On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant upon trial without specification of the offense, than it would be under a common law charge.

Exceptions to rule: And besides this general principle, there are the following settled exceptions to the rule before us:

§ 270. CONCLUSION OF LAW NOT ENOUGH. 1. Statutes frequently make indictable common law offenses, describing them in short by their technical name, *e. g.*, "burglary," "arson." No one would venture to say that in such cases indictments would be good charging the defendants with committing "burglary" or "arson."[1]

State v. La Creux, 1 McM. 488. TEX.—Jones v. State, 12 Tex. App. 424. VA.—Bailey's Case, 78 Va. 19. FED.—United States v. Lancaster, 2 McL. C. C. 431, Fed. Cas. No. 15556.

Compare: Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; Frazer v. People, 54 Barb. (N. Y.) 306.

1 Supra, § 196. ALA.—Sikes v. State, 66 Ala. 77; Grattan v. State, 71 Ala. 344. CAL.—People v. Martin, 52 Cal. 201. IND.—Bates v. State, 31 Ind. 72; State v. Windell, 60 Ind. 300. LA.—State v. Flint, 33 La. Ann. 1288. N. C.—State v. Simmons, 73 N. C. 269. TEX.—State v. Meschac, 30 Tex. 518; Hoskey v. State, 9 Tex. App. 202; Marshall v. State, 13 Tex. App. 492. VT.—State v. Higgins, 53 Vt. 191. WYO.—McCarthy v. Territory, 1 Wyo. 311. FED.—United States v. Pond, 2 Curt. C. C. 265; Fed. Cas. No. 16067; United States v. Staton, 2 Flip. 319, Fed. Cas. No. 16382; United States v. Crosby, 1 Hugh. C. C. 448, Fed. Cas. No. 14893. ENG.—R. v. Pownér, 12 Cox C. C. 235.

In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, it was held that where a defendant is not

2. A statute may be one of a system of statutes, from which, as a whole, a description of the offense must be picked out. Thus, a statute makes it indictable to obtain negotiable paper by false pretenses. But what are "false pretenses"? To learn this we have to go to another statute, and this statute, it may be, refers to another statute, giving the definition of terms. No one of these statutes gives an adequate description of the offense, nor can such description be taken from them in a body. It is inferred from them, not extracted from them. The same may be said of statutes making indictable the use of slanderous words. These words must be set forth.[2]

3. A statute on creating a new offense describes it by a popular name. It is made indictable, for instance, to obtain goods by "falsely personating" another. But no one would maintain that it is enough to charge the defendant with "falsely personating another." So far from this being the case, the indictment would not be good

charged with using a still, boiler, or other vessel himself, but with causing and procuring some person to use them, the name of such person must be given in the indictment. It was further ruled that an indictment for distilling vinegar illegally must set out that the apparatus was used for that purpose, and in the premises described, and the vinegar manufactured at the time the apparatus described was being used; and further, that the averment that defendant caused and procured the apparatus to be used for distilling implies with sufficient certainty that it was so used; it is not essential that its actual use shall be set out. It was held, also, that it is not necessary, in an indictment for defrauding the revenue, to set out the particular means of the fraud.

An indictment under the Massachusetts statute, which charges the defendant with adulterating "a certain substance intended for food, to wit, one pound of confectionery," is not sufficiently descriptive of the substance alleged to have been adulterated.—Com. v. Chase, 125 Mass. 202.

Taking up animals on land other than his own land for the purpose of taking advantage of the provisions of the statute, being made a f e l o n y by statute (Cal. Stats., 1873-4, p. 50), an indictment charging the offense must state the particular provision which the person taking up the animals intended to violate.—People v. Martin, 52 Cal. 201.

2 Lagrone v. State, 12 Tex. App. 436; supra, § 251.

As to libel.—Hartford v. State, 96 Ind. 461, 49 **Am. Rep.** 185.

unless it stated the kind of personation, and the person on whom the personation took effect.[3] An act of Congress, to take another illustration, makes it indictable to "make a revolt," but under this act it has been held necessary to specify what the revolt is.[4] "Fraud" in elections, in a Pennsylvania statute, is made indictable; but the indictment must set out what the fraud is.[5] It is not enough to say that the defendant "attempted" an offense, though this is all the statute says; the particulars of the attempt must be given.[6] "Not a qualified voter," in a statute, must be expanded in the indictment by showing in what the disqualification consists.[7] And "the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution against him. An indictment not so framed is defective, although it may follow the language of the statute."[8]

4. The terms of a statute may be more broad than its intent, in which case the indictment must so differentiate the offense (though this may bring it below the statutory

3 See United States v. Goggin, 9 Biss. C. C. 269, 1 Fed. 49.

4 United States v. Almeida, 6 Leg. Int. No. 5, 2 Whart. Prec. 1061, Fed. Cas. No. 14433.

5 Com. v. Miller, 2 Pars. (Pa.) 197.

6 Com. v. Clark, 6 Gratt. (Va.) 675; United States v. Warner, 26 Fed. 616; R. v. Powner, 12 Cox C. C. 235; R. v. Marsh, 1 Den. C. C. 505; Kerr's Whart. Crim. Law, § 231, where other cases are given.

7 ALA.—Anthony v. State, 29 Ala. 27; Danner v. State, 54 Ala. 127, 25 Am. Rep. 662. IND.—State v. Dole, 3 Blackf. 298; State v. Brougher, 3 Blackf. 307; State v. Jackson, 7 Ind. 270. IOWA—State v. Shaw, 35 Iowa 575. MO.—State v. Pugh, 15 Mo. 509. N. Y.—People v. Wilber, 1 Park. Cr. Rep. 19. N. C.—State v. Langford, 10 N. C. (3 Hawks) 381. TENN.—Pearce v. State, 33 Tenn. (1 Sneed) 63. FED.—United States v. Crosby, 1 Hugh. C. C. 448, Fed. Cas. No. 14893.

As to general rule, see State v. McLoon, 78 Me. 420, 6 Atl. 601.

8 Field, J., United States v. Hess, 124 U. S. 483, 488, 31 L. Ed. 516, 8 Sup. Ct. 571, citing United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

description) as may effectuate the intention of the legislature.[9]

5. An offense, when against an individual, must be specified as committed on such an individual, when known, though no such condition is expressed in the statute; though it is otherwise with nuisances, and offenses against the public.[10]

§ 271. VARIANCE, IF INDICTMENT PROPOSES TO BUT FAILS TO SET FORTH STATUTORY WORDS. An indictment, when professing to recite a statute, is bad if the statute is not set forth correctly.[1] It is otherwise when the statute is counted on (or appealed to by the conclusion against the form of the statute, etc.), in which case, as is hereafter noticed, terms convertible with those in the statute may be used.[2]

§ 272. SPECIAL LIMITATIONS TO BE GIVEN. Where a general word is used, and afterwards more special terms, defining an offense, an indictment charging the offense must use the most special terms; and if the general word is used, though it would embrace the special term, it is inadequate.[1]

§ 273. PRIVATE STATUTE MUST BE GIVEN IN FULL. An indictment on a private statute must set out the statute

9 ME.—State v. Turnbull, 78 Me. 392, 6 Atl. 1. MASS.—Com. v. Slack, 36 Mass. (19 Pick.) 304; Com. v. Collins, 56 Mass. (2 Cush.) 556. MO.—State v. Griffin, 89 Mo. 49, 1 S. W. 87. TEX.—Longenotti v. State, 22 Tex. App. 61, 2 S. W. 620. FED.—United States v. Pond, 2 Curt. C. C. 265, 268, Fed. Cas. No. 16067.

10 Com. v. Ashley, 68 Mass. (2 Gray) 357; Kerr's Whart. Crim. Law, §§ 1676 et seq.

1 Infra, § 273; Com. v. Burke, 81 Mass. (15 Gray) 408; Com. v. Washburn, 128 Mass. 421; Butler v. State, 3 McC. (S. C.) 383; United States v. Goodwin, 20 Fed. 237.

For a more liberal view, see R. v. Westley, Bell C. C. 193.

2 See infra, § 286; Whart. Crim. Ev., §§ 91 et seq.; Hall v. State, 3 Kelly (Ga.) 18; Com. v. Unknown, 72 Mass. (6 Gray) 489; State v. Petty, Harp. (S. C.) 59; Butler v. State, 3 McC. (S. C.) 383.

1 Archbold C. P. 93; State v. Plunkett, 2 Stew. (Ala.) 11; State v. Raiford, 7 Port. (Ala.) 101; State v. Bryant, 58 N. H. 59.

in full.[1] As has been seen, it is otherwise with a public statute.[2]

§ 274. Offense must be averred to be within limitation. The indictment must show what offense has been committed, and what penalty incurred by positive averment. It is not sufficient that they appear by inference.[1]

§ 275. Section or designation of statute need not be stated. It is not necessary to indicate the particular section or even the particular statute, upon which the case rests. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found.[1]

§ 276. Where statute requires two defendants one is not sufficient. Where a statute creates an offense, which from its nature requires the participation of more than one person to constitute it, a single individual can not be charged with its commission unless in connection with persons unknown.[1] Thus, an indictment against one individual unconnected with others, based upon that section of the Vermont statute relative to offenses against public policy which inflicts a penalty upon each indi-

1 Sid. 356; 2 Hale 172; 2 Hawk., ch. 25, § 103; Bac. Ab. Indict., p. 2; Goshen v. Sears, 7 Conn. 92; State v. Cobb, 18 N. C. (1 Dev. & B.) 115.

By statute in some states private statutes may be cited by title. See State v. Loomis, 27 Minn. 521, 8 N. W. 758.

These statutes, however, do not apply to cases, such as charters of banks, which it was not necessary to plead at common law.

2 Com. v. Colton, 77 Mass. (11 Gray) 1; Com. v. Hoye, 77 Mass. (11 Gray) 462; United States v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16151; R. v. Sutton, 4 Moore & S. 542.

1 State v. Briley, 8 Port. (Ala.) 472; Graves v. State, 63 Ala. 134; Com. v. Walters, 36 Ky. (6 Dana) 291; Hampton's Case, 3 Gratt. (Va.) 590; Com. v. Glass, 33 Gratt. (Va.) 827.

1 Com. v. Griffin, 38 Miss. (21 Pick.) 523, 525; Com. v. Wood, 77 Mass. (11 Gray) 85; Com. v. Thompson, 108 Mass. 461.

1 See, infra, § 355.

vidual of any company of players or other persons who shall exhibit any tragedies, etc., is insufficient.[2]

§ 277. WHEN STATUTE STATES OBJECT IN PLURAL, IT MAY BE PLEADED IN SINGULAR. When, however, the object (as distinguished from the actor) of an offense is stated in the statute in the plural, then, if this be done as a description of a class, the indictment may be in the singular, designating any one of the class. Thus, in a statute prohibiting the stealing of notes, an indictment for stealing a note was sustained;[1] on a statute prohibiting the living in houses of ill-fame, an indictment for living in a house of ill-fame is good.[2]

§ 278. DISJUNCTIVE STATUTORY STATEMENTS TO BE AVERRED CONJUNCTIVELY. The general rule of law is that where the statute specifies several things disjunctively as constituting an offense, an indictment charging a commission of the offense which avers the several things in the disjunctive, is bad.[1] But though the language of the

2 State v. Fox, 15 Vt. 22.

1 Com. v. Messenger, 1 Binn. (Pa.) 273, 2 Am. Dec. 441; Hassell's Case, 1 Leach C. L. 1, 2 East Cr. L. 598. See State v. Nichols, 83 Ind. 228, 43 Am. Rep. 66 (in statutes relating to houses of ill-fame, the plural includes the singular); Jessup v. State, 14 Ind. App. 257, 42 N. E. 950 (in statutes relating to prostitutes, the plural includes the singular).

"Letter of law" not inflexibly followed, even in penal statutes.—Com. v. Messenger, 1 Binn. (Pa.) 273, 2 Am. Dec. 441; Stewart v. Keemle, 4 Serg. & R. (Pa.) 72; Com. v. Bird, 4 Serg. & R. (Pa.) 141.

2 State v. Nichols, 83 Ind. 228, 43 Am. Rep. 66. See Hall v. State, 3 Kelly (Ga.) 18.

1 Disjunctive allegation in indictment is bad, notwithstanding it is made in the language of the statute. See: ALA.—Danner v. State, 54 Ala. 127, 25 Am. Rep. 662; Horton v. State, 60 Ala. 72 ("barn or stable," or "barn, house, or stable"). GA.—Henderson v. State, 113 Ga. 1148, 39 S. E. 446 (indictment alleging accused cut and stabbed A. with a "knife or other like instrument"). IOWA—State v. Daily, 113 Iowa 362, 85 N. W. 629. KAN.—State v. Seeger, 65 Kan. 711, 70 Pac. 599. LA.—State v. Barnett, 138 La. 693, 70 So. 614 (must be charged conjunctively). N. J.—State v. Hatfield, 93 Atl. 677 ("physiognomy, palmistry, or like crafty science"). N. Y.—People v. Schatz, 50 App. Div. 544, 15 N. Y. Cr. Rep. 38, 64 N. Y. Supp. 127 ("sell or give away" liquor on Sunday). N. D.—

statute be disjunctive, *e. g.*, burned *or* caused to be burned, and the indictment charge the offense in the conjunctive, *e. g.*, burned *and* caused to be burned, the allegation, as has been noticed, is sufficient.[2] The same rule applies where the intent is averred disjunctively. In either case

State v. Lonne, 15 N. D. 275, 107 N. W. 524 ("fraudulent appropriating property or secreting," etc.). TEX.—Fry v. State, 36 Tex. Cr. Rep. 582, 38 S. W. 168 ("gaming table or bank for purpose of gaming"); Venturio v. State, 37 Tex. Cr. Rep. 653, 40 S. W. 974 ("fish or terrapin, or both fish and terrapin, with a drag sein or set net"); Reuter v. State, 67 S. W. 505 ("hogs, sheep or goats"); Canterbury v. State, 44 S. W. 522; Hunter v. State, 166 S. W. 164 (carrying a pistol "on or about his person").

Alleging robbery in alternative should the taking of one of the things alleged not amount to robbery, the indictment is insufficient.—Wesley v. State, 61 Ala. 282.

Alleging the taking of property from the "person or possession" is bad.—Hill v. State, 145 Ala. 58, 40 So. 654; Slover v. Territory, 5 Okla. 506, 49 Pac. 1009.

"Bet at a game played with cards, or some devise or substitute for cards, held good.—Ford v. State, 123 Ala. 81, 26 So. 503.

Charging in alternative acts prohibited and acts not prohibited, is bad.—Watson v. State, 140 Ala. 134, 37 So. 225.

"Or otherwise" in statute prohibiting the doing of an act in specified ways, the indictment for acts committed "otherwise," must so allege.—Neal v. State, 53 Ala. 465; Daniel v. State, 61 Ala. 4.

Under statute making it unlawful to "sell, give away, or otherwise dispose of" intoxicating liquors, an indictment charging defendant "did sell, give away, or otherwise dispose of," held good.—McClellan v. State, 118 Ala. 122, 23 So. 732.

Use of "or" and "and" in indictments is thus regulated: In negative averments or may be used; in affirmative averments and must be used where the terms are synonymous.—People v. Ellis, 185 Ill. App. 417. See people v. Jackson, 181 Ill. App. 713.

—"Or" meaning "to-wit" it may properly be used in an indictment.—People v. Jackson, 181 Ill. App. 713.

—Failure to perform a duty being the gist of the offense charged, indictment may use "or" in following the language of the statute.—Byrd v. State, 72 Tex. Cr. Rep. 242, 162 S. W. 360.

Contra: State v. Lark, 64 S. C. 350, 42 S. E. 175 (charging murder by striking on the head "with a stone or iron hammer").

Charging in alternative is especially provided for by statute in some states. See Smith v. State, 142 Ala. 14, 39 So. 329; Dudley v. State (Ala.), 64 So. 309.

2 Supra, § 207; infra, § 300. COLO.—Rowe v. People, 26 Colo. 542, 59 Pac. 57. IND.—Marshall v. State, 123 Ind. 128, 23 N. E. 1141; Douglass v. State, 18 Ind. App. 289, 48 N. E. 9. MO.—State

the superfluous term may be rejected as surplusage.[3] And it is held that when the words of the statute are synonymous, it may not be error to charge them alternatively.[4]

§ 279. At common law defects in statutory indictments are not cured by verdict. Defects in the description of a statutory offense will not at common law be aided by verdict,[1] nor will the conclusion, contra formam statuti, cure.[2] But if the indictment describe the offense in the words of the statute, in England, after verdict, by the operation of the 7 Geo. 4, c. 64,[3] it will be sufficient in all offenses created or subjected to any greater degree of punishment by any statute.[4] But as a rule, at common law the features of the statute must be enumerated by the indictment with rigid particularity.

§ 280. Statutes creating an offense are to be closely followed. Where an act not before subject to punishment is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued.[1]

v. Flynn, 258 Mo. 211, 167 S. W. 516; State v. Curtis, 185 Mo. App. 594, 172 S. W. 619. ORE.—State v. Feister, 32 Ore. 254, 50 Pac. 561. S. D.—State v. Hall, 14 S. D. 161, 84 N. W. 766.—TEX.—Day v. State, 14 Tex. App, 26; Hammell v. State, 14 Tex. App, 326; Smith v. State, 36 Tex. Cr. Rep. 442, 37 S. W. 743. FED.—United States v. Armstrong, 5 Phila. Rep. 273, Fed. Cas. No. 14468; Stockslager v. United States, 54 C. C. A. 46, 116 Fed. 590.

3 Supra, §§ 206-208.

4 Russell v. State, 71 Ala. 348; State v. Ellis, 4 Mo. 474; State v. Flint, 62 Mo. 393; State v. Snyder, 182 Mo. 462, 82 S. W. 12; Lancaster v. State, 43 Tex. 519; Hofheintz v. State, 45 Tex. Cr. Rep. 117, 74 S. W. 310 ("a liquor dealer or keeper of a bar room" is not bad; "dealer" and "keeper" are synonymous terms); supra, § 206.

1 See Lee v. Clarke, 2 East 333.

2 2 Hale 170; and see R. v. Jukes, 8 T. R. 536, Com. Dig. Inform. D. 3; Stevens v. State, 18 Fla. 903.

3 See, supra, § 131.

4 R. v. Warshoner, I Mood. C. C. 466.

1 MASS.—Com. v. Howes, 32 Mass. (15 Pick.) 231. MO.—Journey v. State, 1 Mo. 304. PA.—McElhinney v. Com., 22 Pa. St. 365. S. C.—State v. Helgen, 1 Spears (S. C.) 310. TENN.—State v. Maze, 25 Tenn. (6 Humph.) 17.

Where an offense is created by statute, or the statute declares a common law offense committed under peculiar circumstances, not necessarily included in the original offense, punishable in a different manner from what it would be without such circumstances; or where the nature of the common law offense is changed by statute from a lower to a higher grade, as where a misdemeanor is changed into a felony; the indictment must be drawn with reference to the provisions of the statute, although the precise words of the statute need not be employed,[2] and conclude contra formam statuti;[3] but where the statute is only declaratory of what was previously an offense at common law, without adding to or altering the punishment, the indictment need not so conclude.[4]

§ 281. WHEN COMMON-LAW OFFENSE IS MADE PENAL BY TITLE, DETAILS OF OFFENSE MUST BE GIVEN. As we have already noticed, where a statute refers to a common law offense by its technical name, and proceeds to impose a penalty on its commission, it is insufficient to charge the defendant with the commission of the offense in the statutory terms alone.[1] The cases are familiar where, notwithstanding the existence of statutes assigning punishments to "murder," "arson," "burglary," etc., by name, with no further definition, it has been held nec-

VA.—Com. v. Turnpike, 2 Va. Cas. 361. ENG.—Attorney-General v. Radloff, 10 Exch. 84.

2 Gouglemann v. People, 3 Park. Cr. Rep. (N. Y.) 20.

3 See, infra, § 330.

4 State v. Corwin, 4 Mo. 609; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; People v. Berberrich, 11 How. Pr. (N. Y.) 338, sub nom. People v. Toynbee, 20 Barb. (N. Y.) 213, 2 Park. Cr. Rep. 358 (saying of People v. Enoch, supra, that "there could not be a stronger case to illustrate the rule that newly-created crimes are subject to the incidents of the class into which they are introduced, without any express provision of the statute to that effect"); State v. Loftin, 19 N. C. (2 Dev. & B.) 31.

1 Supra, § 270. ALA.—State v. Absence, 4 Port. 397; State v. Stedman, 7 Port. 495. IND.—Bates v. State, 31 Ind. 72. LA.—See State v. Philbin, 38 La. Ann. 964. MD.—Davis v. State, 39 Md. 355. TEX.—State v. Meschac, 30 Tex. 518; Witte v. State, 21 Tex. App. 88, 17 S. W. 723. ENG.—Erle's Case, 2 Lew. C. C. 133.

essary for the pleader to define the offenses by stating the common law ingredients necessary to its consummation.[2]

§ 282. WHEN STATUTE IS CUMULATIVE, COMMON LAW MAY BE PURSUED. Where both a right and a remedy are given by statute, that remedy alone can be pursued;[1] but generally where a statute gives a new remedy, either summary or otherwise, for an existing right, the remedy at common law still continues open.[2]

2 See, supra, §§ 196, 270; Com. v. Stout, 46 Ky. (7 B. Monr.) 247.

When a statute makes official extortions indictable, the indictment must give the facts of the extortion.—State v. Perham, 4 Ore. 188.

Where a statute makes another crime one of its constituents in defining a crime, this second crime must be specifically averred; e. g., where murder with intent to commit rape is defined as murder in the first degree.—Titus v. State, 49 N. J. L. 36, 7 Atl. 621.

1 People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; State v. Southern R. Co., 145 N. C. 539, 59 S. E. 585.

2 Kerr's Whart. Crim. Law, §§ 32-38. CAL.—People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331. GA.—Southern R. Co. v. Moore, 133 Ga. 810, 26 L. R. A. (N. S.) 851, 67 S. E. 87. IOWA—State v. Moffett, 1 Greene 247. MASS.—Jennings v. Com., 34 Mass. (17 Pick.) 80; Com. v. Rumford Works, 82 Mass. (16 Gray) 231. S. C.—State v. Thompson, 2 Strobh. 12, 47 Am. Dec. 588. TENN.—Simpson v. State, 18 Tenn. (10 Yerg.) 525; State v. Rutledge, 27 Tenn. (8 Humph.) 32. VA.—Pitman v. Com., 2 Rob. 800. FED.—United States v. Halberstadt, Gilp. 262, Fed. Cas. No. 15276. ENG.—R. v. Jackson, Cowp. 297, 98 Eng. Rep. 1095; R. v. Wigg, 2 Ld. Raym. 1163, 92 Eng. Rep. 269.

As to when offense is to be regarded as statutory, see, infra, § 331.

In Pennsylvania, as it has been noticed, it is required by act of assembly, that every act must be followed strictly, and where a statutory penalty is imposed, the common law remedy is forever abrogated.—Act 21st March, 1806, § 13; 4 Smith's Laws 332; Respublica v. Tryer, 3 Yeates (Pa.) 451; Brown v. Com., 3 Serg. & R. (Pa.) 273; Updegraph v. Com., 6 Serg. & R. (Pa.) 5; Evans v. Com., 13 Serg. & R. (Pa.) 426; Wake v. Lightner, 1 Rawle (Pa.) 290; Fromberger v. Greiner, 5 Whart. (Pa.) 357. See Kerr's Whart. Crim. Law, §§ 32-38.

Where a magistrate is guilty of extortion, it has accordingly been held, the common law remedy, by indictment, is abrogated by the act of assembly giving the injured party, in such case, a qui tam action for the penalty.—Evans v. Com., 13 Serg. & R. (Pa.) 246.

Courts have shown great unwillingness to extinguish the com-

§ 283. When statute assigns no penalty, punishment is at common law. On the other hand, as has been noticed,[1] where the statute both creates the offense and prescribes the penalty, the statute must be exclusively followed, and no common law penalty can be imposed. But where the statute creates the offense, but assigns no penalty, then the punishment must be by common law.[2]

§ 284. Exhaustive statute absorbs common law. Wherever a general statute, purporting to be exhaustive, is passed on a particular topic, it absorbs and vacates, on that topic, the common law.[1]

§ 285. Statutory technical averments to be introduced. Whenever a statute attaches to an offense certain technical predicates, these predicates must be used in the indictment.[1] Thus, in an indictment on the statute which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gain sake," it was necessary to charge the offense to have been committed for the sake of wicked lucre or gain,[2] otherwise it would be bad. In another case, an indictment on that part of the Black Act (now repealed) which made it felony, "wilfully and maliciously" to shoot at any person in a dwelling-house or other place, was ruled bad, because it charged the offense to have been done "unlaw-

mon law remedy in many cases where a statutory penalty is created. Thus, nuisances to navigable rivers are still indictable at common law, though the Act of 23d March, 1803, points out a peculiar procedure by which the obstruction is to be abated; Com. v. Church, 1 Barr (Pa.) 107; and a common law indictment is preserved against an interference with the health of the city of Philadelphia, though the legislature has particularly committed that interest to the care of a board of health, with plenary powers to abate or indict.—Com. v. Vansickle, 1 Brightly (Pa.) 69. See Whart. Crim. Law, 9th ed., §§ 25-6.

1 Supra, § 230.

2 R. v. Robinson, 2 Burr. 799.

1 Com. v. Dennis, 105 Mass. 162, Kerr's Whart. Crim. Law, §§ 42 et seq.

1 As to particular averments, see, infra, §§ 306-318. See State v. Dodge, 78 Me. 439, 6 Atl. 875.

2 1 Hale 220.

fully and maliciously," omitting the word "wilfully";[3] some of the judges thought that "maliciously" included "wilfully," but the greater number held, that as wilfully and maliciously were both mentioned in the statute, as descriptive of the offense, both must be stated in the indictment.

In Pennsylvania, an indictment for arson, charging that the defendant did "feloniously, unlawfully, and maliciously set fire," etc., was held to be sufficient without the word "wilfully," though "wilfully" was included in the description of the offense given in the act constituting it.[4]

In New Hampshire and North Carolina, the contrary view has been taken.[5]

In England, under Stat. 7 and 8 Geo. IV, c. 33, § 2, an indictment for feloniously, voluntarily, and maliciously setting fire to a barn, was holden bad, because the words of the statute are "unlawfully and maliciously."[6]

§ 286. —— BUT EQUIVALENT TERMS MAY BE GIVEN. It must be remembered, in qualification of what has been heretofore stated, that as to the *substance,* as distinguished from the technical incidents of an offense, it is the wrongful act that the statute forbids, and that the words used by the statute in describing the act may not be the only words sufficient for this purpose. A statute

[3] R. v. Davis, 1 Leach 493; State v. Parker, 81 N. C. 548.

See, however, State v. Thorne, 81 N. C. 555; infra, § 286. And see, also, Davis v. State, 4 Tex. App. 456.

[4] Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565, see State v. Pennington, 40 Tenn. (3 Head) 119.

[5] State v. Abbott, 31 N. H. 434; State v. Grove, 34 N. H. 510; State v. Massey, 97 N. C. 465, 2 S. E. 445; State v. Morgan, 98 N. C. 641, 3 S. E. 927.

[6] R. v. Turner, 1 Mood. C. C. 239.

Where an indictment charged in one count that the defendant did break to get out, and in another that he did break and get out, this was ruled insufficient, because the words of the statute are "break out."—R. v. Compton, 7 Car. & P. 139, 32 Eng. C. L. 540.

may include in such description cumulative terms of aggravation for which substitutes may be found without departing from the sense of the statutory definition; or, as in the case of the Pennsylvania and cognate statutes dividing murder into two degrees, the terms used to indicate the differentia of the offense may be regarded as so far equivalents of the common law description that the common law description may be held to be proper, and the introduction of the statutory terms unnecessary.[1] Or, another word may be held to be so entirely convertible with one in the statute that it may be substituted without variance. In such case a deviation from the statutory terms may be sustained. We have already seen that these words, when they state a conclusion of law, are not sufficient, but that the unlawful act must be further described. We have further to add that these words, when they describe the substance, are not necessarily exclusive. Hence, where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment may be sufficient.[2] Thus, if the word "*knowingly*" be in the statute and the word "*advisedly*" be substituted for it in the indictment, the indictment may be

1 See Kerr's Whart. Crim. Law, § 519.

2 CAL.—People v. Schmidt, 63 Cal. 28. ILL.—McCutcheon v. State, 69 Ill. 601. IND.—Williams v. State, 64 Ind. 553, 31 Am. Rep. 135; Schmidt v. State, 78 Ind. 41. IOWA—State v. Shaw, 35 Iowa 575. LA.—State v. George, 34 La. Ann. 261. MISS.—Roberts v. State, 55 Miss. 414. MO.—State v. Watson, 65 Mo. 115. N. Y.—Tully v. People, 67 N. Y. 15; Eckhardt v. People, 83 N. Y. 452. N. C.—State v. Lawrence, 81 N. C. 521; State v. Thorne, 81 N. C. 558. WIS.—State v. Welch, 37 Wis. 196. FED.—United States v. Nunnemacher, 7 Biss. C. C. 129, Fed. Cas. No. 15903; Dewee's Case, Chase's Dec. 531, Fed. Cas. No. 4570.

"Wilfully, maliciously, feloniously and premeditatedly" an equivalent to "malice aforethought."—People v. Vance, 21 Cal. 400.

"With malice and premeditation," equivalent to "malice aforethought."—State v. Curtis, 70 Mo. 598.

sufficient.[3] In further illustration of this view it may be mentioned that "excite, move, and procure" are held convertible with "command, hire, and counsel" as used in the statute,[4] and "without lawful authority and excuse" with "without lawful excuse."[5] But, as a rule, it is not prudent to substitute other terms for those in the statute.

§ 287. WHERE A STATUTE DESCRIBES A CLASS OF ANIMALS BY A GENERAL TERM, IT IS ENOUGH TO USE THIS TERM FOR THE WHOLE CLASS: OTHERWISE NOT. We have elsewhere seen that where a statute uses a single general term, this term is to be regarded as comprehending the several species belonging to the genus; but that if it specifies each species, then the indictment must designate specifically.[1] Where an indictment on the repealed statutes 15 Geo. 2, c. 34, and 14 Geo. 2, c. 6, which made it felony, without benefit of clergy, to steal any cow, ox, heifer, etc., charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was determined to be a fatal variance; for the statute having mentioned both cow and heifer, it was presumed that the words were not considered by the legislature as synonymous.[2] It is otherwise when "cow" is used as a nomen generalissimum.[3] A "ewe"[4] or "lamb"[5] may be included under the general term "sheep," when such general term

3 R. v. Fuller, 1 Bos. & P. 180, 126 Eng. Rep. 847.

4 R. v. Grevil, 1 And. 194.

5 R. v. Harvey, L. R. 1 C. C. 284.

It is not essential, on an indictment on the Slave-trade Act of 20th of April, 1818, ch. 86, §§ 2 and 3, to aver that the defendant knowingly committed the offense. —United States v. Smith, 2 Mas. C. C. 143, Fed. Cas. No. 16338.

1 Whart. Crim. Ev., § 124.

2 State v. Plunket, 2 Stew. (Ala.) 11; Turley v. State, 22 Tenn. (3 Humph.) 323; R. v. Douglas, 1 Camp. 212; R. v. Cooke, 2 East P. C. 616, 1 Leach 123.

See, also, supra, § 257; Whart. Crim. Ev., § 124.

3 People v. Soto, 49 Cal. 69; see Taylor v. State, 25 Tenn. (6 Humph.) 285.

4 R. v. Barran, Jebb 245; R. v. Barnam, 1 Crawf. & Dix C. C. 147.

5 State v. Tootle, 2 Harr. (Del.) 541; R. v. Spicer, 1 Car. & K. 699, 47 Eng. C. L. 697; R. v. McCully, 2 Moody 34.

Compare: R. v. Beany, R. & R. 416.

stands alone in the statute, without "ewes" or "lambs" being specified; but not otherwise.[6] On the same conditions, under the term "cattle" may be included "pigs,"[7] "asses,"[8] "horses,"[9] and "geldings,"[10] but not a domesticated buffalo,[11] "sheep," or "goats."[12] As a nomen generalissimum, under "swine" may be included "hogs";[13] under "horses" may be included "mares."[14]

The rule generally may be stated to be that when a statute uses a nomen generalissimum as such (e. g., cattle), then a particular species can be proved; but that when the statute enumerates certain species, leaving out others, then the latter can not be proved under the nomen generalissimum, unless it appears to have been the intention of the legislature to use it as such.[15]

6 R. v. Puddifoot, 1 Moody 247; R. v. Loom, 1 Moody 160.

7 R. v. Chapple, R. & R. 77.

8 R. v. Whitney, 1 Moody 3.

9 State v. Hambleton, 22 Mo. 452; Fein v. Territory, 1 Wyo. 376; R. v. Magle, 3 East P. C. 1076.

In Texas, under statute, a "gelding" under the term "horse."—Jordt v. State, 31 Tex. 571, 98 Am. Dec. 550.

—Contra in Texas at common law.—Valesco v. State, 9 Tex. App. 76. And see Cameron v. State, 9 Tex. App. 332.

10 R. v. Mott, 2 East P. C. 1075.

"Gelding" does not include a ridgeling.—Briscoe v. State, 4 Tex. App. 219, 30 Am. Rep. 162.

Indictment for theft of a gelding defendant can not be convicted of horse stealing.—State v. McDonald, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628; Bartley v. State, 53 Neb. 310, 73 N. W. 744; Swindel v. State, 32 Tex. 102; Gibbs v. State, 34 Tex. 134.

"Steer" does not include "cow" in indictment for larceny.—Martinez v. Territory, 5 Ariz. 55, 44 Pac. 1089.

11 State v. Crenshaw, 22 Mo. 457.

12 McIntosh v. State, 18 Tex. App. 284.

13 Rivers v. State, 10 Tex. App. 177.

14 People v. Pico, 62 Cal. 50.

"Mare" includes within its meaning "one certain animal of the horse species, to-wit, female colt."—Miller v. Territory, 9 Ariz. 123, 80 Pac. 321.

15 ALA. — State v. Plunket, 2 Stew. 11. N. C.—State v. Godet, 29 N. C. (7 Ired.) 210. S. C.—Though see, State v. McLain, 2 Brev. 443; Shubrick v. State, 2 S. C. 21. TENN.—Taylor v. State, 25 Tenn. (6 Humph.) 285. VT.—State v. Abbott, 20 Vt. 537. ENG.—R. v. Chard, R. & R. 488; R. v. Welland, R. & R. 494.

As to machinery, see Kerr's Whart. Crim. Law, § 1299.

§ 288. PROVISOS AND EXCEPTIONS NOT PART OF DEFINITION NEED NOT BE STATED. "Provisos" and "exceptions," to whose consideration we next proceed, though usually coupled in this connection, are logically distinct; a "proviso" being a qualification attached to a category, an "exception," the taking of particular cases out of that category. For our present purposes, however, they may be considered together; and the first principle that meets us is that when they are not so expressed in the statute as to be incorporated in the definition of the offense, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the statutory provisos.[1] Nor is it even necessary

1 1 Sid. 303; 2 Hale 171; 1 Lev. 26; Poph. 93, 94; 2 Bur. 1037; 2 Stra. 1101; 1 East R. 646, in notes; 5 T. R. 83; 1 Bla. R. 230; 2 Hawk., c. 25, § 112; Bac. Ab. Indict. H. 2; Burn, J., Indict. ix; 1 Chit. on Pleading 357. ALA.—Carson v. State, 69 Ala. 235; Grattan v. State, 71 Ala. 344; Jones v. State, 81 Ala. 79, 81, 1 So. 32. ARK.—Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52. CAL.—Ex parte Hornef, 154 Cal. 355, 97 Pac. 891; Hogan v. Superior Court, 16 Cal. App. 793, 117 Pac. 951. COLO.—Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133. CONN.—State v .Miller, 24 Conn. 522; State v. Powers, 25 Conn. 48. DAK.—Territory v. Scott, 2 Dak. 212, 67 N. W. 435. FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371; Ferrell v. State, 45 Fla. 26, 34 So. 320. ILL.—Metzker v. State, 14 Ill. 101; Swartzbaugh v. People, 85 Ill. 457; Beasley v. People, 89 Ill. 571. IND.—Colson v. State, 7 Blackf. 590; Russell v. State, 50 Ind. 174; State v. Maddox, 74 Ind. 105. IOWA—Romp v. State, 3 Greene 276; State v. Williams, 20 Iowa 98. KY.—Thompson v. Com., 103 Ky. 685, 46 S. W. 492. ME.—State v. Gurney, 37 Me. 149; State v. Boyington, 56 Me. 512. MASS.—Com. v. Hart, 65 Mass. (11 Cush.) 130, 1 Benn. & H. Lead. Crim. Cas. 250; Com. v. R. R., 92 Mass. (10 Allen) 189; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; Com. v. Shannihan, 145 Mass. 99, 13 N. E. 347. MICH.—Kopke v. People, 43 Mich. 41, 4 N. W. 551. MISS.—Thompson v. State, 54 Miss. 740. MO.—State v. O'Gorman, 68 Mo. 179; State v. Jaques, 68 Mo. 260; State v. O'Brien, 74 Mo. 549. MONT.—Territory v. Burns, 6 Mont. 72, 9 Pac. 432. NEV.—State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; State v. Buckaroo Jack, 30 Nev. 325, 96 Pac. 467. N. H.—State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Abbott, 31 N. H. (11 Fost.) 434; State v. Wade, 34 N. H. 495; State v. Cassady, 52 N. H. 500. N. Y.—Fleming v. People, 27 N. Y. 329; Jefferson v. People, 101 N. Y. 19, 238, 3 N. Y. Crim. Rep. 572,

to allege that he is not within the benefit of the provisos, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in

3 N. E. 797, affirming 28 Hun 52. N. C.—State v. Lofton, 19 N. C. (2 Dev. & B.) 31; State v. Heaton, 81 N. C. 542. OHIO—Becker v. State, 8 Ohio St. 391; Stanglein v. State, 17 Ohio St. 453; Hale v. State, 58 Ohio St. 676, 51 N. E. 154; Billingheimer v. State, 32 Ohio St. 535; Hale v. State, 58 Ohio St. 676, 51 N. E. 154. PA.—Walter v. Com., 6 Weekly Notes Cases 389. R. I.—State v. O'Donnell, 10 R. I. 472; State v. Rush, 13 R. I. 198; State v. Gallagher, 20 R. I. 266, 38 Atl. 655. TENN.—Worley v. State, 30 Tenn. (11 Humph.) 172; State v. Jackson, 69 Tenn. (1 Lea) 680. TEX.—Blasdell v. State, 5 Tex. App. 263; Logan v. State, 5 Tex. App. 306; Wilkerson v. State, 44 Tex. Cr. Rep. 455, 72 S. W. 850. VT.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; State v. Hodgdon, 41 Vt. 139; State v. Ambler, 56 Vt. 672; Western Union Tel. Co. v. Bullard, 65 Vt. 634, 27 Atl. 322; State v. Bevins, 70 Vt. 574, 41 Atl. 655; State v. Paige, 78 Vt. 286, 6 Ann. Cas. 725, 62 Atl. 1017. FED.—United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538, 1 Cow. Cr. Rep. 308; United States v. Nelson, 29 Fed. 202; Shelp v. United States, 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694. ENG.—Murray v. R., 7 Ad. & El. N. S. (7 Q. B.) 700, 53 Eng. C. L. 698.

Exception in enacting clause, the exception must be negatived, and the indictment must state that accused is not within it. GA.—Elkins v. State, 13 Ga. 435. ME.—State v. Moore, 6 Me. 274; State v. Boyington, 56 Me. 512. MASS.—Com. v. Byrnes, 126 Mass. 248. MISS.—Kline v. State, 34 Miss. 317. VT.—State v. Butler, 17 Vt. 149; State v. Palmer, 18 Vt. 573; State v. Barker, 18 Vt. 197; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

But if not so inserted as to qualify the enactment, it need not be negatived.—Fuller v. State, 33 N. H. 259.

Exception in subsequent clause or section of the statute, need not be negatived in the indictment. Ibid. See, also, authorities, ante, § 288, in footnote 5.

"There seem to be many shadowy distinctions, the sound reason and good sense of which are not easily discoverable."—State v. Palmer, 18 Vt. 573.

Middle class of cases where exception is not in express terms introduced into enacting clause, but only by reference to a subsequent clause, or prior statute, as where the words "except as hereinafter mentioned," or words of similar import, are employed. In such cases the exception, whether the exception applies to the person or to the offense, must be negatived. Verba relata inesse videntur.—State v. Palmer, 18 Vt. 570; State v. Abbey, 20 Vt. 60, 67 Am. Dec. 754; R. v. Pratten, 6 T. R. 559.

Reason for the rule as to negativing exceptions is founded on the general principle that the indictment must contain the statement of those facts which consti-

the cases thereinafter accepted.[2] Nor, even when the enacting clause refers to the subsequent excepting clauses, does this necessarily draw such subsequent clause up into the enacting clause.[3] For when such exceptions embrace matters of defense, they are properly to be introduced by the defendant.[4] And extenuation which comes in by

tute an offense under the statute. A prima facie case must be stated; and it is for the accused for whom matter of excuse exists to bring it forward in his pleading or defense.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. See Com. v. Hart, 65 Mass. (11 Cush.) 130, 1 Benn. & H. Lead. Cas. 250; Davis v. Henry, 121 Mass. 153.

Indictment for abortion necessary to negative exception as to necessity for preserving life.—State v. Stokes, 54 Vt. 179.

Indictment for eloping with wife of another exception that was innocent and virtuous must be averred.—State v. Connor, 142 N. C. 700, 55 S. E. 787.

Indictment for rape must aver woman not the wife of the accused.—Young v. Territory, 8 Okla. 525, 58 Pac. 724; Parker v. Territory, 9 Okla. 109, 59 Pac. 9.

As to proof of negative averments, see Whart. Crim. Ev., § 321.

2 CAL.—People v. Nugent, 4 Cal. 341; Ex parte Hornef, 154 Cal. 361, 97 Pac. 893. CONN.—State v. Powers, 25 Conn. 48. N. H.—State v. Adams, 6 N. H. 533. TENN.—Matthews v. State, 10 Tenn. (2 Yerg.) 233. VT.—State v. Sommers, 3 Vt. 156; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

See Kerr's Whart. Crim. Law, § 2055.

3 Ibid.; 2 Hawk. P. C. C. 25; Com. v. Hill, 5 Gratt. (Va.) 682.

4 1 Bla. Rep. 230; 2 Hawk., ch. 25, § 113; 2 Ld. Raym. 1378; 2 Leach 548; People v. Nugent, 4 Cal. 341. See, also, reading notes in footnote 1, this section.

The subject is closely allied to that of Burden of Proof, discussed in Whart. Crim. Ev., § 319.

In Com. v. Hart, 65 Mass. (11 Cush.) 130, 1 Benn. & H. Lead. Crim. Cas. 250, we have the following from Metcalf, J.:

"The rule of pleading a statute which contains an exception is usually expressed thus: 'If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party.' The same rule is applied in pleading a private instrument of contract. If such instrument contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it

way of subsequent proviso or exception need not be pleaded by the prosecution.[5]

§ 289. —— OTHERWISE WHEN PROVISO IS IN SAME CLAUSE. But where a proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso.[1] This is eminently the case with clauses in statutes prohibiting doing

together with the exception.—Gould Pl., ch. 4, §§ 20, 21; 2 Saunders Pl. & Ev., 2d ed., 1025, 1026; Vavasour v. Ormrod, 9 Dow. & Ry. 597, 6 Barn. & C. 430, 13 Eng. C. L. 199.

"The reason of this rule is obvious, and is simply this: Unless the exception in the enacting clause of a statute, or in the general clause in a contract, is negatived in pleading the clause, no offense or no cause of action appears in the indictment or declaration, when compared with the statute or contract.—Plowden 410. But when the exception or proviso is in a subsequent substantive clause, the case provided for in the enacting or general clause may be fully stated without negativing the subsequent exception or proviso. A prima facie case is stated, and it is for the party, for whom matter of excuse is furnished by the statute or the contract, to bring it forward in his defense. . . .

"The word 'except' is not necessary in order to constitute an exception within the rule. The words 'unless,' 'other than,' 'not being,' 'not having,' etc., have the same legal effect, and require the same form of pleading."—East P. C. 166, 167; Com. v. Maxwell, 19 Mass. (2 Pick.) 139; State v. Butler, 17 Vt. 145; Wells v. Iggulden, 5 Dow. & Ry. 19; R. v. Palmer, 1 Leach C. C., 4th ed., 102; Spieres v. Parker, 1 T. R. 141; Gill v. Scrivens, 7 T. R. 27.

But in a subsequent case the last distinction was reconsidered in the same court, it being held that an exception not in the enacting clause need not be negatived, unless necessary to the definition of the offense.—Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249.

[5] R. v. Bryan, 2 Stra. 1101, 93 Eng. Rep. 1058.

Where different grades of the same general offense are defined in the statute, certain special circumstances being included as essential elements in the definition of the higher grade and excluded by negative words in the definition of the lower grade, an information charging the lower grade of the offense need not negative the presence of such circumstances.—Infra, § 250; State v. Kane, 63 Wis. 260, 23 N. W. 488.

[1] ALA.—Smith v. State, 81 Ala. 74, 1 So. 83; Jones v. State, 81 Ala. 79, 1 So. 32. CAL.—People v. Roderigas, 44 Cal. 9. DAK.—Territory v. Scott, 2 Dak. 212, 6 N. W. 435. KY.—Connor v. Com.,

certain acts without a license,[2] and with statutes prohibiting sales to minors without consent of parents.[3] And where a statute forbids the doing of a particular act, without the existence of either one of two conditions, the indictment must negative the existence of both these conditions before it can be supported.[4]

§ 290. EXCEPTIONS IN ENACTING CLAUSE TO BE NEGATIVED. Where exceptions are stated in the enacting clause (under which term are to be understood all parts of the statute which define the offense), unless they be mere matters of extenuation or defense, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute.[1] But it

76 Ky. (13 Bush) 714. ME.—State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382; State v. Gurney, 37 Me. 149; State v. Boyington, 56 Me. 512. MD.—Barber v. State, 50 Md. 161; Gibson v. State, 54 Md. 447. MASS.—Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; Com. v. Davis, 121 Mass. 352. MO.—State v. Meek, 70 Mo. 355, 35 Am. Rep. 427. N. H.—State v. Abbott, 31 N. H. (11 Fost.) 434; State v. Bryant, 58 N. H. 79. N. C.—State v. Heaton, 81 N. C. 542; State v. Lanier, 88 N. C. 658. TEX.—Leatherwood v. State, 6 Tex. App. 244; Tallner v. State, 15 Tex. App. 23. VT.—State v. Barker, 18 Vt. 195; State v. Palmer, 18 Vt. 570; State v. Stokes, 54 Vt. 179. WIS.—Jenson v. State, 60 Wis. 577, 19 N. W. 374. FED.—United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; and cases cited in prior notes.

Dam creating nuisance, indictment must allege dam not erected and maintained in accordance with the charter granting the privilege.—State v. Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495.

Illegal fishing charged, indictment must aver fishing occurred in a part of the river or other body of water, not exempted from the provisions of the statute.—State v. Turnbull, 78 Me. 392, 6 Atl. 1.

As to exceptions in bigamy, see Kerr's Whart. Crim. Law, § 2055.

2 Infra, §§ 290, 291, Kerr's Whart. Crim. Law, § 1789.

3 Ibid. State v. Emerick, 35 Ark. 324; infra, §§ 290, 291.

4 State v. Loftin, 19 N. C. (2 Dev & Bat.) 31; Newman v. State, 63 Ga. 533. Thus,

When either of two licenses is specified, both must be negatived.—Neales v State, 10 Mo. 498.

1 2 Hale 170; 1 Burr. 148; Fost. 430; 1 East Rep. 646, in notes; 1 T. R. 144; 1 Ley 26; Com. Dig. Action, Statute; 1 Chit. on Plead. 357. GA.—Elkins v. State, 13 Ga. 435. ILL.—Metzker v. People, 14 Ill. 101. ME.—State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382. MD.—

is a substantial, not an express negative, that is required.[2] Thus, where the charge preferred, ex natura rei, as conclusively imports a negative of the exception as if such negative had been in express terms, the indictment is sufficient under the above general rule.[3]

Instances: Thus, where a statute imposes a penalty on the selling of spirituous liquors without a license, it is necessary to aver the want of a license in the indictment;[4] and such negation must squarely meet and traverse the assumption of a license of the character specified in the indictment as an excuse.[5] So, in an indictment under the Mississippi Act of 1830, prohibiting any person, other than Indians, from making settlements within their territory, it is necessary to aver that the defendant

See State v. Price, 12 Gill & J. 260, 37 Am. Dec. 81; Rawlings v. State, 2 Md. 201; Barber v. State, 50 Md. 161; Kiefer v. State, 87 Md. 562, 40 Atl. 377. MISS.—Kline v. State, 44 Miss. 317. N. H.—State v. Adams, 6 N. H. 532. N. C.—State v. Bloodworth, 94 N. C. 918. VT.—State v. Munger, 15 Vt. 290.

See, also, authorities, ante, § 288, footnote 1.

Exceptions and provisos descriptive of offense, only, need be negatived. — State v. Bouknight, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451.

Following words of statute in negativing exception, indictment usually sufficient. — Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

Proviso to subsequent section need not be negatived.—State v. Byington, 56 Me. 512; Rawlins v. State, 2 Md. 201; Kiefer v. State, 87 Md. 562, 40 Atl. 377.

As to mode of negativing, see Beasley v. People, 89 Ill. 571.

2 State v. Brown, 8 Blackf. (Ind.) 69; State v. Damon, 97 Me. 323, 54 Atl. 845; State v. Montgomery, 92 Me. 433, 43 Atl. 13.

3 State v. Price, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81; State v. Bouknight, 56 S. C. 532, 74 Am. St. Rep. 751, 32 S. E. 451.

4 Com. v. Thurlow, 41 Mass. (24 Pick.) 374; Riley v. State, 43 Miss. 397; see Surratt v. State, 45 Miss. 601; State v. Webster, 10 N. J. L. (5 Halst.) 293.

See fully, infra, note to § 291.

Compare: Kerr's Whart. Crim. Law, §§ 1789, 2055.

Where the statute declares that the license may be from "A. or B.," this is to be negatived by denying a license from either "A. or B." See Com. v. Hadcraft, 69 Ky. (6 Bush) 91; State v. Swadley, 15 Mo. 515; State v. Burns, 20 N. H. 550; People v. Gilkinson, 4 Park. Cr. Rep. (N. Y.) 26.

5 Ibid.; Davis v. State, 39 Ala. 521; Goodwin v. State, 72 Ind. 113, 37 Am. Rep. 144; Rawlings v. State, 2 Md. 236.

is not an Indian.[6] Again, on an indictment under the Massachusetts statute of 1791, c. 58, making it penal to entertain persons not being strangers on the Lord's day, it must appear that the parties entertained were not strangers.[7] So in Vermont, an indictment under the statute which prohibits the exercise on the Sabbath of any "secular business," etc., except "works of necessity and charity," must allege that the acts charged were not acts of "necessity and charity."[8] Even where certain persons were authorized by the legislature to erect a dam, in a certain manner, across a river which was a public highway, it was held that an indictment for causing a nuisance, by erecting the dam, must contain an averment that the dam was beyond the limits prescribed in the charter, and that it was not erected in pursuance of the act of the legislature.[9]

§ 291. —— QUESTION IN SUCH CASE IS WHETHER STATUTE CREATES A GENERAL OR A LIMITED OFFENSE. Such are the technical tests which are usually applied to determine whether an exception or proviso is or is not to be negatived in an indictment. In many cases we are told that when the exception or proviso is in the "enacting clause," it must be negatived in the indictment, but it is otherwise when it is in "subsequent" clauses. This distinction has sometimes been called rude, and sometimes artificial, yet in point of fact it serves to symbolize a germinal point of discrimination. I prohibit, for instance, all sale of alcohol by a sweeping section; and in a subsequent section I except from this sales for medicinal purposes. Here the very structure of the statute shows my intent, which is to make the sale of alcohol a crime by statute, as is the exploding gunpowder in the streets a crime at

6 State v. Craft, 1 Miss. (1 Walker) 409; Matthews v. State, 10 Tenn. (2 Yerg.) 233.

7 Com. v. Maxwell, 19 Mass. (2 Pick.) 139.

8 State v. Barker, 18 Vt. 195.

9 State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382.

common law; and hence a license in the first case need not be negatived in the indictment any more than a license in the second.[1] On the other hand, I enact that none but licensed persons shall sell alcohol. Here I do not create a general crime, but I say that if certain persons do certain things they shall be liable to indictment; and to maintain an indictment it must be averred that the defendants were of the class named. Hence the test before us is not formal, but essential; it is practically this,—is it the scope of the statute to create a *general* offense, or an offense limited to a particular class of persons or conditions? In other words, is it intended to impose the stamp of criminality on an entire class of actions, or upon only such actions of that class as are committed by particular persons or in a particular way? In the latter case, the defendant must be declared to be within this class; in the former case this is not necessary. We may take as a further illustration a statute defining murder, in which statute are specified the cases in which necessity or self-defense are to be regarded as excusatory. It would make no matter, in such case, whether these excusatory cases be or be not given in the same clause with that prohibiting the general offense; in either case they need not be negatived in the indictment. The same might be said of the defense, that the person killed was an alien enemy, and that the killing was in open war. On the other hand, if the statute should say that an offense is indictable only when perpetrated on a particular class of persons, no matter how many clauses may intervene between the designation of the offense and the limitation of the object, the limitation of the object must be given in the indictment.[2] Of course, the question thus involved, whether a crime is general or limited as to persons, may be determined otherwise than by the structure of a statute. If it be clear that an act is only to become a crime

1 See Surratt v. State, 45 Miss. 601.

2 Com. v. Maxwell, 19 Mass. (2 Pick.) 139.

when executed by persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed. With this view practically coincides that expressed in some of the cases cited above, that mere excusatory defense is not to be negatived in the indictment. For an excusatory defense implies a crimen generalissimum; and to a crimen generalissimum no exceptions, on the foregoing principles, need be negatived in the indictment.[3]

3 See 1 Benn. & Heard's Lead. Crim. Cas. 250; Kerr's Whart. Crim. Law, § 2055. GA.—Hill v. State, 53 Ga. 472. MASS.—Com. v. Hart, 65 Mass. (11 Cush.) 130; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249. MISS.—Surratt v. State, 45 Miss. 601. MO.—Neales v. State, 10 Mo. 498. R. I.—State v. O'Donnell, 10 R. I. 472. VT.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

In England a statute casting on the defendant the burden of proving a license does not, by itself, relieve the prosecution from averring the want of license (R. v. Harvey, L. R. 1 C. C. 284), though otherwise in Massachusetts.—Com. v. Edwards, 66 Mass. (12 Cush.) 187.

In prosecutions for selling liquor without license, the indictment, as a general rule, should negative the license.—IND.—Burke v. State, 52 Ind. 461. KY.—Com. v. Smith, 69 Ky. (6 Bush) 303. MASS.—Com. v. Thurlow, 41 Mass. (24 Pick.) 374. N. J.—State v. Webster, 10 N. J. L. (5 Halst.) 293. TEX.—State v. Horan, 25 Tex. 271. VT.—State v. Munger, 15 Vt. 290. VA.—Com. v. Hampton, 3 Gratt. 590.

—Accused not a "druggist," indictment need not aver.—Riley v. State, 43 Miss. 397; Surratt v. State, 45 Miss. 601; State v. Buford, 10 Mo. 703; State v. Fuller, 33 N. H. 259; State v. Blaisdell, 33 N. H. 388.

—The whole question depends, as the cases show, on the principle underlying the statute. Where one section of the statute imposes a penalty on selling "in violation of the provisions of this act," it has been held unnecessary to negative exceptions in subsequent sections.—Com. v. Tuttle, 66 Mass. (12 Cush.) 502; Com. v. Hill, 5 Gratt. (Va.) 682.

—In Maine a statute has been held unconstitutional which prescribes that the vendee need not be named.—State v. Learned, 47 Me. 426.

—In Texas, a statute providing that license need not be negatived has been pronounced unconstitutional.—State v. Horan, 25 Tex. 271; Hewitt v. State, 25 Tex. 722.

—In Vermont, the rule is the contrary of the Texas rule.—State v. Comstock, 27 Vt. 553.

—"Without" implies a sufficient negation.—Com. v. Thompson, 84 Mass. (2 Allen) 507.

XII. Duplicity.

§ 292. GENERALLY, JOINDER IN ONE COUNT OF TWO DISTINCT OFFENSES IS BAD. A count in an indictment which charges two distinct offenses, each distinctively punishable, is bad, and may be quashed on motion of the defendant, or judgment may be entered for the defense

—"Without lawful excuse" is equivalent to without authority.—R. v. Harvey, L. R. 1 C. C. 284.

"Without being duly authorized and appointed thereto according to law," is a sufficient negation.—Com. v. Conant, 72 Mass. (6 Gray) 482; Com. v. Keefe, 73 Mass. (7 Gray) 332; Com. v. Hoyer, 125 Mass. 209; see State v. Hornbreak, 15 Mo. 478; State v. Andrews, 28 Mo. 17; State v. Fanning, 38 Mo. 359; Roberson v. Lambertville, 38 N. J. L. (9 Vr.) 69.

—If the negation of the license to sell is as to quantity co-extensive with the quantity charged to be sold, it is sufficient. The general negation, "not having a license to sell liquors as aforesaid," relates to the time of sale, and not to the time of finding of the bill, and will suffice.—State v. Munger, 15 Vt. 290.

As to mode of negativing, see Eagan v. State, 53 Ind. 162.

In indictments for bigamy, the exceptions in the statute, when not part of the description of the offense, need not be negatived.—IOWA—State v. Williams, 20 Iowa 98. MASS.—Com. v. Jennings, 121 Mass. 47, 50, 23 Am. Rep. 249. MINN.—State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241. N. C.—State v. Loftin, 19 N. C. (2 Dev. & B.) 31. OHIO—Stanglein v. State, 17 Ohio St. 453. VT.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. ENG.—Murray v. R., 7 Ad. & El. N. S. (7 Q. B.) 700, 53 Eng. C. L. 698.

Nor is it necessary to allege that the defendant knew at the time of his second marriage that his former wife was then living, or that she was not beyond the seas, or to deny her continuous absence for seven years prior to the second marriage.—Barber v. State, 50 Md. 161, citing Bode v. State, 7 Gill (Md.) 316.

Where an indictment, under the Massachusetts statute, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she, the said A., being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A."; and it was proved that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B.; it was ruled, that there was a variance between the allegations and the proof.—Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647.

on special demurrer.[1] But where two or more acts constitute the same offense under the statute, and are, in legal contemplation, one and the same act, whether taken separately or conjointly, they may be joined in one count.[2]

To constitute duplicity, however, the second or superfluous offense must be sufficiently averred, as otherwise its description can be rejected as surplusage;[3] nor does the objection of duplicity prevail, as will presently be seen, when one of the offenses joined is a component part

It is otherwise where the exception describes the offense in the enacting clause.—Fleming v. People, 27 N. Y. 329.

1 Starkie's C. P. 272; Archbold C. P. 49. ARIZ.—Territory v. Duffield, 1 Ariz. 59, 25 Pac. 476. ARK.—State v. Brewer, 33 Ark. 176. GA.—Hoskins v. State, 11 Ga. 92; Long v. State, 12 Ga. 293. IND.—Knopf v. State, 84 Ind. 316; Stewart v. State, 111 Ind. 554, 13 N. E. 59. KY.—Ellis v. Com., 78 Ky. 130. LA.—State v. Maas, 37 La. Ann. 292. ME. — State v. Smith, 31 Me. 386; State v. Cates, 99 Me. 68, 58 Atl. 238. MASS.—Com. v. Symonds, 2 Mass. 163; Com. v. Colby, 128 Mass. 91. MISS.—Miller v. State, 6 Miss. (5 How.) 250. N. H.—State v. Nelson, 8 N. H. 163; State v. Hastings, 53 N. H. 452. N. Y.—People v. Wright, 9 Wend. 193. PA.—Com. v. Gable, 7 Serg. & R. 423. S. C.—State v. Lot, 1 Rich. 260. TENN.—State v. Ferriss, 71 Tenn. (3 Lea) 700. TEX.—Heinemann v. State, 22 Tex. App. 44, 2 S. W. 619. VT.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201. VA.—Rasnick v. Com., 2 Va. Cas. 356. FED.—United States v. Nunnemacher, 7 Biss. C. C. 129, Fed. Cas. No. 14903; United States v. Sharp, 1 Peters C. C. R. 131, Fed. Cas. No. 16265.

Similar acts of equal criminality, when done by one person, may be joined in one count and stated as one crime.—Byrne v. State, 12 Wis. 519.

2 People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 58 Pac. 581 (raising a check and forging indorsements thereon); McClure v. State, 27 Colo. 358, 61 Pac. 612; Com. v. Curtis, 91 Mass. (9 Allen) 266 (violations of city ordinance prohibiting the permitting of swine to run at large upon the streets); State v. Morton, 27 Vt. 310, 65 Am. Dec. 201 (charging defendant forged, and caused to be forged, and aided in forging); Morganstern v. Com., 94 Va. 787, 26 S. E. 402; United States v. Nunnemacher, 7 Biss. 129, Fed. Cas. No. 15903 (violations of internal revenue laws); United States v. Hull, 4 McCr. 272, 14 Fed. 324 (making false claims against the United States).

3 Supra, § 200; Whart. Crim. Ev., § 138; State v. Palmer, 35 Me. 9; Com. v. Tuck, 37 Mass. (20 Pick.) 356; Green v. State, 23 Miss. 509; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

or preliminary stage of the other. The objection, also, can not be taken on arrest of judgment.[4]

§ 293. —— EXCEPTION IN CASES WHERE LARCENY IS INCLUDED IN BURGLARY OR EMBEZZLEMENT. Prominent exceptions to the rule before us are to be found in indictments for burglary, in which it is correct to charge the defendant with having broken into the house with intent to commit a felony, and also with having committed the felony intended;[1] in indictments for robbery, in which there can be averments for larceny;[2] and in indictments in England for embezzlements by persons intrusted with public or private property, which may charge any number of embezzlements, not exceeding three, committed within six months.[3] On the same principle, a count stating that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity.[4] So when an indictment alleged that the defendant broke and entered into the dwelling-house of one person with intent to steal his goods, and having so entered, stole the goods of another person, etc., it was held there was no misjoinder.[5] So, also, a person may be indicted in one count for breaking and entering a building with intent to steal, and also with stealing, and may be convicted of the larceny simply.[6]

4 Infra, § 304.

1 Kerr's Whart. Crim. Law, § 1038. ARK.—Dodd v. State, 33 Ark. 517. IOWA—State v. Shaffer, 59 Iowa 290, 13 N. W. 306. LA.—State v. Depass, 31 La. Ann. 487; State v. Johnson, 34 La. Ann. 48; State v. Pierre, 38 La. Ann. 91. MO.—State v. Davis, 73 Mo. 129.

2 Infra, § 295; Allen v. State, 68 Ala. 98; People v. Jones, 53 Cal. 58; McTigue v. State, 63 Tenn. (4 Baxt.) 31.

3 Archbold's C. P. 49; Whart. Crim. Ev., § 129.

4 Com. v. Tuck, 37 Mass. (20 Pick.) 356; State v. Ayer, 23 N. H. (3 Fost.) 301.

Contra, under Iowa Code, see State v. McFarland, 49 Iowa 99.

5 State v. Brady, 15 Vt. 353.

6 ALA.—Borum v. State, 66 Ala. 468. CAL.—People v. Nelson, 58 Cal. 104. DEL.—State v. Crocker, 3 Harr. 554. KAN.—State v. Bran-

§ 294. —— AND SO WHERE FORNICATION IS INCLUDED IN MAJOR OFFENSE. Another exception has been recognized in indictments for adultery, in which under some statutes the jury may find the defendants guilty of fornication but not guilty of adultery.[1] And so, on an indictment for seduction,[2] it is not duplicity to charge fornication.[3] It is not duplicity, also, to join "battery" with "rape"[4] or "robbery."[5]

§ 295. WHEN MAJOR CRIME INCLUDES MINOR, CONVICTION MAY BE FOR EITHER. At common law, under an indictment charging the higher offense, the defendant could be found guilty of a lower grade of offense of the same generic character.[1] The same view is taken by the courts in this country.[2] Generally speaking, where an accusation (as in the case of the inclusion of manslaughter in murder) includes an offense of an inferior degree, the jury may discharge the defendant of the high crime, and convict him of the less atrocious; and in such case it is

don, 7 Kan. 106. MISS.—Smith v. State, 57 Miss. 822. N. C.—State v. Grisham, 2 N. C. (1 Hayw.) 12. OHIO—Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340. R. I.—State v. Colter, 6 R. I. 195. TENN.—Davis v. State, 43 Tenn. (3 Cold.) 77. VA.—Speers v. Com., 17 Gratt. 570; Vaughan v. Com., 17 Gratt. 576.

See Kerr's Whart. Crim. Law, § 1037, and cases.

So in Ohio, as to "robbery" and "assault."—Howard v. State, 25 Ohio St. 399.

1 State v. Cowell, 26 N. C. (4 Ired.) 231; Barber v. State, 39 Ohio St. 660; Com. v. Roberts, 1 Yeates (Pa.) 6.

See Kerr's Whart. Crim. Law, § 2083.

Compare: Maull v. State, 37 Ala. 160.

2 State v. Bierce, 27 Conn. 319; Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542. See Kerr's Whart. Crim. Law, § 2083.

3 Com. v. Murphey, 84 Mass. (2 Allen) 163. See Shouse v. Com., 5 Pa. St. 83; Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542.

4 Com. v. Thompson, 116 Mass. 346.

5 Hanson v. State, 43 Ohio St. 376, 1 N. E. 136.

1 State v. Robey, 8 Nev. 312; MacKalley's Case, 9 C. Rep. 67b.

2 State v. Waters, 39 Me. 54; Com. v. Griffin, 38 Mass. (21 Pick.) 523; State v. Lessing, 16 Minn. 75; State v. Robey, 8 Nev. 312.

sufficient if they find a verdict of guilty of the inferior offense, and take no notice of the higher.[3]

On indictments for riot there can be a conviction of any averred indictable ingredient.[4] Hence, when there is a proper allegation in the indictment for riot, the defendant may be convicted of an assault.[5]

Under indictment for robbery, also, there may, when there are proper averments, be a conviction of larceny.[6]

§ 296. "ASSAULT" IS INCLUDED UNDER "ASSAULT WITH INTENT." Further illustrations are to be found in indictments for assault and battery, or assault with intent to kill or ravish, or assault with intent to do other illegal acts, where the defendant may be convicted of assault alone,[1] or for assault and battery, where a battery is

3 See Kerr's Whart. Crim. Law, §§ 675-840. ARK. — Cameron v. State, 13 Ark. (8 Eng.) 712. COLO.—Packer v. People, 8 Colo. 361, 8 Pac. 564. IND.—Fahnestock v. State, 23 Ind. 231; Davis v. State, 100 Ind. 154. ME.—State v. Waters, 39 Me. (4 Heath) 54. MASS. — Com. v. Griffin, 38 Mass. (21 Pick.) 523; Com. v. Binney, 133 Mass. 571. MISS. — Swinney v. State, 6 Miss. (8 Sm. & M.) 576. NEB.—Denman v. State, 15 Neb. 138, 17 N. W. 347. N. Y.—People v. McDonnell, 92 N. Y. 657. ORE.—State v. Taylor, 3 Ore. 10. ENG.—R. v. Oliver, 8 Cox C. C. 384, Bell C. C. 287; R. v. Yeadon, 9 Cox C. C. 91; R. v. Dungey, 4 F. & F. 99; R. v. Dawson, 3 Stark. R. 62, 3 Eng. C. L. 595.

See as to verdict, Johnson v. State, 14 Ga. 55; Collins v. State, 33 La. Ann. 162; State v. Flannagan, 6 Md. 167.

4 Kerr's Whart. Crim. Law, § 1866. See Bradley v. State, 20 Fla. 738.

5 Shouse v. Com., 5 Pa. St. 83; Kerr's Whart. Crim. Law, § 1866.

Compare: Ferguson v. People, 90 Ill. 570.

6 Kerr's Whart. Crim. Law, § 1093.

1 ALA.—State v. Stedman, 7 Port. 495; Carpenter v. State, 23 Ala. 84. ARK.—McBride v. State, 7 Ark. (2 Eng.) 374. D. C.—Ex parte Robinson, 3 McAr. 418. GA.—Clark v. State, 12 Ga. 131; Lewis v. State, 33 Ga. 131. IND.—State v. Kennedy, 7 Blackf. 233; Foley v. State, 9 Ind. 363; Siebert v. State, 95 Ind. 471. IOWA—State v. Graham, 51 Iowa 72, 50 N. W. 285; State v. Schele, 52 Iowa 608, 3 N. W. 632. KAN.—State v. Cooper, 31 Kan. 505, 3 Pac. 429. ME.—State v. Waters, 39 Me. 54; State v. Dearborn, 54 Me. 442; State v. Bean, 77 Me. 486. MINN.—State v. Lessing, 16 Minn. 75. MO.—State v. Burk, 89 Mo. 635, 2 S. W. 10. NEV.—State v. Robey, 8 Nev. 312. N. H.—State v. Hardy, 47 N. H. 538. N. J.—Francisco v. State, 24 N. J. L. (4 Zab.) 30;

charged in an indictment for assault with intent to kill.[2] And if the aggravating facts sustaining the intent are imperfectly pleaded, the defendant can be convicted of the assault alone.[3]

§ 297. ON INDICTMENT FOR MINOR OFFENSE THERE CAN BE CONVICTION OF MINOR ONLY. Where an offense is, by law, made more highly punishable if committed upon a person of a particular class than if committed upon a person of another class, an indictment for the offense may be maintained, though it does not specify to which of the classes the injured person belongs; and upon a conviction on such an indictment, the milder punishment only will be awarded.[1] And although the evidence prove the major offense, if the indictment charge only the minor, the defendant can only be convicted of minor.[2]

§ 298. MAY BE CONVICTION OF MISDEMEANOR ON INDICTMENT FOR FELONY. At common law, for the reason that a defendant on trial for misdemeanor was entitled to certain privileges (*e. g.*, a special jury, a copy of the indictment, and counsel) which were not allowed to a defendant on trial for a felony, the rule was that a defendant could not be convicted of a misdemeanor on an indictment for a felony. Had such a conviction been permitted, then it would have been within the power of the prosecution

State v. Johnson, 30 N. J. L. (1 Vr.) 185. N. C.—State v. Perkins, 82 N. C. 681. OHIO—Stewart v. State, 5 Ohio 242. S. C.—State v. Gaffney, Rice 431. TEX.—Reynolds v. State, 11 Tex. 20. VT.—State v. Coy, 2 Aik. 181; State v. Burt, 25 Vt. (2 Deane) 373; State v. Reed, 40 Vt. 603. ENG.—R. v. Mitchell, 5 Cox C. C. 541, 2 Den. C. C. 468, 12 Eng. Law & Eq. 588; R. v. Owen, 20 Q. B. D. 829.

For other cases, see Kerr's Whart. Crim. Law, §§ 840, 1866.

Indictment for an assault with intent to commit murder in the first degree, by the Tennessee Act of 1832, ch. 22, this includes an indictment for an assault and battery; and upon failure of proof to warrant a conviction of felony, the defendant may be convicted of the misdemeanor.—State v. Bowling, 29 Tenn. (10 Humph.) 52.

2 Com. v. Kennedy, 13 Mass. 584; Com. v. Blaney, 133 Mass. 571.

3 State v. Schloss, 63 Mo. 361.

1 State v. Fielding, 32 Me. 585.

2 See, infra, chapter on "Pleas," division VI, last three sections subd. 2.

to deprive the defendant, in a case of misdemeanor, of these privileges, by indicting him for a felony in which the misdemeanor was inclosed. This, however, could not be tolerated, and hence rose the common law rule prohibiting a conviction of misdemeanor on an indictment for felony.[1] But when these privileges were allowed in felonies as well as misdemeanors, the reason for the rule failed; and the rule ceased to be regarded as peremptory.[2] In some jurisdictions in this country the rule has never been in force, the reason for it not existing;[3] in other jurisdictions the right to so convict is expressly given by statute.[4]

On an indictment for rape, the defendant may now be convicted of assault and battery,[5] or of adultery,[6] or, on the same charge, of incest where the indictment contains the proper averments;[7] or on an indictment for man-

1 See Dearsley's Crim. Proc. 67; London Law Times, Nov. 5, 1881, p. 11; R. v. Westbeer, Leech 14.

2 Com. v. Newall, 7 Mass. 245; Com. v. Roby, 29 Mass. (12 Pick.) 496, overruling Com. v. Cooper, 15 Mass. 345. See R. v. Bird, 2 Den. (N. Y.) 202, 217.

3 See Rogers v. People, 34 Mich. 345; infra, § 310.

4 See Com. v. Drum, 36 Mass. (19 Pick.) 479, and cases hereafter cited.

5 Ibid.

So in other states.—Prideville v. People, 42 Ill. 217; State v. Pennell, 56 Iowa 29, 8 N. W. 686; State v. Jay, 57 Iowa 164, 10 N. W. 343; Hall v. People, 47 Mich. 636, 11 N. W. 414.

6 Com. v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

No less adultery that it is rape, where the sexual intercourse is by a married man with an unmarried woman, or an unmarried man with a married woman. "The offenses are different in the nature of the wrong done, and in the facts which constitute them. Neither includes the other; and a defendant may be convicted of either without allegation or proof essential to the other. Carnal knowledge of a woman is the fact common to both; if it is with force against her will the crime is rape, and the fact that she is married is immaterial; if she is a married woman the crime is adultery, and the fact that it is by force is immaterial. That a man can not commit rape upon a married woman without also committing adultery, only shows that he commits both crimes by one act which includes all the elements of both."—Com. v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248, citing State v. Sanders, 30 Iowa 582; Morey v. Com., 108 Mass. 433.

7 Com. v. Goodhue, 43 Mass. (2 Met.) 193; People v. Rowle, 2 Mich. N. P. 209.

slaughter or murder there may be a conviction of assault and battery,[8] and on an indictment for murder the defendant may be convicted of an assault with intent to kill.[9]

In New York on an indictment for procuring an abortion of a quick child, which by statute is a felony, the prisoner may be convicted of the statutory misdemeanor of destroying a child not quick.[10]

Misdemeanor in felony: And we may now generally hold that it is not duplicity to inclose a misdemeanor in a felony.[11]

§ 299. —— BUT MINOR OFFENSE MUST BE ACCURATELY STATED. In every case, however, the minor offense, to sustain a conviction for its commission, must be accurately

See more fully Kerr's Whart. Crim. Law, § 2098.

8 KAN. — State v. O'Kane, 23 Kan. 244. MASS.—Com. v. Drum, 36 Mass. (19 Pick.) 479; Com. v. Griffin, 38 Mass. (21 Pick.) 523; Com. v. Hope, 39 Mass. (22 Pick.) 1, 7. MISS.—Scott v. State, 60 Miss. 268. NEB.—Denman v. State, 15 Neb. 138, 17 N. W. 347. TEX.—Green v. State, 8 Tex. App. 71; Peterson v. State, 12 Tex. App. 650.

See, also, Kerr's Whart. Crim. Law, § 677.

In such case, however, to sustain a conviction, "the assault must be included in the charge on the face of the indictment, and also be part of the very act" presented as a felony.—R. v. Birch, 1 Den. 185.

If we could conceive of a case of murder in which there was no assault (see R. v. Walkden, 1 Cox 282) then there could be no conviction in such a case of an assault. But, in point of fact, there can be no murder without an assault; and this even is the case with homicide by poison taken by the deceased in ignorance of its nature. See Kerr's Whart. Crim. Law, § 805.

9 People v. M'Donnell, 92 N. Y. 657.

10 People v. Jackson, 3 Hill (N. Y.) 92. See, infra, § 310.

11 Infra, § 310.

In Georgia, Hill v. State, 53 Ga. 125.

In Massachusetts, "feloniously" is made by statute unnecessary in all cases.—Stat. 1852, ch. 40, § 3.

In Pennsylvania there may be a conviction of attempt on indictment for complete offense.—Rev. Act. 1860, p. 442.

In Tennessee, Lacy v. State, 67 Tenn. (8 Baxt.) 401; Smith v. State, 70 Tenn. (2 Lea) 614.

In Virginia the practice is the same.—Code, 1866, ch. ccviii, § 27.

The general common-law rule on this point in the United States will be considered under another head. Infra, § 310.

stated.[1] Thus, on an indictment for rape, there can be no conviction for fornication unless there be an averment that the prosecutrix was not the defendant's wife.[2] So there can be no conviction of an assault on an indictment for murder unless the indictment avers an assault.[3] The minor offense, also, must be an ingredient of the major; if simply collateral to the major, not forming part of it, there can be no conviction of such minor offense.[4]

§ 300. NOT DUPLICITY TO COUPLE SUCCESSIVE STATUTORY PHASES. Where a statute, as has already been observed,[1] makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled they may be coupled in one count.[2] Thus, setting up a gaming-table, it has been said,

1 See, infra, chapter on "Contempt," div. IV.

2 Com. v. Murphy, 84 Mass. (2 Allen) 163.

In a leading English case, it was ruled that, in order to convict a prisoner of a felony, not a felony primarily charged in the indictment, it is necessary that the minor felony should be substantially included in the indictment. Thus, an indictment for burglary includes an indictment for housebreaking, and generally also for larceny, and the prisoner on this may be found guilty of one or other of these felonies. But in an indictment for burglary, and for breaking and entering a house and stealing, the prisoner can not be found guilty of breaking and entering a house with intent to steal.—R. v. Reid, 2 Den. C. C. 98, 1 Eng. Law & Eq. 599. See Speers v. Com., 17 Gratt. (Va.) 570.

3 Scott v. State, 60 Miss. 268. See State v. Ryan, 15 Ore. 572, 16 Pac. 417.

4 R. v. Watkins, 2 Moody 217.

1 Supra, § 207.

2 Supra, § 287; infra, chapter on "Verdict," div. III; Whart. Crim. Ev., §§ 134, 138. CONN.—Barnes v. State, 20 Conn. 232; State v. Teahan, 50 Conn. 92. GA.—Hoskins v. State, 11 Ga. 92. IOWA—State v. Myers, 10 Iowa 448; State v. Harris, 11 Iowa 414; State v. Brannon, 50 Iowa 372; State v. House, 55 Iowa 466, 8 N. W. 307. LA.—State v. Palmer, 32 La. Ann. 565. ME.—State v. Nelson, 29 Me. 329. MASS.—Com. v. Hall, 86 Mass. (4 Allen) 305; Com. v. Nichols, 92 Mass. (10 Allen) 199; Com. v. Dolan, 121 Mass. 374; Com. v. Ashton, 125 Mass. 384; Com. v. Atkins, 136 Mass. 160. MINN.—State v. Gray, 29 Minn. 142, 12 N. W. 455. MO.—Murphy v. State, 47 Mo. 274; State v. Fancher, 71 Mo. 460. N. Y.—People v. Casey, 72 N. Y. 393; Read v. People, 86 N. Y. 381. OHIO—State v. Conner, 30 Ohio St. 405; Watson v. State, 39 Ohio

may be a distinct offense; keeping a gaming-table and inducing others to bet upon it, may constitute a distinct offense; for either unconnected with the other an indictment will lie;[3] yet when both are perpetrated by the same person at the same time, they may be coupled in one count.[4] An indictment, also, for keeping and maintaining, at a place and time named, "a certain building, to-wit: a dwelling-house, used as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, the said building, so used as aforesaid, being then and there a common nuisance," may be sustained,[5] and so of several successive statutory phases of making, forging, and counterfeiting, of causing and procuring to be falsely made, forged and counterfeited, and of willingly aiding and assisting in the said false making, forging, and counterfeiting.[6] It is admissible, also, to charge that the defendant "administered, and caused to

St. 123. ORE.—State v. Carr, 6 Ore. 133; State v. Bergman, 6 Ore. 341. PA.—Com. v. Miller, 107 Pa. St. 276. R. I.—State v. Fowler, 13 R. I. 661; State v. Wood, 14 R. I. 151. S. C.—State v. Smalls, 11 S. C. 262. TENN.—Ferrell v. State, 70 Tenn. (2 Lea) 25; Clemons v. State, 72 Tenn. (4 Lea) 23. TEX.—Thompson v. State, 30 Tex. 356; Copping v. State, 7 Tex. App. 59. VT.—State v. Matthews, 42 Vt. 542; Sprouse v. Com., 81 Vt. 374. VA.—Leath v. Com., 32 Gratt. 873. FED.—United States v. Hull, 4 McCr. C. C. 273, 14 Fed. 324; United States v. Ferro, 18 Fed. 901. ENG.—R. v. Jennings, 1 Cox C. C. 88; R. v. Oliver, 8 Cox C. C. 384, Bell C. C. 287; R. v. Yeadon, 9 Cox C. C. 91; R. v. Bowen, 1 Den. C. C. 21.

3 See State v. Fletcher, 18 Mo. 425.

4 Hinkle v. Com., 34 Ky. (4 Dana) 518.

5 State v. Adam, 31 La. Ann. 717; Com. v. Ballou, 124 Mass. 26; State v. Carver, 2 R. I. 285.

So as to advertising, exposing to sale, and selling lottery tickets.—State v. McWilliams, 7 Mo. App. 99; Read v. People, 86 N. Y. 381; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

6 Supra, § 207; Kerr's Whart. Crim. Law, § 932. CAL.—People v. Tomlinson, 35 Cal. 503. GA.—Hoskins v. State, 11 Ga. 92; Wingard v. State, 13 Ga. 396. MASS.—Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. MO.—State v. McCollum, 44 Mo. 343. MONT.—State v. Malish, 15 Mont. 509, 39 Pac. 739. N. H.—State v. Hastings, 53 N. H. 452. N. J.—State v Price, 11 N J. L. (6 Halst.) 203. OHIO—Mackey v. State, 3 Ohio St. 363.

be administered," poison, etc.[7] "Obstruct or resist" process may be joined, so as to read "obstruct and resist" in the indictment.[8] It is also not duplicity to charge that the defendant did "offer to vend and to sell, and to cause to be furnished to and for one A. C., a certain paper, being a lottery ticket," etc.;[9] or that he did "torment, maim, beat, and wound" an animal.[10] And in an indictment on the Massachusetts Rev. Stats. c. 58, § 2, by which the setting up or promoting of any of the exhibitions therein mentioned, without license therefor, is prohibited, it is not duplicity to allege that the defendant "did set up and promote" such an exhibition.[11] In such cases the offenses are divisible, and a verdict may be had for either.[12]

Where a statute requires a license from A. or B., the indictment following the statute must negative a license from *either* A. or B.[13]

S. C.—Jones v. State, 1 McMull. 236, 36 Am. Dec. 257. VT.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201. VA.—Angle v. Com., 2 Va. Cas. 231; Rasnick v. Com., 2 Va. Cas. 356. FED.—United States v. Armstrong, 5 Phil. R. 273, Fed. Cas. No. 14468. ENG.—R. v. North, 6 Dow. & Ry. 143, 16 Eng. C. L. 258.

As taking a narrower view, see State v. McCormack, 56 Iowa 585, 9 N. W. 916; State v. Haven, 59 Vt. 399, 9 Atl. 841.

Conjunctive allegation necessary.—People v. Tomlinson, 35 Cal. 503; State v. Hill, 73 N. J. L. 77, 62 Atl. 936. But see Koetting v. State, 88 Wis. 502, 60 N. W. 822.

7 Ben v. State, 22 Ala. 9, 58 Am. Dec. 234.

8 Slicker v. State, 8 Eng. (13 Ark.) 397; State v. Locklear, 44 N. C. (1 Busbee) 205; supra, § 278.

9 Read v. People, 86 N. Y. 381. See Com. v. Atkins, 136 Mass. 160.

10 State v. Haskell, 76 Me. 399.

11 Com. v. Twitchell, 58 Mass. (4 Cush.) 74.

12 See Kerr's Whart. Crim. Law, § 932; Whart. Crim. Ev., § 154. See, however, State v. Bach, 25 Mo. App. 554.

A neglect by supervisors of roads both to open and repair roads may be charged in one count of an indictment against them.—Edge v. Com., 7 Pa. St. (7 Barr) 275.

Under a statute making it an offense to "send or convey" an indecent letter, it is duplicity to charge "send and convey," the "sending" and "conveying" having different meanings.—Larison v. State, 49 N. J. L. 256, 259, 60 Am. Rep. 606, 9 Atl. 700, sed quære.

13 Supra, § 290.

§ 301. Several articles can be joined in larceny. In all cases of larceny, and like offenses, several articles may be joined in a count, even though the articles belong to different owners,[1] and the proof of the taking of either of which will sustain the indictment,[2] though where a variety of articles are stolen at the same time and place, and from the same individual, it has been held that the stealing of such articles at the same time and place is only one offense, and must be so charged.[3] It has been even ruled that the same count may join the larceny of several distinct articles, belonging to different owners, where the time and the place of the taking of each are the same.[4] This, however, has been properly denied;[5] and when

1 IND.—Furnace v. State, 153 Ind. 93, 54 N. E. 441. IOWA—State v. Congrove, 109 Iowa 66, 80 N. W. 227. MO.—State v. Morphin, 37 Mo. 373. ORE.—State v. Clark, 46 Ore. 140, 80 Pac. 101. TEX.—Wilson v. State, 45 Tex. 76, 23 Am. Rep. 602. W. VA.—Moundsville v. Fountain, 27 W. Va. 182.

Property of different persons located in different places, the rule is different, though the thefts committed in rapid succession in accordance with premeditated design.—State v. Maggard, 160 Mo. 469, 83 Am. St. Rep. 483, 61 S. W. 184. See State v. Nash, 86 N. C. 250, 41 Am. Rep. 472.

2 Supra, § 260; Whart. Crim. Ev., § 132. KAN.—State v. McAnulty, 26 Kan. 533. KY.—Leslie v. Com., 82 Ky. 250. MASS.—Com. v. Williams, 56 Mass. (2 Cush.) 583; Com. v. Eastman, 68 Mass. (2 Gray) 76; Com. v. O'Connell, 94 Mass. (12 Allen) 451. MO.—Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; State v. Daniels, 32 Mo. 558. N. C.—State v. Bishop, 98 N. C. 773, 4 S. E. 357. OHIO—State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253. S. C.—State v. Johnson, 3 Hill 1; State v. Evans, 23 S. C. 209. TENN.—State v. Williams, 29 Tenn. (10 Humph.) 101. VT.—State v. Cameron, 40 Vt. 555.

Value in aggregate may be charged.—State v. O'Connell, 144 Mo. 387, 46 S. W. 175. See State v. Mjelde, 29 Mont. 490, 70 Pac. 87.

In Maine it has been ruled that a count charging a larceny of bank bills each of a denomination and value stated, and of a pocket-book and knife, "of the goods, chattels, and money of J. S. K.," etc., contains a sufficient description of the property, and is not bad for duplicity.—Stevens v. State, 62 Me. 284.

3 Ibid.

4 See Hoiles v. United States, 3 McAr. (D. C.) 370, 36 Am. Rep. 106; Smith v. State, 63 Ga. 168; Dodd v. State, 10 Tex. App. 370.

5 Com. v. Andrews, 2 Mass. 409; Casey v. People, 72 N. Y. 393; State v. Thurston, 2 McMull. (S. C.) 382.

averred to be at distinct times, the count is unquestionably double.[6]

§ 302. —— And so of cumulative overt acts and intents and agencies. Laying several overt acts in a count for high treason is not duplicity,[1] because the charge consists of the compassing, etc., and the overt acts are merely evidences of it; and the same as to conspiracy. A count in an indictment, charging one endeavor or conspiracy to procure the commission of two offenses, is not bad for duplicity, because the endeavor is the offense charged.[2] The same rule exists where assaults and other offenses with several intents are charged.[3] It is so, as we have seen, where forging a note and forging an indorsement are joined.[4] It is admissible, also, to state cumulatively several weapons by which a wound has been inflicted;[5] and those not proved may be rejected as surplusage.[6]

Various means used in committing the offense may be joined without duplicity.[7]

See Kerr's Whart. Crim. Law, §§ 1169, 1187.

6 State v. Newton, 42 Vt. 537.

1 Kelyng 8.

2 People v. Milne, 60 Cal. 71; People v. Hall, 94 Cal. 597; R. v. Fuller, 1 Bos. & P. 181, 126 Eng. Repr. 847; R. v. Bykerdike, 1 M. & Rob. 179, 2 Leach (3d ed.) 916.

3 CAL.—People v. Milne, 60 Cal. 71. MASS.—Com. v. McPike, 57 Mass. (3 Cush.) 181, 50 Am. Dec. 727. MINN.—State v. Dineen, 10 Minn. 407. N. H.—State v. Moore, 12 N. H. 42. N. Y.—People v. Curling, 1 John. 320. ENG.—R. v. Davis, 1 Car. & P. 306, 12 Eng. C. L. 183; R. v. Smith, 4 Car. & P. 569, 19 Eng. C. L. 653; R. v. Batt, 6 Car. & P. 329, 25 Eng. C. L. 458; R. v. Gillow, 1 Moody C. C. 85; R. v. Hill, 2 Moody C. C. 30; R. v. Cox, R. & R. 362; R. v. Dawson, 20 Law J. Rep. (N. S.) M. C. 102, 15 Jur. 159, 1 Eng. Law & Eq. 589.

See Kerr's Whart. Crim. Law, §§ 155, 156; Whart. Crim. Ev., § 135.

4 Sprouse v. Com., 81 Va. 374.

5 GA.—Williams v. State, 59 Ga. 401. N. Y.—People v. Casey, 72 N. Y. 398. OHIO—State v. Jackson, 39 Ohio St. 37. TEX.—Gonzales v. State, 5 Tex. App. 584.

See, also, cases cited supra, § 261.

6 State v. Blan, 69 Mo. 317; United States v. Patty, 9 Biss. C. C. 429, 2 Fed. 664; supra, §§ 200, 261.

7 Com. v. Brown, 80 Mass. (14 Gray) 419; State v. McDonald, 37 Mo. 13; People v. Casey, 72 N. Y. 393. See Whart. Crim. Ev., §§ 134, 138.

§ 303. —— AND SO OF DOUBLE BATTERIES, LIBELS, OR SALES. A man may be indicted for the battery of two or more persons in the same count,[1] or for libel upon two or more persons, where the publication is one single act;[2] or for selling liquor to two or more persons,[3] or in several forms,[4] without rendering the count bad for duplicity. And it is said that burning several houses by one fire can be joined.[5]

Whether the killing of two persons by one act is one offense is hereafter discussed.[6]

§ 304. DUPLICITY IS USUALLY CURED BY VERDICT. Duplicity, in criminal cases, may be objected to by special demurrer,[1] perhaps by general demurrer; or the court,

1 MASS.—Com. v. O'Brien, 107 Mass. 208. R. I.—Kenney v. State, 5 R. I. 385. TENN.—Fowler v. State, 50 Tenn. (3 Heisk.) 154. ENG.—R. v. Benfield, 2 Burr. 983, 97 Eng. Repr. 665; R. v. Giddins, Car. & M. 634, 41 Eng. C. L. 344; 2 Str. 890; 2 Ld. Raym. 1572.

Contra: State v. McClintock, 8 Iowa 203.

And so of a double shooting or stabbing.—Shaw v. State, 18 Ala. 547; Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; R. v. Scott, 4 Best & S. 368, 116 Eng. C. L. 366.

2 State v. Lea, 41 Tenn. (1 Coldw.) 177; State v. Womack, 47 Tenn. (7 Coldw.) 508; State v. Atchison, 71 Tenn. (3 Lea) 729, 31 Am. Rep. 663; R. v. Jenour, 7 Mod. 400; R. v. Benfield, 2 Burr. 983, 97 Eng. Repr. 665.

So where two horses are overdriven in one team.—People v. Tindale, 10 Abb. Pr. N. S. (N. Y.) 374.

3 State v. Anderson, 3 Rich. (S. C.) 172; State v. Bielby, 21 Wis. 204; Kerr's Whart. Crim. Law, § 1814.

For a cognate case, Walter v. Com., 6 Weekly Notes Cases (Pa.) 389.

An indictment for selling spirituous liquors without a license charged that the defendant, at his storehouse and dwelling-house in Pennsboro, in said county, did sell, etc.; and it was held on motion to quash, that it was not intended to charge two distinct sales at different places, but rather to describe the store and dwelling-house as constituting one building, and one and the same place; and, therefore, there were not two distinct offenses charged in the same count.—Conley v. State, 5 W. Va. 522.

Compare: Kerr's Whart. Crim. Law, § 1814.

4 Osgood v. People, 39 N. Y. 449.

5 Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464.

6 Infra, chapter on "Pleas," div. VI, subd. 3.

1 People v. Quvise, 56 Cal. 396; People v. DeCoursey, 61 Cal. 134; People v. Clement, 4 Cal. Unrep.

in general, upon application, may quash the indictment; but the better view is that it can not be made the subject of a motion in arrest of judgment,[2] or of a writ of error,[3] although it seems to be otherwise when there is a confusion of averments;[4] and it is in any view cured by a verdict of guilty[5] as to one of the offenses, and not guilty as to the other,[6] and by a nolle prosequi as to one member of the count.[7] But when two repugnant offenses, requiring different punishments, are introduced in one count, judgment may be arrested.[8]

493, 35 Pac. 1022; State v. Goodwin, 33 Kan. 538, 6 Pac. 899; Ellis v. Com., 78 Ky. 130.

2 Common-law rule was that motion in arrest of judgment was a matter of right, and might be made at any time after conviction and before sentence. The California Penal Code makes but one restriction. If the defendant fail to demur to the information he waives his right to move in arrest of judgment upon any of the grounds mentioned in § 1004 of California Penal Code (see Cal. Pen. Code, § 1185). "Like a complaint in a civil case, which states no cause of action, a fatal defect in an indictment may be taken advantage of at any stage of the proceedings, unless the right to do so is restricted by the Penal Code. The Penal Code, as well as the common law, permits this motion after a plea of guilty, and even authorizes the court to arrest the judgment on its own view of any of the defects specified in the code, without motion."—People v. Clement, 4 Cal. Unrep. 493, 35 Pac. 1022.

3 CAL.—People v. Shotwell, 27 Cal. 394. IND.—Simmons v. State, 25 Ind. 331. MASS.—Com. v. Tuck, 37 Mass. (20 Pick.) 356. S. C.—State v. Johnson, 3 Hill 1. TENN.—State v. Brown, 27 Tenn. (8 Humph.) 89; Scruggs v. State, 66 Tenn. (7 Baxt.) 38; Forrest v. State, 81 Tenn. (13 Lea) 103. TEX.—Tucker v. State, 6 Tex. App. 251. FED.—United States v. Bayaud, 21 Blatchf. C. C. 217, 287, 16 Fed. 376, 23 Fed. 721. ENG.—Nash v. R., 9 Cox C. C. 424, 4 B. & S. 935.

4 KY.—Com. v. Powell, 71 Ky. (8 Bush) 7. N. H.—State v. Fowler, 28 N. H. 184. S. C.—State v. Howe, 1 Rich. 260. WASH.—Haywood v. Territory, 2 Wash. Ter. 180, 2 Pac. 189. ENG.—R. v. Cook, 1 R. & R. 176.

See, also, cases cited supra, § 292.

5 As to curing by verdict, see, infra, chapter on "Pleas," div. V, subd. 2.

6 State v. Miller, 24 Conn. 522; State v. Merrill, 44 N. H. 624; R. v. Guthrie, L. R. 1 C. C. 241.

7 State v. Buck, 59 Iowa 382, 13 N. W. 342; State v. Merrill, 44 N. H. 624.

8 Cases cited infra, § 305; Com. v. Holmes, 119 Mass. 198, and see State v. Nelson, 8 N. H. 163, modified by State v. Snyder, 50 N. H. 150.

XIII. Repugnancy.

§ 305. WHERE MATERIAL AVERMENTS ARE REPUGNANT, INDICTMENT IS BAD. When one material averment in an indictment is contradictory to another the whole is bad;[1] but repugnancy in an immaterial part of the indictment

1 2 Hawk., ch. 25, § 62. IND.—Keller v. State, 51 Ind. 111; Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767. MASS.—Com. v. Lawless, 101 Mass. 32. MO.—State v. Lawrence, 178 Mo. 350, 77 S. W. 497. VT.—State v. Haven, 59 Vt. 399, 9 Atl. 841. ENG.—R. v. Harris, 1 Den. C. C. 461, T. & M. 177.

Charging act as officer of nonexistent office, bad for repugnance.—Munzon v. State, 40 Tex. Cr. Rep. 457, 50 S. W. 949.

Charging shooting and cutting with revolver and some other instrument, not repugnant.—Sutherlin v. State, 148 Ind. 695, 48 N. E. 246.

Commission of offense at B. and "at said W." being alleged, and W. not having been before mentioned, indictment bad for repugnancy.—Com. v. Pray, 30 Mass. (13 Pick.) 359.

Copulative "and" uniting repugnant clauses renders indictment bad.—State v. Bracken, 152 Ind. 565, 53 N. E. 838; Taylor v. State, 74 Miss. 544, 21 So. 129. See State v. McCollum, 44 Mo. 343.

Full name and initials of accused in different parts of indictment does not constitute repugnance, even though in the latter connection it is averred that the Christian name is unknown.—Harrison v. State, 144 Ala. 20, 40 So. 568.

Impossible date charged, objection can not be taken after verdict.—Conner v. State, 25 Ga. 515, 71 Am. Dec. 184.

July 1892 and July 1902 are repugnant.—Hickman v. State, 44 Tex. Cr. Rep. 533, 72 S. W. 587.

"B." and "B. Sr." used interchangeably does not render indictment repugnant.—State v. Simpson, 166 Ind. 211, 76 N. E. 544, 1005.

La Pendergrass and Mr. Pendergrass does not render indictment repugnant.—Read v. State, 63 Ark. 618, 40 S. W. 85.

M. E. Smith Treasurer of the City, naming the municipality, and the instrument being "N. E. Smith, Treasurer," not repugnant.—State v. Kroeger, 47 Mo. 552.

Not bad for repugnancy where there is sufficient matter alleged to indicate the crime and the person charged therewith.—Selby v. State, 161 Ind. 667, 69 N. E. 463.

Repugnancy has been held to exist where an indictment charged the offense to have been committed in November, 1801, and in the twenty-fifth year of American independence (State v. Hendricks, 1 N. C. 532, Com. & N. Conf. Rep., § 639); charging that on the 4th day of April, 1873, being Sunday, kept open a saloon in violation of statute, the 4th being Friday (Werner v. State, 51 Ga. 426; Hoover v. State, 56 Md. 584); alleging offense to have been committed on different days (State v. Hendricks, 1 N. C. 532, Com. & N.

does not render it bad,[2] such as an impossible date in an immaterial part of the indictment, which may be corrected at any time when the date does not enter into the essence of the offense charged,[3] or it may be rejected as surplusage.[4] Thus, to adopt one of the old illustrations, if an indictment charge the defendant with having forged a certain writing, whereby one person was bound to another, the whole will be vicious, for it is impossible that any one can be bound by a forgery.[5]

A relative pronoun, also, referring with equal uncertainty to two antecedents will make the proceedings bad in arrest of judgment. But, as is elsewhere seen, every fact or circumstance laid in an indictment, which is not a necessary ingredient in the offense, may be rejected as surplusage.[6]

Conf. Rep., § 639); averring an impossible date (Markely v. State, 10 Mo. 291. **Contra:** McMath v. State, 55 Ga. 303; Jones v. State, 55 Ga. 625); fixing time of offense thirteen years before the state became such, and forty years before the enactment of the statute creating the offense (State v. O'Donnell, 81 Me. 272, 17 Atl. 66), or 800 years before date of indictment (Serpentine v. State, 2 Miss. (1 How.) 256).

2 **"Crushing, fracturing and breaking the skull,"** in an indictment charging forcibly striking and beating upon the body a named person, is not bad for repugnance, because it is not necessary to describe the part of the body upon which the injury inflicted.—State v. Ferguson, 162 Mo. 668, 63 S. W. 101.

3 State v. Pierre, 39 La. Ann. 915, 3 So. 60.

4 Com. v. Pray, 30 Mass. (13 Pick.) 359.

5 3 Mod. 104; 2 Show. 460. See Mills v. Com., 13 Pa. St. 634.

6 Supra, §§ 200, 302, 303; Whart. Crim. Ev., §§ 138 et seq.; 1 Chitty on Pleading 334, 335; State v. Cassety, 1 Rich. (S. C.) 91; State v. Smolls, 11 S. C. 262; R. v. Craddock, 2 Den. C. C. 31, T. & M. 361.

A general verdict of guilty on an indictment for procuring a miscarriage, in which one count averred quickness and the other merely pregnancy, and one count averred the abortion of the mother and the other of the child, the Supreme Court refused to reverse on the ground of repugnancy.—Mills v. Com., 13 Pa. St. 634.

An indictment charging an assault with three weapons—a pair of tongs, a hammer, and an axe-handle—is not **void** for repugnancy.—State v. McDonald, 67 Mo. 13; supra, §§ 200, 261.

Disjunctive statements inadmissible has been elsewhere seen.[7]

Where counts are repugnant a general verdict can not be sustained;[8] though it is otherwise when they represent varying phases or stages of the same offense.[9]

XIV. Technical Averments.

§ 306. IN TREASON, "TRAITOROUSLY" MUST BE USED. In indictments for treason, the offense must be laid to have been committed traitorously; but if the treason itself be laid to have been so committed, whether it consists in levying war against the supreme authority or otherwise, it is not necessary to allege every overt act to have been traitorously committed.[1]

§ 307. "MALICE AFORETHOUGHT" ESSENTIAL TO MURDER. In an indictment for murder, it must be alleged that the offense was committed of the defendant's malice aforethought, words which can not be supplied by the aid of any other; and if this averment be omitted, or if the defendant be merely charged with killing and slaying the deceased, the offense will amount to no more than manslaughter.[1] But the want of these words in an indictment for an assault with intent to kill will not be fatal on arrest of judgment.[2]

7 Supra, §§ 206, 278.

Where one count charges the offense to have been committed in one county and another count charges it in another, the general rule is, that the counts are repugnant, and the indictment will be quashed on motion, or the prosecutor be compelled to elect which he will proceed on.—State v. Johnson, 50 N. C. (5 Jones) 221.

8 Infra, chapter on "Verdict," div. I.

9 Ibid.; infra, §§ 335 et seq.; State v. Mallon, 75 Mo. 355.

1 Cranbourn's Case, 4 St. Tr. 701; Salk. 633; East P. C. 116.

1 1 Hale 450, 466; East P. C. 345; Kerr's Whart. Crim. Law, §§ 650 et seq.; McElroy v. State, 14 Tex. App. 235.

A killing by misadventure, or chance medley, is described to have been done "casually and by misfortune, and against the will of the defendant." See State v. Rabon, 4 Rich. (S. C.) 260.

2 Cross v. State, 55 Wis. 261, 262, 12 N. W. 425. See Kerr's Whart. Crim. Law, § 843.

§ 308. "STRUCK" USUALLY ESSENTIAL TO WOUND. Where the death arises from any wounding, beating, or bruising, it has been said that the word "struck" is essential, and that the wound or bruise must be alleged to have been mortal.[1]

§ 309. "FELONIOUSLY" ESSENTIAL TO FELONY. The word "feloniously" is at common law essential to all indictments for felony, whether at common law or statutory,[1] although the reason for the term being purely arbitrary,[2] it is no longer necessary unless prescribed by statute, or unless describing a common law or statutory felony.[3] But in all common law felonies it is, at common law, essential. Thus, in an indictment for murder, it is at common law requisite to state as a conclusion from the facts previously averred that the said defendant, him, the said C. D., in manner and form aforesaid, feloniously did kill and murder.[4]

1 See Kerr's Whart. Crim. Law, §§ 651 et seq.; 2 Hale 184; 2 Inst. 319; 2 Hawk., ch. 23, § 82; Cro. Jac. 635; 5 Co. 122; Lad's Case, 1 Leach 112.

1 ARK.—Edwards v. State, 25 Ark. 444. DEL.—State v. Brister, 1 Houst. 150. IND.—Scudder v. State, 62 Ind. 13. MISS.—Bowler v. State, 41 Miss. 570; Wile v. State, 60 Miss. 260. MO.—State v. Murdock, 9 Mo. 739; State v. Gilbert, 24 Mo. 380. N. C.—State v. Roper, 88 N. C. 656. PA.—Mears v. Com., 2 Grant 385; Com. v. Weidenhold, 112 Pa. St. 684; 4 Atl. 345. ENG.—R. v. Gray, L. & C. 365.

It has been held, however, that when a statute creating a felony does not use the term "feloniously," the latter term may be omitted in the indictment.—People v. Olivera, 7 Cal. 403; Jane v. Com., 60 Ky. (3 Metc.) 18.

The word "feloniously" may be sometimes dispensed with by statute, either expressly or by implication.—Butler v. State, 22 Ala. 43; Peek v. State, 21 Tenn. (2 Humph.) 78.

2 The term was originally introduced in order to exclude the offender from his clergy (R. v. Clerk, 1 Salk. 377, 91 Eng. Repr. 328), and is not essential to an indictment for manslaughter. See, as to gradual disappearance of distinction, Kerr's Whart. Crim. Law, § 26.

3 See Steph. Cr. Law, §§ 56, 57 et seq.; State v. Felch, 58 N. H. 1.

4 Kerr's Whart. Crim. Law, §§ 651 et seq.; 1 Hale 450, 466; 4 Bl. 307; Yel. 205; Cain v. State, 18 Tex. 387.

"Feloniously" is not essential to an assault and battery with intent to kill, it has been held (Stout v. Com., 11 Serg. & R. (Pa.) 177;

§ 310. —— WORD "FELONIOUSLY" CAN BE REJECTED AS SURPLUSAGE. We have already seen that matter which is merely surplusage is not required to be stated in an indictment.[1] Mere surplusage does not vitiate an indictment,[2] and where it occurs, if the offense is otherwise sufficiently charged,[3] may be stricken out[4] or disre-

State v. Scott, 24 Vt. 27), though elsewhere the omission has been held fatal. See Curtis v. People, 1 Ill. (1 Breese) 199; Scudder v. State, 62 Ind. 13; Mears v. Com., 2 Grant (Pa.) 385, and see Kerr's Whart. Crim. Law, § 843.

In all cases of mayhem, the words feloniously and did maim are requisite.—1 Inst. 118; 2 Hawk., ch. 23, §§ 15, 16, etc.; 2 Hawk., ch. 25, § 55; State v. Brown, 60 Mo. 141; Canada v. Com., 22 Gratt. (Va.) 899; Com. v. Reed, 3 Am. L. Jour. 140; Kerr's Whart. Crim. Law, § 772.

—In Massachusetts it is said that the offense is not a felony.—Com. v. Newell, 7 Mass. 244.

In Georgia, feloniously is said to be necessary in case of castration, only.—Adams v. Barrett, 5 Ga. 404.

1 Supra, § 200.

2 ALA.—Lodano v. State, 25 Ala. 64. CAL.—People v. Flores, 64 Cal. 426, 1 Pac. 498. N. Y.—Dawson v. People, 25 N. Y. 403; Crichton v. People, 40 N. Y. (1 Keyes) 341, 1 Abb. App. Dec. 467, 1 Cow. Cr. Rep. 454, 6 Park. Cr. Rep. 366; Dolan v. People, 6 Hun 503, affirmed 64 N. Y. 485; La Beau v. People, 33 How. Pr. 68, 6 Park. Cr. Rep. 385; Mackesey v. People, 6 Park. Cr. Rep. 117. W. VA.—State v. Howes, 26 W. Va. 110.

3 CONN.—State v. Corrigan, 24 Conn. 286. IND.—Selby v. State, 161 Ind. 667, 69 N. E. 463. MASS.—Com. v. Wright, 166 Mass. 174, 44 N. E. 129. MO.—State v. Meyers, 99 Mo. 107, 12 S. W. 516; City of St. Louis v. Lee, 8 Mo. App. 599. NEB.—State v. Kendall, 38 Neb. 817, 57 N. W. 525; Blodgett v. State, 50 Neb. 121, 69 N. W. 751. N. H.—State v. Bailey, 31 N. H. 521; State v. Webster, 39 N. H. 96. N. C.—State v. Piner, 141 N. C. 760, 53 S. E. 305. TENN.—State v. City of Bellville, 66 Tenn. (7 Baxt.) 548.

4 ALA.—Lodano v. State, 25 Ala. 64. ARK.—Downs v. State, 60 Ark. 521, 31 S. W. 149 ("upon" used a second time in indictment for rape). ILL.—Snell v. State, 29 Ill. App. 470. IND.—Weaver v. State, 8 Ind. 410 (indictment for misdemeanor averring accused a "person of color"); Botkins v. State, 36 Ind. App. 179, 75 N. E. 298 ("suffer, allow and permit," where statute said "permit"); State v. Dawson, 38 Ind. App. 483, 78 N. E. 352. KY.—Travis v. Com., 96 Ky. 77, 27 S. W. 863 ("of Kentucky" in the phrase "lawful money of the United States of Kentucky"). LA.—State v. Jackson, 106 La. 189, 30 So. 309. ME.—State v. Hatch, 94 Me. 58, 46 Atl. 796. MD.—State v. Mercer, 101 Md. 535, 61 Atl. 220. MASS.—Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Hope, 39 Mass. (22 Pick.) 1; Com. v. Squires, 42 Mass. (1 Metc.) 258; Com. v. Penniman, 49 Mass. (8 Metc.) 519; Eastman v.

garded.[5] Hence, if in an indictment an act be charged to have been done with a felonious intent to commit a crime, and it appears upon the face of the indictment that the crime, though perpetrated, would not have amounted to a felony, the word felonious, being repugnant to the legal import of the offense charged, may be rejected as surplusage.[6]

Com., 70 Mass. (4 Gray) 416; Com. v. Murphy, 65 Mass. (11 Cush.) 472; Com. v. Keefe, 73 Mass. (7 Gray) 332; Com. v. Farren, 91 Mass. (9 Allen) 489. MO.—State v. Edwards, 19 Mo. 674 ("with intent" rejected as surplusage); State v. Leonard, 22 Mo. 449; State v. Inks, 135 Mo. 678, 37 S. W. 942; State v. McCoy, 12 Mo. App. 589. NEB.—State v. Kendall, 38 Neb. 817, 57 N. W. 525; Hurlburt v. State, 52 Neb. 428, 72 N. W. 471. NEV.—State v. Johnson, 9 Nev. 175 (kill "and murder"). N. H.—State v. Bailey, 31 N. H. (11 Fost.) 521; State v. Webster, 39 N. H. 96. N. J.—State v. Cannon, 72 N. J. L. 46, 60 Atl. 177. OHIO—Turner v. State, 1 Ohio St. 422. ORE.—State v. Lee Ping Bow, 10 Ore. 27 (stealing from "and on" the person). PA.—Com. v. Goldsmith, 12 Phila. 632, 35 Leg. Int. 420 (as "and divers other persons," "and divers other goods"). S. C.—State v. Cassety, 1 Rich. L. 90 ("and divers other persons"); State v. Jeffcoat, 54 S. C. 196, 32 S. E. 298. TEX.—Rivers v. State, 10 Tex. App. 177 ("him the said"); Segars v. State, (Tex. Cr. Rep.) 51 S. W. 398; Clark v. State, 41 Tex. Cr. Rep. 641, 56 S. W. 621; Rocha v. State, 43 Tex. Cr. Rep. 169, 63 S. W. 1018 (kill "and murder"). VA.—Laziere v. Com., 10 Gratt. 78 ("said" 14th, the 14th not before mentioned).

After verdict may be rejected.—United States v. Larkin, 4 Cr. C. C. 617, Fed. Cas. No. 15561.

Continuando clause may be rejected as surplusage, where the offense charged is not a continuing one, and the offense is otherwise sufficiently charged.—Eggart v. State, 40 Fla. 527, 25 So. 144.

Carelessly inserted words rendering indictment for perjury senseless may be rejected.—Com. v. Wright, 166 Mass. 174, 44 N. E. 129.

Misspelled word in surplusage does not affect indictment.—State v. Hornsby, 8 Robt. (La.) 554, 41 Am. Dec. 305.

As to misspelled words and clerical errors generally, see, post, § 322.

Surplusage connected with the offense charged may not be stricken out or disregarded.—State v. Samuels, 144 Mo. 68, 45 S. W. 1088.

[5] State v. Samuels, 144 Mo. 68, 45 S. W. 1088; State v. Ameker, 73 S. C. 330, 53 S. E. 484.

[6] Whart. Crim. Ev., § 148; 2 East P. C. 1028; Cald. 397. D. C.—Davis v. United States, 16 App. D. C. 442. IND.—State v. Sparks, 78 Ind. 166. MASS.—Com. v. Philpot, 130 Mass. 59. N. Y.—People v. Jackson, 3 Hill 92; People v. White, 22 Wend.

Where a count on its face is for a complete felony, however, it has been doubted whether a conviction can be had for the constituent misdemeanor. In England, the rule at common law was that such a conviction could not be had, the reason being, that if a misdemeanor be tried under an indictment for a felony, the defendant loses his right to a special jury and a copy of the bill of indictment.[7] In this contry, though the reason fails, the principle that under an indictment for a felony there can, at common law, be no conviction for a misdemeanor, has been followed in several of the states, among others Massachusetts,[8] in Indiana,[9] in Tennessee,[10] in Maryland,[11] and in Louisiana.[12] In New York,[13] Pennsylvania,[14]

175; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340. OHIO—Hess v. State, 5 Ohio 1. PA.—Com. v. Gable, 7 Serg. & R. 423; Hackett v. Com., 15 Pa. St. 95; Staeger v. Com., 103 Pa. St. 469.

Contra: Starkie's C. P. 169; n. r. DEL.—State v. Darrah, 1 Houst. 112. LA.—State v. Flint, 33 La. Ann. 1238. MD.—Black v. State, 2 Md. 376. N. H.—State v. Fletch, 58 N. H. 1. N. C.—State v. Edwards, 90 N. C. 710.

See, also, supra, § 298.

And so of "knowingly."—Com. v. Squire, 42 Mass. (1 Metc.) 258; Com. v. Farren, 91 Mass. (9 Allen) 489.

7 3 Salk. 193; 2 Hawk., ch. 47, § 6; 1 Chitty C. L. 251, 639; R. v. Gisson, 2 Car. & K. 781, 61 Eng. C. L. 779; R. v. Walker, 6 Car. & P. 657, 25 Eng. C. L. 624; R. v. Reid, 2 Den. C. C. 88; 2 Eng. Law & Eq. 473; R. v. Cross, 1 Ld. Raym. 711, 91 Eng. Repr. 1374; R. v. Woodhall, 12 Cox C. C. 240.

See, supra, §§ 286, 287.

Now, however, the statute of 1 Vict., ch. 85, § 11 (Lord Denman's Act) enables conviction to be had for a constituent misdemeanor.

8 Com. v. Newell, 7 Mass. 245.

This has been corrected by statute.—Com. v. Drum, 36 Mass. (19 Pick.) 479; Com. v. Scannel, 65 Mass. (11 Cush.) 547. See, supra, § 298.

9 State v. Kennedy, 7 Blackf. (Ind.) 233; Wright v. State, 5 Ind. 527.

10 State v. Valentine, 14 Tenn. (6 Yerg.) 533.

11 Black v. State, 2 Md. 376; affirmed in Barber v. State, 50 Md. 161.

Though see Burke v. State, 2 Har. & J. 426; State v. Sutton, 4 Gill 494.

See, also, supra, § 296.

12 State v. Flint, 33 La. Ann. 1238.

13 Lohman v. People, 1 N. Y. 379, 39 Am. Dec. 340; People v. Jackson, 3 Hill (N. Y.) 92; People v. White, 22 Wend. (N. Y.) 175. See, supra, § 298.

14 Hunter v. Com., 79 Pa. St. 503, 21 Am. Rep. 83. See Com. v. Gable, 7 Serg. & R. (Pa.) 433, and Kerr's Whart. Crim. Law, § 675.

Vermont,[15] New Jersey,[16] Ohio,[17] North Carolina,[18] South Carolina,[19] Michigan,[20] and Arkansas,[21] it has been held that the English reason ceasing, the rule itself ceases. In most States this latter position is now established by statute, if not by common law.[22]

§ 311. —— In such case conviction may be had of attempt. Attempts, by the statutes of England and most of the United States, are made substantive offenses, even where they do not exist as such at common law. And by the same statutes, the jury in most instances—even in indictments for felony—may convict of the attempt.[1]

On an indictment triable exclusively in the Oyer and Terminer, in which the defendant can not be examined as a witness, he can not be convicted of a misdemeanor, in which he could be examined as a witness. See Com. v. Harper, 14 Weekly Notes, Cas. (Pa.) 10.

15 State v. Coy, 2 Aiken (Vt.) 181; State v. Wheeler, 3 Vt. 244, 23 Am. Dec. 212; State v. Scott, 24 Vt. 129.

16 State v. Johnson, 30 N. J. L. (1 Vr.) 185.

17 State v. Hess, 5 Ohio 1; Stewart v. State, 5 Ohio 242.

18 State v. Watts, 82 N. C. 656.

See, however, State v. Upchurch, 31 N. C. (9 Ired.) 455; State v. Durham, 72 N. C. 747.

19 State v. Gaffney, Rice (S. C.) 431; State v. Wimberly, 3 McC. (S. C.) 190.

20 Rogers v. People, 34 Mich. 345.

21 Cameron v. State, 13 Ark. (8 Eng.) 712.

22 Supra, § 158; Whart. Crim. Ev., § 148; Com. v. Squire, 42 Mass. (1 Met.) 258; Com. v. Scannel, 65 Mass. (11 Cush.) 547. So in Minnesota, State v. Crummey, 17 Minn. 72.

In Iowa, State v. McNally, 32 Iowa 580.

In North Carolina.—State v. Purdie, 67 N. C. 26, 326. See State v. Upchurch, 31 N. C. (9 Ired.) 455.

In Texas.—Jorasco v. State, 6 Tex. App. 238.

1 Kerr's Whart. Crim. Law, § 212, and see, infra, chapter on "Verdict," divs. III, IV, as to verdict.—Burke v. State, 74 Ala. 399.

An indictment for arson charged that the defendants "feloniously, wilfully, and unlawfully" set fire to, burned, and consumed a certain building used as a brewery for the manufacture of beer. It was held that the indictment was defective in not alleging that the burning was malicious. — Kellenbeck v. State, 10 Md. 431, 69 Am. Dec. 166. Supra, § 285.

Where a statute makes criminal the doing of the act "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and unlawfully," or feloniously, unlawfully and wilfully; these latter terms not being synonymous, equivalent, of the same legal import, or substantially the same as "wilfully and maliciously."—State v. Gove, 34 N. H. 510; though see,

§ 312. "RAVISH" AND "FORCIBLY" ARE ESSENTIAL TO RAPE. In indictments of rape, the words "feloniously ravished" are essential, and the word "rapuit" is not supplied by the words "carnaliter cognovit";[1] and it seems that the latter words are also essential in indictments,[2] though the contrary has been ruled in the case of an appeal.[3]

The usual course in an indictment for rape is to aver that it was committed forcibly, and against the will of the female, and therefore it would not be safe to omit the averment,[4] though in Pennsylvania the omission was held not to be fatal, in a case where ravish and carnally know were introduced.[5]

In an indictment for an unnatural crime, the descriptive words of the statute taking[6] away clergy, must be used; and it is not sufficient to say contra naturæ ordinem rem habuit veneream et carnaliter cognovit.[7]

§ 313. "FALSELY" ESSENTIAL TO PERJURY. In an indictment for perjury, it is necessary to charge that the defendant wilfully and corruptly swore falsely.[1] But it is not necessary in forgery.[2]

§ 314. "BURGLARIOUSLY" ESSENTIAL TO BURGLARY. In burglary the essential words are "feloniously and burglariously broke and entered the dwelling-house, in the night time"; and the felony intended to be committed,[1] or

supra, § 285; Kerr's Whart. Crim. Law, § 772.

1 1 Hale 628; 2 Hale 184; 1 Inst. 190; 2 Inst. 180; State v. Meinhart, 73 Mo. 562; Gougleman v. People, 3 Park. Cr. Rep. (N. Y.) 15.

2 1 Hale 632; 3 Inst. 60; Co. Lit. 137; 2 Inst. 180.

3 11 H. 4, 13; 2 Hawk., ch. 23, § 79; Staun. 81.

4 State v. Jim, 12 N. C. (1 Dev.) 142; Kerr's Whart. Crim. Law, § 743.

5 Com. v. Fogerty, 70 Mass. (8 Gray) 489; Harman v. Com., 12 Serg. & R. (Pa.) 69, and see, for fuller discussion, Kerr's Whart. Crim. Law, § 743.

6 5 Eliz., ch. 17, 3, 4; W. & M., ch. 9, § 2; Fost. 424; Co. Ent. 351; 3 Inst. 59; 1 Hawk., ch. 4, § 2.

7 East P. C. 480; 3 Inst. 59.

1 See fully Kerr's Whart. Crim. Law, § 1550.

2 State v. McKiernan, 17 Nev. 224, 30 Pac. 831.

1 Failure to allege property of another was intended to be stolen,

actually perpetrated, must also be stated in technical terms.[2] But "burglariously" is not necessarily in statutory housebreaking.[3]

§ 315. "TAKE AND CARRY AWAY" ESSENTIAL TO LARCENY. In larceny, the words feloniously took and carried away the goods,[1] or took and led away the cattle, are essential. "The property of" is also essential.[2] These terms are also requisite in statutory indictments for embezzlement.[3]

§ 316. "VIOLENTLY AND AGAINST THE WILL" ESSENTIAL TO ROBBERY. In an indictment for robbery from the person, the words feloniously, violently,[1] and against the will, are essential; and it is usual, though it is said to be unnecessary, to allege a putting in fear.[2]

fatal to an indictment for burglary.—Barnhart v. State, 154 Ind. 177, 56 N. E. 212.

Failure to state intent to commit specified crime or some crime unknown to grand jury, indictment for burglary fatally defective.—State v. Buchanan, 75 Miss. 349, 22 So. 875; Portwood v. State, 29 Tex. 47, 94 **Am. Dec.** 258; Simms v. State, 2 Tex. App. 110; Philbrick v. State, 2 Tex. App. 517; Webster v. State, 9 Tex. App. 75 (charging generally intent to steal insufficient); Rodriguez v. State, 12 Tex. App. 552 (particular felony must be described with all its statutory evidence).

2 1 Hale 549; Lyon v. People, 68 Ill. 271; State v. Curtis, 30 La. Ann. (pt. II) 814; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258, and see Kerr's Whart. Crim. Law, § 1028.

3 Tully v. Com., 45 Mass. (4 Met.) 357; Sullivan v. State, 13 Tex. App. 462; State v. Meadows, 22 W. Va. 766.

1 1 Hale 504; 2 Hale 184; Rountree v. State, 58 Ala. 381; Gregg v. State, 64 Ind. 223; Com. v. Adams, 73 Mass. (7 Gray) 43; R. v. Middleton, L. R. 2 C. C. 41; Kerr's Whart. Crim. Law, § 1152.

In Green v. Com., 111 Mass. 417 it was held that "steal" might be a substitute; though this ruling may be questioned. See State v. Johnson, 30 La. Ann. (Pt. I) 305.

"Steal" may be omitted.—See State v. Lee Ping, 10 Ore. 27.

2 State v. Parker, 1 Houst. (Del.) 9.

3 Com. v. Pratt, 132 Mass. 246.

1 1 Hale 534; Frost. 128; 3 Inst. 68.

Compare: Smith's Case, East P. C. 783, in which it was holden that violenter is not an essential term of art. See Kerr's Whart. Crim. Law, § 1092.

As to "wilfully," see Woolsey v. State, 14 Tex. App. 57.

2 Kerr's Whart. Crim. Law, § 1092.

§ 317. "PIRATICAL" ESSENTIAL TO PIRACY. Piracy must be alleged to have been done feloniously and piratically.[1]

§ 318. "UNLAWFULLY," AND OTHER AGGRAVATIVE TERMS, NOT ESSENTIAL. The phrase "unlawful" is in no case essential, unless it be a part of the description of the offense as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the facts stated be legal, the word unlawful can not render it indictable.[1] The same observation is applicable to the terms "wrongfully," "unjustly," "wickedly," "wilfully," "corruptly," to "the evil example," "falsely," "maliciously," "fraudulently," and such like.[2] Thus, though it is usual to allege that the party falsely forged and counterfeited, it is enough to allege that he forged, because the word implies a false making. In indictment for libels, it is sufficient either to use the word falsely or maliciously,[3] or an equivalent epithet. But when either of these terms is part of the essential definition of the offense, it can not be dropped.[4] And this is eminently the case when the term is part of a statutory definition.[5]

§ 319. "FORCIBLY" AND "WITH A STRONG HAND" ESSENTIAL TO FORCIBLE ENTRY. In forcible entry, at common law, the defendants must be charged with having used such a

1 1 Hawk., ch. 37, §§ 6, 10.

1 IND.—Stazey v. State, 58 Ind. 514; Shinn v. State, 68 Ind. 423; State v. Mulhisen, 69 Ind. 145. IOWA—Capps v. State, 4 Iowa 502. MO.—State v. Bray, 1 Mo. 180. N. H.—State v. Williams, 23 N. H. (3 Fost.) 321; State v. Concord R. Co., 59 N. H. 85. TENN.—Williams v. State, 50 Tenn. (3 Heisk.) 376. VT.—State v. Vermont R. Co., 27 Vt. 103. FED.—United States v. Driscoll, 1 Low. C. C. 305, Fed. Cas. No. 14994.

Contra: Under present Indiana statute.—State v. Smith, 74 Ind. 557.

As to Texas, see Woolsey v. State, 14 Tex. App. 57.

2 State v. Hartman, 67 Tenn. (8 Baxt.) 384; United States v. Caruthers, 15 Fed. 309. See Kerr's Whart. Crim. Law, §§ 650, 1070.

3 Sty. 392; 2 Wms. Saund. 242; Starkie C. P. 86.

4 Com. v. Turner, 71 Ky. (8 Bush) 1.

5 Supra, § 285.

degree of force as amounts to a breach of the peace.[1] The words, "with strong hand," are indispensable. But it is sufficient in such an indictment to aver, that the defendants unlawfully and with a strong hand entered into the prosecutor's mills, etc., and expelled him from the possession thereof.[2] In rape, also, "forcibly" is in most jurisdictions essential.[3]

§ 320. —— "VI ET ARMIS" NOT ESSENTIAL. The practice still exists of introducing, in indictments for forcible injuries, the technical words, vi et armis; but by the stat. 37 H. 8, c. 8, it is enacted that "inquisitions or indictments lacking the words vi et armis, viz., baculis, cultellis, arcubus, et sagittis, or any such like words, shall be taken, deemed, and adjudged, to all intents and purposes, to be good and effectual in law, as the same inquisitions and indictments having the same words were theretofore taken, deemed, and adjudged to be." These words are therefore superfluous, even where the crime is of a forcible nature, and were unnecessary at common law, where the injury was not forcible.[1] And in case of murder, the force at common law is implied from the very nature of the offense.[2] The stat. 37 H. 8, c. 8, is in force in Pennsylvania,[3] in New Hampshire,[4] in Vermont,[5] in Massachusetts,[6] in North Carolina,[7] in Tennessee,[8] in

1 R. v. Wilson et al., 8 T. R. 357, 6 Mod. 178; Kerr's Whart. Crim. Law, § 1370.

2 Ibid.

3 Kerr's Whart. Crim. Law, § 743.

1 2 Lev. 221; Cro. Jac. 473; 3 P. Wms. 497; Skinner 426; 2 Hawk., ch. 25, § 90.

2 2 Hale 187; 1 Hawk., ch. 25, § 3; 1 Hale 534; 3 Inst. 68; Pulton 131b; State v. Pratt, 54 Vt. 484.

3 Roberts's Dig. 34; Com. v. Martin, 2 Pa. 244, in which case the omission of the "vi et armis" was held immaterial.

4 State v. Kean, 10 N. H. 347, 34 Am. Dec. 162.

5 State v. Munger, 2 Tyler (Vt.) 166; State v. Munger, 15 Vt. 290.

6 Com. v. Scannel, 65 Mass. (11 Cush.) 547.

7 State v. Duncan, 28 N. C. (6 Ired.) 236.

8 Tipton v. State, 10 Tenn. (2 Yerg.) 542; Taylor v. State, 25 Tenn. (6 Humph.) 285.

Indiana,[9] and in Louisiana,[10] and in these States, as well as generally in this country, the term may be properly omitted.[11]

§ 321. "KNOWINGLY" ALWAYS PRUDENT. "Knowingly" is one of the expletives which, when fraud is charged, it may be useful to insert.[1] For although it may be discharged as surplusage if unnecessary, it may be sometimes employed to help out an otherwise defective allegation of guilty knowledge.[2]

XV. Clerical Errors.

§ 322. VERBAL INACCURACIES NOT AFFECTING SENSE, NOT FATAL. It has been well said that formerly, in England, the judges felt themselves constrained to adhere so strictly to form that public justice was in many cases evaded, and the most dangerous malefactors let loose upon society, in consequence of the omission of some senseless and unmeaning form. The failure on the part of the prosecution to dot an i,[1] or cross a t, or something equally absurd, was considered sufficiently fatal to vitiate the whole proceedings. Substance was sacrificed to form, or rather form became substance, and substance mere form. A more correct and just appreciation of criminal justice has banished from English courts these legal absurdities, which answered no other purpose than to protect and screen the guilty from the just punishment of their crimes.[2] A like condition prevailed in the American courts to too great an extent, but has been, or is being,

9 State v. Elliot, 7 Blackf. (Ind.) 280.

10 Territory v. McFarlane, 1 Martin, O. S. (La.) 244. See State v. Thornton, 2 Rice Dig. (S. C.) 109.

11 See, also, State v. Temple, 12 Me. 214.

1 As to scienter, see, supra, § 210.

2 1 Starkie C. P 390; Com. v. Hobbs, 140 Mass. 443, 5 N. E. 158.

1 "i" not dotted in one count, where dotted in another count, indictment sufficient.—Harrison v. State, 144 Ala. 20, 40 So. 568.

2 State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

remedied by statutory enactments and reformed rules of practice.

Bad or awkward writing does not vitiate an otherwise good indictment, and constitutes no ground for a motion to quash.[3] Thus the fact that the name "Coats" looks like "Coots,"[4] or the time of the offense "ten" looks like "toe,"[5] will not vitiate the indictment or render it subject to motion to quash.

Mere clerical errors in an indictment otherwise good do not necessarily vitiate it,[6] and will not do so except in those cases in which the word is changed into one of a different import,[7] or into one which so obscures the sense that a person of ordinary intelligence can not with certainty ascertain the meaning,[8] and a defendant will not be permitted to take advantage of a mere clerical error which is corrected by the necessary intendments of the indictment.[9]

3 McGee v. State, (Tex. Cr. Rep.) 46 S. W. 930; Rogers v. State, 69 Tex. Cr. Rep. 90, 153 S. W. 850.

4 When standing alone, but the "a" in the name being the replica of 14 other "a"s in the indictment, held not open to the objection of variance.—Lewis v. State, 55 Tex. Cr. Rep. 167, 115 S. W. 577.

5 Rogers v. State, 69 Tex. Cr. Rep. 90, 153 S. W. 850.

6 Sanders v. State, 2 Ala. App. 13, 56 So. 69; State v. Sharpe, 121 Minn. 381, 141 N. W. 526; Smith v. Territory, 14 Okla. 162, 77 Pac. 187; State v. Briggs, (R. I.) 86 Atl. 316.

"An" for "the," in an indictment for perjury, was held immaterial. —People v. Warner, 5 Wend. (N. Y.) 271.

"And" for "of" in the clause alleging ownership, will not vitiate an indictment for larceny.—State v. Perry, 94 Ark. 215, 126 S. W. 717.

"On" for "of," in the expression, "notes on the Bank United States," will be disregarded.—McLaughlin v. Com., 4 Rawls. (Pa.) 464; Harris v. State, 71 Tenn. (3 Lea) 324.

"Unlawfully and felony desert" wife, sufficiently charges desertion.—Peacock v. State, (Ind.) 91 N. E. 597.

Mere clerical error in date of adoption of a township organization law, will not invalidate an indictment for a violation of that law.—State v. Fritz, 154 Mo. App. 578, 136 S. W. 746.

7 Hawkins v. State, 64 Tex. Cr. Rep. 481, 142 S. W. 917; Pye v. State, 71 Tex. Cr. Rep. 94, 154 S. W. 222.

8 Sanders v. State, 2 Ala. App. 13, 56 So. 69.

9 Couch v. State, 6 Ala. App. 43,

——*Instances:* Thus, it has been held that an indictment will not be rendered bad by writing, inadvertently, "aganist" for "against,"[10] "cash" for "case,"[11] "clerk" for "court,"[12] "fifty-too" for "fifty-two,"[13] "frunk" for "drunk,"[14] "make" for "marke,"[15] masculine for a feminine pronoun,[16] "May" for "November,"[17] "monet" for "money,"[18] "Pittis" for "Pettis,"[19] "respectfully" for "respectively,"[20] "stael" for "steal,"[21] "Tebruary" for "February,"[22] "therefore" for "theretofore,"[23] and the like.

——*Omissions of words,*[24] *letters and syllables* do not necessarily vitiate an indictment; particularly is this

60 So. 539; Territory v. Montoya, 17 N. M. 122, 125 Pac. 622.

10 In concluding clause of indictment.—State v. Duvenick, 237 Mo. 185, 140 S. W. 185; Hudson v. State, 10 Tex. App. 215.

11 In the clause "contrary to the statute in such case made and provided."—State v. Given, 32 La. Ann. 782.

12 Hogue v. United States, 192 Fed. 918.

13 State v. Hedge, 6 Ind. 333.

14 Kincade v. State, 14 Ga. App. 544, 81 S. E. 910.

15 In indictment for putting false mark on sheep.—State v. Davis, 23 N. C. (1 Ired.) 125, 35 Am. Dec. 735.

16 In charge of pandering, in describing person unlawfully induced to remain in house of prostitution. —People v. Armond, 172 Ill. App. 489.

17 Where manifestly a mere clerical error.—In re Hilstock, 3 Gratt. (Va.) 650.

18 In indictment for theft.—Wright v. State, 70 Tex. Cr. Rep. 73, 156 S. W. 624.

19 In allegation of ownership of cattle stolen, where name properly spelled elsewhere in indictment.—Hutto v. State, 7 Tex. App. 44.

20 Compton v. State, 67 Tex. Cr. Rep. 15, 148 S. W. 580.

21 State v. Lockwood, 58 Vt. 378, 3 Atl. 539.

22 Witten v. State, 4 Tex. App. 70.

23 Schapiro v. State, 75 Tex. Cr. App. 213, 169 S. W. 683.

24 "An" omitted before "unmarried" in a charge of having carnal knowledge of a female.—State v. Perrigan, 258 Mo. 233, 167 S. W. 573.

"Did" omitted does not vitiate (Krueger v. People, 141 Ill. App. 510, affirmed People v. Krueger, 237 Ill. 357, 86 N. E. 617). Thus, "did" omitted in an indictment for selling spirituous liquors by the small measure, when the auxiliary did should have joined the words "sell" and "dispose of," is immaterial.—State v. Edwards, 19 Mo. 674; State v. Whitney, 15 Vt. 298. See, post, § 324. See, also, the text and authorities in the following paragraph treating of "Ungrammatical Indictment."

However, an indictment which charged that the defendant "felo-

true in those instances in which the omission is readily supplied by the context and the intendment of the instrument considered as a whole, does not impair the charge, or lead to confusion or uncertainty. Omission of letters,[25]

niously utter and publish, dispose and pass," etc., etc., omitting the word "did" before utter, etc., the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner did the act.—State v. Halder, 2 McC. (S. C.) 377, 13 Am. Dec. 738. See State v. Hutchinson, 26 Tex. 111; State v. Daugherty, 30 Tex. 360; State v. Earp, 41 Tex. 487; Koontz v. State, 41 Tex. 570.

"Last" omitted between the words "year" and "aforesaid."—State v. Coleman, 8 Rich. (S. C.) 237.

"With" omitted after "defendant," in an indictment for murder, from the clause, "defendant, a certain pistol then and there charged with," not defective.—State v. West, 202 Mo. 128, 100 S. W. 478. See State v. Long, 201 Mo. 664, 100 S. W. 587.

In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury, "on their oath," present (the first two counts being regular in that respect), the objection is obviated by the fact that the record states that the grand jury was sworn in open court.—Huffman v. Com., 6 Rand. (Va.) 685.

25 **"Apprpiate" for "appropriate,"** does not affect validity of indictment for theft.—Hawkins v. State, 64 Tex. Cr. App. 480, 142 S. W. 917.

"Assalt" for "assault."—State v. Crane, 4 Wis. 400.

"Canally" for "carnally," in an indictment for incest, sufficient under statute.—Bailey v. State, 63 Tex. Cr. Rep. 584, 141 S. W. 224.

"Chil" for "child," in the phrase "female chil under 11 years of age," is not misleading, and sufficient.—State v. Griffin, 249 Mo. 624, 155 S. W. 432.

"Di" for "did."—Holland v. State, (Ala. App.) 66 So. 126, certiorari denied in Ex parte Holland, 191 Ala. 662, 66 So. 1008.

"Fertilize" for "fertilizer," in charging larceny of a pistol from the warehouse of a certain fertilizer company.—Kirk v. State, 13 Ala. App. 316, 69 So. 350.

"Gran" for "grand" jurors, in second count of indictment, word correctly spelled in first count, does not affect validity of indictment.—Gardner v. State, 56 Tex. Cr. Rep. 594, 120 S. W. 895.

"Inten" for "intent" does not vitiate indictment for assault with intent to murder.—Stinson v. State, 76 Tex. Cr. App. 169, 173 S. W. 1039.

"Make" for "marke."—State v. Davis, 23 N. C. (1 Ired.) 125, 35 Am. Dec. 735.

"On" instead of "one," in allegation of marriage, in indictment for bigamy.—Witt v. State, 5 Ala. App. 137, 59 So. 715.

"Secret" for "secrete," sufficient in indictment charging statutory offense against officer receiving public moneys.—Ferrell v. State, (Tex. Cr. Rep.) 152 S. W. 901.

"Stal" for "steal," in indictment for larceny.—Wills v. State, 4 Blackf. (Ind.) 457.

"Statement" for "statements," in

or even of syllables,[26] does not vitiate. Thus, omission of a letter in the prisoner's name, in the title of a bill by the grand jury, is not a ground for a motion in arrest of judgment, as the prisoner had pleaded to it, and had been convicted upon it, especially where the name is properly stated in the body of the bill of the indictment itself.[27]

Misspelled word or words do not vitiate an indictment unless the meaning is thereby obscured or changed;[28] where it is evident what word was intended to be used,[29] and especially where the intended word and the word as spelled have the same sound when pronounced,[30] in which case the rule of idem sonans applies.[31] And this is true even though the word misspelled is a material word.[32]

——*Instances:* Thus it has been held that the indictment is not affected by the spelling of "aforethough" for

an indictment for perjury charging false swearing on two separate instances.—Freeman v. State, 44 Tex. Cr. Rep. 486, 72 S. W. 1001.

"Stree" for "street," in indictment for disturbing peace.—Hart v. State, 69 Tex. Cr. Rep. 417, 154 S. W. 553.

"t" omitted in the required clause "against the peace and dignity of the state," being manifestly a mere clerical error, will not vitiate an indictment.—State v. Duvenick, 237 Mo. 185, 140 S. W. 135; Hudson v. State, 10 Tex. App. 215.

"Tenty" for "twenty," in stating denomination of money stolen.—Allen v. State, (Tex. App.) 28 S.W. 474.

26 Entire syllable omitted, indictment will be quashed.—Hawkins v. State, 64 Tex. Cr. Rep. 481, 142 S. W. 917. However, it has been said that—

—"Wom" for "woman," in indictment for abandonment after seduction, it being alleged in other clauses that she was a female, does not vitiate the indictment.—Qualls v. State, 71 Tex. Cr. Rep. 67, 158 S. W. 539.

27 State v. Dustoe, 1 Bay (S. C.) 377.

28 State v. Earp, 41 Tex. 487; Koontz v. State, 41 Tex. 570.

29 ALA.—Grant v. State, 55 Ala. 201. ILL.—People v. Hallberg, 259 Ill. 502, 102 N. E. 1005. IND.—Bader v. State, 176 Ind. 268, 94 N. E. 1009. N. M.—State v. Cabodi, 138 Pac. 262. TEX.—Brumley v. State, 11 Tex. App. 114; McGee v. State, (Tex. Cr. Rep.) 46 S. W. 930; Monroe v. State, 56 Tex. Cr. Rep. 244, 119 S. W. 1146; Cheesebourge v. State, 70 Tex. Cr. Rep. 612, 157 S. W. 761.

30 State v. Colly, 69 Mo. App. 444.

31 Brumley v. State, 11 Tex. App. 114.

32 Leffer v. State, 122 Ind. 206, 23 N. E. 154.

"aforethought,"[33] "assalt" for "assault,"[34] "brest" for "breast,"[35] "ulet" for "bullet,"[36] "bullts" for "bullets,"[37] "Chickopee" for "Chicopee,"[38] "deliberatedly" premeditated malice,[39] "eiget" for "eight,"[40] "eigh" for "eight,"[41] "extravasion" for "extravasation,"[42] "fraudlently" for "fraudulently,"[43] "frausulently" for "fraudulently,"[44] "fourman" for "foreman,"[45] "gilding" for "gelding,"[46] "gilts" for "guilts,"[47] "iliciously" for "maliciously,"[48] "incestous" for "incestuous,"[49] "inhabitance" for "inhabi-

Incorrect spelling of name, following word "said," after name had been previously correctly spelled, does not vitiate the indictment.—Bartley v. State, 47 Tex. Cr. Rep. 41, 83 S. W. 190.

33 In an indictment for murder, is sufficiently near the word intended to render the indictment valid.—Sanders v. State, 2 Ala. App. 13, 56 So. 69.

34 In charge of an assault to wound.—State v. Crane, 4 Wis. 400.

35 In indictment for murder.—State v. Carter, 1 N. C. (Conf. Rep.) 210; Anon., 3 N. C. (2 Hayw.) 140.

36 Does not vitiate an indictment for murder.—Gaither v. Com., 28 Ky. L. Rep. 1345, 91 S. W. 1124.

37 Where word correctly spelled in other parts of indictment.—Blackwell v. State, 69 Fla. 453, 68 So. 479.

38 As the place of the crime, in an indictment for murder.—Com. v. Dasmarteau, 82 Mass. (16 Gray) 1.

39 Does not vitiate an indictment for murder.—State v. Lu Sing, 34 Mont. 31, 85 Pac. 521.

40 In clause charging year of murder.—Somerville v. State, 16 Tex. App. 433.

41 In laying time of act charged.—State v. Coleman, 8 Rich. (S. C.) 237.

42 State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

43 In an indictment for embezzlement is not bad for indefiniteness and uncertainty.—Bell v. State, 139 Ala. 124, 35 So. 1021.

44 Not misleading and therefore not bad.—St. Louis v. State, (Tex. Cr. Rep.) 59 S. W. 889.

45 Of grand jury.—State v. Karn, 16 La. Ann. 183.

46 In indictment for stealing a horse.—Thomas v. State, 2 Tex. App. 293.

47 Does not vitiate an indictment for hog-stealing.—State v. Lucas, 147 Mo. 70, 47 S. W. 1067.

48 Immaterial in an information charging wilfully, forcibly, burglariously and feloniously breaking and entering a certain building, malice being sufficiently charged.—Johns v. State, 88 Neb. 145, 129 N. W. 247.

49 In indictment for incest.—State v. Carville, (Me.) 11 Atl. 601.

tants,"[50] "is" for "his,"[51] "mair" for "mare,"[52] "maultus" for "malt,"[53] "offince" for "offense,"[54] "premeditted" for "premeditated,"[55] "shorting" for "shooting,"[56] "sive" for "sieve,"[57] "statue" for "statute,"[58] and the like.

On the other hand it has been held that an indictment is rendered bad by the use of "ainst" for "against,"[59] "appriate" for "appropriate,"[60] "congration" for "congregation,"[61] "dwell-house" for "dwelling-house,"[62] "futher" for "father,"[63] "fraudently" for "fraudulently,"[64] "larcey" for "larceny,"[65] "ossion" for "possession,"[66] "pine" for "pint,"[67] and the like.

50 Keller v. State, 25 Tex. App. 325, 8 S. W. 275.

51 In an indictment charging fraudulent conversion, in the charge of converting to his own use, does not vitiate the indictment.—Lewallen v. State, 48 Tex. Cr. Rep. 283, 87 S. W. 1159.

52 In indictment for stealing a horse.—State v. Meyers, 85 Tenn. (1 Pick.) 203, 5 S. W. 377.

53 In an accusation of selling spirituous, vinous or malt liquors.—Couch v. State, 6 Ala. App. 43, 60 So. 539.

54 Gaither v. Com., 28 Ky. L. Rep. 1345, 91 S. W. 1124.

55 The word being correctly spelled in other parts of the indictment.—Blackwell v. State, 69 Fla. 453, 68 So. 479.

56 In an indictment for murder, the intention of the pleader being clear, does not invalidate the indictment.—Frances v. State, 44 Tex. Cr. Rep. 246, 70 S. W. 751.

57 State v. Molier, 12 N. C. (1 Dev. L.) 263.

58 In closing clause of indictment.—State v. Coleman, 8 Rich. (S. C.) 237.

59 In the statutory conclusion of an indictment.—Bird v. State, 37 Tex. Cr. Rep. 408, 35 S. W. 382.

60 In indictment charging taking of property with intent to deprive the owner, etc.—Jones v. State, 25 Tex. App. 621, 8 Am. St. Rep. 449, 8 S. W. 801.

61 In indictment for disturbing religious meeting.—State v. Mitchell, 25 Mo. 420.

62 In an indictment charging burglary.—Parker v. State, 144 Ala. 690, 22 So. 791.

63 In indictment for bastardy.—State v. Caspary, 11 Rich. (S. C.) L. 356.

64 In indictment for theft of a horse.—Wells v. State, 50 Tex. Cr. Rep. 499, 98 S. W. 851.

65 In an indictment charging breaking into a stable with intent to steal.—People v. St. Clair, 55 Cal. 524, 56 Cal. 406.

66 In indictment for robbery.—Evans v. State, 34 Tex. App. 110, 29 S. W. 266.

67 In an indictment charging selling less than four gallons of intoxicating liquor without a license.—State v. Clinkenbeard, 135 Mo. 189, 115 S. W. 1059.

—— *The general rule* may be said to be that false spelling, which does not alter the meaning of the words misspelled, is not ground for arrest of judgment;[68] but it is otherwise when the blunder destroys the sense.[69]

Grammatical and oratorical inaccuracies in an indictment will not vitiate it where it contains a substantial accusation of crime,[70] and the averment furnishes the accused with the nature and cause of the accusation.[71]

68 CAL.—People v. Clair, 55 Cal. 524. LA.—State v. Karn, 16 La. Ann. 183. N. C.—State v. Carter, 1 N. C. (Conf.) 210; State v. Carter, 3 N. C. (2 Hayw.) 140; State v. Molier, 12 N. C. (1 Dev. L. 263). S. C.—State v. Caspary, 11 Rich. 356; State v. Wimberly, 3 McC. 190.

69 CAL.—People v. St. Clair, 56 Cal. 406. IND.—Strader v. State, 92 Ind. 376. MO.—State v. Edwards, 70 Mo. 480. TEX.—Haney v. State, 2 Tex. App. 504; Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746; Jones v. State, 21 Tex. App. 349, 17 S. W. 424.

70 If meaning is clear, grammar, spelling or punctuation will not vitiate an information.—Bader v. State, 176 Ind. 268, 94 N. E. 1009.

71 ALA.—Ward v. State, 50 Ala. 120; Pickens v. State, 58 Ala. 364. FLA.—Strobhar v. State, 55 Fla. 167, 47 So. 4. ILL.—Langdale v. People, 100 Ill. 263; People v. Hallberg, 259 Ill. 502, 102 N. E. 1005; People v. Potempa, 181 Ill. App. 457. IND.—State v. Hedge, 6 Ind. 330. IOWA—State v. Raymond, 20 Iowa 582; State v. Kruppa, 158 N. W. 401. LA.—State v. Karn, 16 La. Ann. 183; State v. Ross, 32 La. Ann. 854; State v. Morgan, 35 La. Ann. 293. ME.—State v. Patterson, 68 Me. 473. MASS.—Terms v. Com., 47 Mass. (6 Metc.) 224; Com. v. Burke, 81 Mass. (15 Gray) 408. MINN.—State v. Sharpe, 121 Minn. 381, 141 N. W. 526. MISS.—Fortenberry v. State, 55 Miss. 403; State v. Lee, 72 So. 195. MO.—State v. Edwards, 19 Mo. 674; State v. Zorn, 202 Mo. 12, 100 S. W. 591; State v. Schomers, 176 Mo. App. 271, 161 S. W. 1177. N. H.—State v. Shaw, 58 N. H. 74. N. M.—State v. Cabodi, 138 Pac. 262. N. Y.—Shay v. People, 22 N. Y. 317; Phelps v. People, 72 N. Y. 334, 372; People v. Pindar, 210 N. Y. 181, 104 N. E. 133, affirming 159 App. Div. 12, 144 N. Y. Supp. 242. N. C.—State v. Haney, 19 N. C. (2 Dev. & B.) 400; State v. Shepherd, 30 N. C. (8 Ired.) 195; State v. Smith, 63 N. C. 234; State v. Davis, 80 N. C. 384. ORE.—State v. Lee Ping, 10 Ore. 27. PA.—Com. v. Moyer, 7 Pa. 439; Perdue v. Com., 96 Pa. St. 311. S. C.—State v. Coleman, 8 S. C. 237; State v. White, 15 S. C. 381; State v. Jefcoat, 20 S. C. 383. TENN.—Williams v. State, 50 Tenn. (3 Heisk.) 376. TEX.—Witten v. State, 4 Tex. App. 70; Stinson v. State, 5 Tex. App. 31; Snow v. State, 6 Tex. App. 274; Somerville v. State, 6 Tex. App. 433; Hutto v. State, 7 Tex. App. 44; Irvin v. State, 7 Tex. App. 109; Henry v. State, 7 Tex. App. 388; Brumley v. State, 11 Tex. App.

Strict grammatical rules should not be enforced in court proceedings any more than in private and ordinary transactions.[72] Thus, it has been held that the relative pronoun must be referred to that antecedent which the principles of law and the tenor of the instrument require, even though in violation of the rules of syntax,[73] and even the use of the singular "it" for "them," in an indictment for stealing hogs does not invalidate it, the meaning being clear.[74] The same is true regarding the misuse of "ad" and "have,"[75] and "shoot and discharge" for "shooting and discharging," in an indictment for murder, it being a mere grammatical error.[76] The same is true regarding the phrase "with intent to injure and

114; Wilson v. State, 49 Tex. Cr. Rep. 50, 90 S. W. 312; Lewis v. State, (Tex. Cr. Rep.) 115 S. W. 577; Thompson v. State, 69 Tex. Cr. Rep. 31, 152 S. W. 893; Cheesebourge v. State, 70 Tex. Cr. Rep. 612, 157 S. W. 761. VT.—State v. Lockwood, 58 Vt. 378, 3 Atl. 539. VA.—Com. v. Ailstock, 3 Gratt. 650; Lazier v. Com., 10 Gratt. 708. W. VA.—State v. Gilmore, 9 W. Va. 641. FED.—Hume v. United States, 55 C. C. A. 407, 48 Fed. 689. ENG.—R. v. Stokes, 1 Den. C. C. 307.

As a specimen of how much carelessness can be passed by when the sense is preserved, Hackett v. Com., 15 Pa. St. 95. See, supra, §§ 213 et seq.; Whart. Crim. Ev., §§ 114 et seq.

As to curing by verdict, see, infra, chapter on "Motion in Arrest of Judgment."

72 State v. Kruppa, (Iowa) 158 N. W. 401.

73 Strobhar v. State, 55 Fla. 167, 47 So. 4.

74 Funderbunk v. State, (Tex. Cr. Rep.) 61 S. W. 393.

"It," in indictment for stealing "hogs" with intent to deprive owner of their value "and appropriate said hogs to his own use," is not open to the objection that the word "it" should be used instead of "hogs," as referring to the value and not to the animals stolen.—Pate v. State, 47 Tex. Cr. Rep. 373, 83 S. W. 695.

Same rule applies in perjury indictment where the pleader in declaring on the falsity in two instances of alleged perjury inadvertently uses "it" for "them" (Hollis v. State, (Tex. Cr. Rep.) 69 S. W. 594). And the same rule applies where the pleader alleges that "the statement so made," where he should have said "statements." — Freeman v. State, 44 Tex. Cr. Rep. 496, 72 S. W. 1001.

75 Where from the indictment it is manifest the past tense was intended.—Krueger v. People, 141 Ill. App. 510, affirmed People v. Krueger, 237 Ill. 357, 86 N. E. 617.

76 Blair v. State, (Okla. Cr. App.) 111 Pac. 1003.

defraud and defraud'' in an indictment charging forgery of a deed.[77]

Mispunctuation, it may be finally said, will not vitiate an indictment where the meaning is clear, and the indictment is otherwise sufficient.[78]

§ 323. QUESTIONS AS TO ABBREVIATIONS. Words written at length are not only more certain, but less liable to alteration, than figures; and, therefore, when the year and day of the month are inserted in any part of an indictment, they are more properly inserted in words written at length than in Arabic characters, but a contrary practice will not vitiate an indictment.[1] The terms anno domini, in an information or bill of indictment, are equivalent to the year of our Lord. Either is

77 Weber v. State, (Tex. Cr. Rep.) 180 S. W. 1082.

78 Pond v. State, 55 Ala. 196; Grant v. State, 55 Ala. 201; Bader v. State, 176 Ind. 268, 94 N. E. 109; State v. Pennell, 56 Iowa 29, 8 N. W. 686.

1 Supra, §§ 166, 167. ALA.—State v. Raiford, 7 Port. 101. CONN.—Rawson v. State, 19 Conn. 292. IND.—State v. Voshal, 4 Ind. 589. IOWA—State v. Seamons, 1 Greene 418; Winfield v. State, 3 Greene 339; State v. McPherson, 114 Iowa 492, 87 N. W. 421. LA.—State v. Egan, 10 La. Ann. 698. ME.—State v. Reed, 35 Me. 489, 58 Am. Dec. 727. MASS.—Com. v. Smith, 153 Mass. 97, 26 N. E. 346 (Arabic numerals). MISS.—Kelly v. State, 11 Miss. (3 Sm. & M.) 518. N. J.—Berrian v. State, 22 N. J. L. (2 Zab.) 9; Johnson v. State, 26 N. J. L. (2 Dutch.) 313. VA.—Lazier v. Com., 10 Gratt. 708.

"First March," for "first day of March," is sufficient.—Simmons v. Com., 1 Rawle (Pa.) 142.

"20 day of September," in indictment, sufficient allegation as to time.—Rawson v. State, 19 Conn. 292; Hampton v. State, 8 Ind. 336; Hezer v. State, 12 Ind. 330; State v. McPherson, 114 Iowa 492, 87 N. W. 421; State v. Reed, 35 Me. 489, 85 Am. Dec. 727; Lazier v. Com., 10 Gratt. (Va.) 708; Cady v. Com., 10 Gratt. (Va.) 776.

Other cases hold dates should be written out at length.—French v. State, 6 Blackf. (Ind.) 533; State v. Voshall, 4 Ind. 589.

"Jno" for "John" in setting out accused's name good. — State v. Granger, 203 Mo. 586, 102 S. W. 498.

"Sd" for "said" will not vitiate an indictment and is no ground for arresting judgment.—Com. v. Desmarteau, 82 Mass. (16 Gray) 1.

Street number of house need not be set forth in words at length.—State v. Castle, 75 N. J. L. 187, 66 Atl. 1059.

Year stated in Arabic numerals instead of English words, no ground for reversal of verdict.—Johnson v. State, 26 N. J. L.

good, and so is the want of either.[2] But some signs ("A. D.,"[3] or "in the year") must appear to show what the figures mean.[4] Hence it is not fatal that the date, instead of being written in full, is abbreviated, as A. D. 1830, if the figures are plainly legible.[5] And where a bill was found on the 2d of January, 1839, and the indorsement of the plea of not guilty was dated as of the 2d of January, 1838, this was held to be a mere clerical error, and amendable.[6] But when a written instrument in figures is copied, the figures are to be given.[7]

§ 324. OMISSION OF FORMAL WORDS MAY NOT BE FATAL. Where an indictment commenced, "the grand jurors within and the body of the county," etc., it was held, that the omission of the word "for" was not fatal.[1] And so

(2 Dutch.) 313; State v. Smith, 7 Tenn. (Peck.) 165.

"&" used for "and" does not vitiate an indictment. — State v. McPherson, 114 Iowa 492, 87 N. W. 421; Com. v. Clark, 58 Mass. (4 Cush.) 596; Brown v. State, 16 Tex. App. 245; Malton v. State, 29 Tex. App. 527, 16 S. W. 423.

"$3" given as the value of a hog alleged to have been stolen, indictment held valid.—Earl v. State, 33 Tex. Cr. Rep. 570, 28 S. W. 469.

"5.00" given as the value of the property alleged to have been stolen, omitting the $, does not render the indictment fatally defective. — State v. Wainwright, (Tenn.) 162 S. W. 583.

2 Hall v. State, 3 Kelly (Ga.) 18, but see Whiteside v. People, 1 Ill. (Breese) 4; State v. Gilbert, 13 Vt. 647; and see fully supra, §§ 166, 167.

3 **"A. D." used to specify the year** does not render indictment bad.—State v. Reed, 35 Me. 489, 85 Am. Dec. 727; Com. v. Clark, 85 Mass. (4 Cush.) 596; Com. v. Hagarman, 92 Mass. (10 Allen) 401; State v. Hodgeden, 3 Vt. 481.

4 Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; Com. v. McLoon, 71 Mass. (5 Gray) 91, 66 Am. Dec. 354; Com. v. Doran, 80 Mass. (14 Gray) 37.

Contra: Rawson v. State, 19 Conn. 292.

Year stated in figures, indictment good.—State v. Reed, 35 Me. 489, 58 Am. Dec. 727; Barnes v. State, 13 Tenn. (5 Yerg.) 186.

Contra: Berrian v. State, 22 N. J. L. (2 Zab.) 9.

5 State v. Hodgeden, 3 Vt. 481. See Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

See, also, Bouvier's Law Dictionary, "Figures," and see, supra, §§ 166, 167.

6 Com. v. Chauncey, 2 Ash. (Pa.) 90.

"First of March," instead of "first day of March," is not fatal.—Simmons v. Com., 1 Rawle (Pa.) 142.

7 See, supra, § 213.

1 State v. Brady, 14 Vt. 353.

of the omission of the word "present," in the commencement.[2] It is otherwise as to dropping an essential word; *e. g.*, "did."[3]

§ 325. SIGNS CAN NOT BE SUBSTITUTED FOR WORDS. Mere signs, however, can not be substituted for words. Thus in Vermont under the statute requiring indictments to be in English, it was held bad on demurrer for an indictment to use the mathematical signs (° ′), in place of "degrees" and "minutes."[1] Where the substitution is purely arbitrary this holds good at common law.[2] And scientific abbreviations can not be used without explanation.[3]

§ 326. ERASURES AND INTERLINEATIONS ARE NOT FATAL. Erasures and interlineations in the body of an indictment will be presumed to have been made before the indictment was found and presented by the grand jury;[1]

2 Abernethy v. State, 78 Ala. 411; State v. Freeman, 21 Mo. 481.

Not fatal to omit the word "so," in the passage "and so the jurors, etc., do present."—State v. Moses, 13 N. C. (2 Dev.) 452.

So of the word "did," before "assault," in an indictment for an assault.—State v. Edwards, 19 Mo. 674; supra, § 322, footnote 24.

It is not a fatal objection to an indictment that the name of a grand juror in the caption does not correspond with his name in the panel, nor that the indictment is stated as found upon the oaths, instead of the oath, of the inquest. —State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. Supra, § 92.

3 Moore v. State, 7 Tex. App. 42. See, however, authorities ante, § 322, footnote 24.

1 State v. Jericho, 40 Vt. 121, 94 Am. Dec. 387. See State v. Gilbert, 13 Vt. 647.

2 A clerk of the court placed on the margin, by several counts, the numbers one, two, and so on, and, by mistake or otherwise, began to number at the second count, and the same error was continued through the whole number of counts; and the jury returned a verdict of guilty on the seventh or eighth count, "as marked." It was held, that it was error for the court to render sentence on the seventh and eighth counts of the indictment as found.—Woodford v. State, 1 Ohio St. 427.

3 United States v. Peichart, 32 Fed. 142.

1 ALA.—Clemmons v. State, 43 Fla. 200, 30 So. 699. GA.—Jones v. State, 99 Ga. 46, 25 S. E. 617. IOWA—State v. Hallestad, 132 Iowa 188, 109 N. W. 613. TEX.—Jacobs v. State, 43 Tex. Cr. Rep. 353, 59 S. W. 1111.

Court will presume indictment with interlineations is exactly as

and especially is this true when the interlineations are in the same handwriting and with the same colored ink as the body of the indictment,[2]—although a different colored ink and a different handwriting will not vitiate,[3]—where such erasures and interlineations are not contrary to the probable intendment and meaning of the indictment as it originally stood, but have a tendency to make the meaning more clear, the wording more definite, and the instrument accurate,[4] even though the interpolated word or words have the effect to change the nature of the offense charged and the degree of the punishment that may be inflicted—*e. g.*, change a charge of manslaughter to one of murder.[5]

Pencil interlineations and corrections or additions of a letter or letters, before the indictment is found and returned by the grand jury, does not vitiate the indictment, and particularly so when the letter or letters added make no difference in the sense, sound or effect of the word to which joined.[6]

it was presented and found, until the contrary is shown by irresistible proof.—State v. Florey, 5 La. Ann. 429.

2 Clemmons v. State, 43 Fla. 200, 30 So. 699.

3 Cook v. State, 119 Ga. 108, 46 S. E. 64.

Different kind of ink used in erasing name originally written and interlining another name as that of the person alleged to have been murdered. — Cook v. State, 119 Ga. 108, 46 S. E. 64.

4 Clemmons v. State, 43 Fla. 200, 30 So. 699.

Name erased and another interlined of the person alleged to have been murdered. — Cook v. State, 119 Ga. 108, 46 S. E. 64; State v. Turner, 25 La. Ann. 573 ("Albert" stricken out and "John" inserted).

"Marion" substituted for "John" in the indictment returned by the grand jury, made by the clerk of the court, is a nullity, though "Marion" be defendant's correct name, and does not affect the indictment as found and returned by the grand jury.—Myatt v. State, 31 Tex. Cr. Rep. 523, 21 S. W. 256.

5 People v. Grancie, 50 Cal. 447.

"Feloniously" inserted after the discharge of the grand jury renders the indictment fatally defective.—State v. Vest, 21 W. Va. 796.

6 May v. State, 14 Ohio 461, 45 Am. Dec. 548. Infra, § 328.

Blanks filled in in pencil, after the return of the indictment by the attorney prosecuting for the people, not as alterations but as a guide to himself, may be erased by order of the court.—Boslock v. State, 61 Ga. 635.

On motion in arrest of judgment, erasures and interlineations do not vitiate an indictment otherwise legible,[7] and interlineations may be read so as to make sense without regard to the caret,[8] though the caret will ordinarily be regarded as decisive of the point of introduction.[9]

On motion to quash defects of this kind may be sufficient for affirmative action of the court, although not fatal in motion in arrest of judgment.[10]

§ 327. Tearing or defacing not necessarily fatal—Lost indictment. That an indictment has been defaced, or even torn into separate parts, does not affect its validity, if the record be preserved in a legible state,[1] and the question of legibility is for the court.[2]

Lost or destroyed indictment, at common law—there are authorities holding—may be prosecuted, after plea, when it is not practical to find a new bill, on parol proof of its contents, or by copy. In the various jurisdictions in this country, by practice and under statute,[3] a lost or destroyed indictment, after plea,[4] of which indictment

7 French v. State, 12 Ind. 670, 74 Am. Dec. 229; Com. v. Fagan, 81 Mass. (15 Gray) 194; Com. v. Desmarteau, 82 Mass. (16 Gray) 1.

The question of erasure or interlineation is for the court.—Ibid.; Com. v. Davis, 77 Mass. (11 Gray) 4; Com. v. Riggs, 80 Mass. (14 Gray) 376, 77 Am. Dec. 333.

8 State v. Daniels, 44 N. H. 383. But see R. v. Davis, 7 Car. & P. 319, 32 Eng. C. L. 634.

9 R. v. Davis, 7 Car. & P. 319, 32 Eng. C. L. 634.

10 Com. v. Desmarteau, 82 Mass. (16 Gray) 1.

1 Com. v. Roland, 97 Mass. 598.

2 Com. v. Davis, 77 Mass. (11 Gray) 4; Com. v. Riggs, 80 Mass. (14 Gray) 376, 77 Am. Dec. 333.

3 **As to statutory provisions** by which such substitution can be effected, see State v. Stevisinger, 61 Iowa 623, 16 N. W. 746; State v. Simpson, 67 Mo. 647; State v. Elliott, 14 Tex. 423; Magee v. State, 14 Tex. App. 367; Pierce v. State, 14 Tex. App. 365; Schultz v. State, 15 Tex. App. 258, 49 Am. Rep. 194.

4 Bradford v. State, 54 Ala. 230; Miller v. State, 41 Ark. 489; Buckner v. State, 56 Ind. 208; State v. Simpson, 67 Mo. 647.

Where destroyed or lost before plea, the right to substitute is doubtful.—Gannaway v. State, 22 Ala. 777; Schultz v. State, 15 Tex. App. 258, 49 Am. Rep. 194; Bradshaw v. Com., 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

In Texas, were indictment lost before plea, defendant may be arraigned and tried on a substitute

there is a record,[5] may be prosecuted on a substituted copy of the original indictment,[6] or upon a certified copy of the official record;[7] but it has been held that it is other-

indictment. — McDowell v. State, 55 Tex. Cr. Rep. 596, 117 S. W. 831.

[5] **No record** of the indictment, he can not be put upon trial.—Buncker v. State, 56 Ind. 208.

[6] ALA.—Bradford v. State, 54 Ala. 230. FLA.—Roberson v. State, 45 Fla. 94, 34 So. 294. IOWA—State v. Shank, 79 Iowa 47, 44 N. W. 241. MO.—State v. Simpson, 67 Mo. 647; State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Lovitt, 243 Mo. 510, 147 S. W. 484; State v. Paul, 87 Mo. App. 47. N. Y.—People v. Burdock, 3 Cai. 194, Coleman & C. Cas. 458. PA.—Com. v. Becker, 14 Pa. Sup. Ct. 430. S. D.—State v. Circuit Court, 20 S. D. 122, 104 N. W. 1048. TENN.—Overruling State v. Harrison, 18 Tenn. (10 Yerg.) 542; Boyd v. State, 46 Tenn. (6 Cold.) 1 (when such proceeding authorized by statute, only); State v. Gardner, 81 Tenn. (13 Lea) 134, 49 **Am. Rep.** 660. TEX.—Schultz v. State, 15 Tex. App. 258, 49 **Am. Rep.** 194; Watson v. State, (Tex. Cr. Rep.) 50 S. W. 340; Carter v. State, 41 Tex. Cr. Rep. 608, 58 S. W. 80; Moore v. State, 52 Tex. Cr. Rep. 336, 107 S. W. 540; Brooks v. State, 55 Tex. Cr. Rep. 122, 113 S. W. 920; Bennett v. State, (Tex. Cr. Rep.) 179 S. W. 713.

Contra: Ganaway v. State, 22 Ala. 772.

Substitute copy must show it is substantially the same as original, and must be filed on leave.—Goodman v. State, 161 Ind. 629, 69 N. E. 442; State v. Rivers, 58 Iowa 102, 12 N. W. 117, 43 **Am. Rep.** 112; State v. Stevisiger, 61 Iowa 623, 16 N. W. 746; Reed v. State, 42 Tex. Cr. Rep. 572, 61 S. W. 925; Bowers v. State, 45 Tex. Cr. Rep. 185, 75 S. W. 299; White v. State, 72 Tex. Cr. Rep. 16, 160 S. W. 703.

Power inherent in court to supply loss.—State v. Paul, 87 Mo. App. 47.

—**Carbon copies of original** may be used in making substituted indictment.—State v. Circuit Court, 20 S. D. 122, 104 N. W. 1048.

—**Copy conclusively shown** to be an exact reproduction of the lost instrument.—Roberson v. State, 45 Fla. 94, 34 So. 294.

Mutilated or obliterated indictment may be replaced with a substitute.—State v. Ivery, 33 Tex. 646; Shehane v. State, 13 Tex. App. 533.

Acts for re-establishment of lost or destroyed records applies to criminal proceedings.—Roberson v. State, 45 Fla. 94, 34 So. 294; Bradenburn v. State, 43 Tex. Cr. Rep. 309, 65 S. W. 519; Berg v. State, 64 Tex. Cr. Rep. 612, 142 S. W. 884.

Contra: State v. Simpson, 67 Mo. 647; Bradshaw v. Com., 16 Gratt. (Va.) 507, 86 **Am. Dec.** 722.

[7] ALA.—Hampton v. State, 1 Ala. App. 156, 55 So. 1018. ARK.—Miller v. State, 40 Ark. 488. IOWA—State v. Rivers, 58 Iowa 102, 43 **Am. Rep.** 112, 12 N. W. 117. LA.—State v. Heard, 49 La. Ann. 375, 21 So. 632. MISS.—McGuire v. State, 76 Miss. 504, 25 So. 495. OKLA.—Harmon v. Territory, 9 Okla. 313, 60 Pac. 115, affirming

wise as to a copy not made by judicial authority.[8] And this right to substitute applies to cases in which the indictment is lost or destroyed after conviction.[9] Trial may proceed upon substituted copy after original found.[10]

§ 328. PENCIL WRITING MAY BE SUFFICIENT. It is seen in another work[1] that a pencil writing may be a valid document, even under the statute of frauds. Objectionable as this mode of writing may be, and strong as may be the reason for quashing an indictment written in pencil in such a way as to be uncertain, it can not be said that after the jury has passed on the indictment, the fact that it is in whole or in part in pencil is ground for a motion in arrest. "Pencil" writing, in fact, it may be difficult to distinguish from "ink" writing. Some pencils write with what is virtually condensed ink. Some ink may be as pale and evanescent as the lead commonly used in pencils.[2]

XVI. Conclusion of Indictments.

§ 329. CONCLUSION MUST CONFORM TO THE CONSTITUTION OR STATUTE. The conclusion of an indictment is one of its important technical features, and when this conclusion is provided for and its form directed, either by the constitution or a statute of the state, it must usually be followed.[1]

5 Okla. 368, 49 Pac. 55. TENN.—Curry v. State, 66 Tenn. (7 Baxt.) 154.

8 Com. v. Keger, 62 Ky. (1 Duv.) 240, and State v. Harrison, 18 Tenn. (10 Yerg.) 542.

9 ME.—State v. Ireland, 109 Me. 158, 83 Atl. 453. OHIO—Mount v. State, 14 Ohio 295, 45 Am. Dec. 542. TEX.—Schultz v. State, 15 Tex. App. 259, 49 Am. Rep. 194; James v. State, 62 Tex. Cr. Rep. 610, 138 S. W. 408; Berg v. State, 64 Tex. Cr. Rep. 612, 142 S. W. 884. W. VA.—State v. Strayer, 58 W. Va. 676, 52 S. E. 862.

10 Owens v. State, 46 Tex. Cr. Rep. 14, 79 S. W. 575.

1 Whart. on Ev., § 666.

As to pencil interlineations and corrections in indictments, see, ante, § 326, footnote 6.

2 See May v. State, 14 Ohio 461, 45 Am. Dec. 548; R. v. Warshaner, 1 Mood. C. C. 466.

1 Defectiveness of form in an indictment being declared by statute not to be ground for quashing the

State constitution, in most of the states of the Union, contains a provision requiring that all indictments shall conclude "against the peace and dignity of the state" or a similar phrase, and when so providing an indictment must so conclude,[2] with the possible exception above noted.[3] In the several states the conclusion is sometimes prescribed by statute, sometimes by constitution.[4] As a

indictment or reversing the judgment rendered thereon in those cases in which the indictment is not so indefinite and vague as to subject the accused to the danger of a new prosecution for the same offense after acquittal or conviction, the provided formal conclusion is immaterial. — Shiver v. State, 41 Fla. 630, 27 So. 36.

See, also, footnote 7, this section.

In Indiana, under statute, indictment need not conclude "against peace and dignity," etc.—Hall v. State, 8 Ind. 439.

In Iowa, by statute, formal conclusion not necessary. — State v. Schilling, 14 Iowa 455.

In Massachusetts, by statute, omission of formal conclusion not ground for quashing indictment.—Com. v. Freelove, 150 Mass. 66, 22 N. E. 435.

In North Carolina, under code provision, omission of prescribed conclusion not fatal.—State v. Kirkham, 104 N. C. 911, 10 S. E. 312.

In Pennsylvania, said to be words of form and not of substance, though required by the constitution.—Com. v. Paxton, 14 Phila. 665, 36 Leg. Int. 444.

2 LA.—State v. Johnson, 35 La. Ann. 842. MD.—State v. Dycer, 85 Md. 246, 36 Atl. 763. MO.—State v. Stacy, 103 Mo. 11, 15 S. W. 147. TENN.—Rice v. State, 50 Tenn. (3 Heisk.) 215. TEX.—Holden v. State, 1 Tex. App. 225; Thompson v. State, 15 Tex. App. 39; Poss v. State, 47 Tex. Cr. Rep. 486, 83 S. W. 1109. W. VA.—Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293. WIS.—Williams v. State, 27 Wis. 402.

See, also, authorities in footnote 5.

Assault charged, indictment need not contain the formal conclusion "and so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that he, the said F, her, the said G, did unlawfully assault, against the peace and dignity of the state."—State v. Fulkerson, 97 Mo. App. 599, 71 S. W. 704.

Informations are not bound by the limitation.—Nichols v. State, 35 Wis. 308.

3 See footnote 1, this section.

4 **The following cases may be referred to** in this connection: COLO.—Packer v. People, 8 Colo. 361, 8 Pac. 564. ILL.—Zareseller v. People, 17 Ill. 101. IOWA—Hariman v. State, 2 Greene 270. KY.—Allen v. Com., 5 Ky. (2 Bibb) 210; Com. v. Young, 46 Ky. (7 B. Mon.) 1. MISS.—State v. Johnson, 1 Miss. (Walk.) 392. N. H.—State v. Kean, 10 N. H. 347, 34 Am. Dec. 162. N. C.—State v. Yancy, 1 N. C. (Con.) 237; State

rule, however, when a particular conclusion is peremptorily imposed by constitution or statute, the conclusion must be given as presented.[5] An interpolation, however, of the words "people of" or other surplusage, does not vitiate.[6]

v. Joyner, 81 N. C. 534; State v. Parker, 81 N. C. 531. PA.—Com. v. Rogers, 5 Serg. & R. 463. S. C.—State v. Washington, 1 Bay 120, 1 Am. Dec. 601; State v. Anthony, 10 S. C. 19; State v. Strickland, 10 S. C. 19.

5 ALA.—Smith v. State, 139 Ala. 115, 36 So. 727. ARK.—Burrard v. State, 20 Ark. 106; Anderson v. State, 20 Ark. 106. LA.—State v. McCoy, 29 La. Ann. 593; State v. Nunn, 29 La. Ann. 589. MO.—State v. Lopez, 19 Mo. 254; State v. Pemberton, 30 Mo. 376; State v. Reaky, 1 Mo. App. 9. N. C.—State v. Parker, 81 N. C. 531; State v. Joyner, 81 N. C. 534. TEX.—State v. Sims, 43 Tex. 521; Holden v. State, 1 Tex. App. 225; State v. Durst, 7 Tex. App. 74; Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746; Haren v. State, 13 Tex. App. 333. VA.—Com. v. Carney, 4 Gratt. 546; Thompson v. State, 20 Gratt. 724. W. VA.—Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293; State v. Allen, 8 W. Va. 680. WIS.—Williams v. State, 27 Wis. 402.

See, also, authorities in footnote 2.

"Against peace and dignity of same," sufficient where state named in commencement of indictment.—State v. Johnson, 1 Miss. (Walk.) 392.

"Against peace and dignity of state of W. Virginia," for West Virginia, held to be fatally defective.—Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293.

"In the peace of the state" omitted, an indictment for murder is not bad.—State v. Robertson, 50 La. Ann. 455, 23 So. 510.

6 State v. Cadle, 19 Ark. 613; Kirkham v. People, 170 Ill. 9, 48 N. E. 465.

Added words to required conclusion do not vitiate, where they form no part of it.—Rawlett v. State, 23 Tex. App. 191, 4 S. W. 582.

—**"And contrary to the form of the statute** in such cases made and provided" added to required conclusion, treated as surplusage.—State v. Schloss, 93 Mo. 361, 6 S. W. 244; State v. Reakey, 1 Mo. App. 3.

—**"This the third day of November, 1882,"** added to the constitutional conclusion, held to vitiate the indictment.—Haun v. State, 13 Tex. App. 383, 44 Am. Rep. 706.

"Against the peace and dignity of the people of," etc., instead of "against, etc., the state of," sufficient.—Anderson v. State, 5 Ark. 444.

"Against the peace and dignity of the same state aforesaid," instead of "against the peace and dignity of the state," as prescribed by the constitution, does not vitiate an indictment.—State v. Robinson, 27 S. C. 615, 4 S. E. 750; State v. Mason, 54 S. C. 240, 32 S. E. 357; State v. Powers, 59 S. C.

In the United States courts the conclusion is "against the form of the statute and the peace and dignity of the United States."[7]

Count conclusions are not usually governed by the constitution or statutory provision as to the conclusions of indictments, and need not contain that conclusion,[8] where the indictment so concludes.[9]

——*By constitutional provision* in Arkansas,[10] Mis-

200, 37 S. E. 690. See State v. Kean, 10 N. H. 347, 34 Am. Dec. 162.

In North Carolina, an indictment substantially in the form prescribed by statute, for perjury, is held not vitiated by the addition of the formal conclusion "against the form of the statute," etc., it being treated as mere surplusage. —State v. Peters, 107 N. C. 876, 12 S. E. 74.

"State of," naming it, not demurrable or otherwise objectionable. See: ALA.—Washington v. State, 53 Ala. 29. ILL.—Kirkham v. People, 170 Ill. 9, 48 N. E. 465; Zarresseller v. People, 17 Ill. 101. LA.—State v. Johnson, 35 La. Ann. 842. MO.—State v. Hays, 78 Mo. 600. PA.—Rogers v. Com., 5 Serg. & R. (Pa.) 463. TEX.—State v. Pratt, 44 Tex. 93. VA.—Brown v. Com., 86 Va. 466, 10 S. E. 745.

Contra: In Wisconsin, constitution requires that indictments shall conclude, "against the peace and dignity of the state," and a conclusion "against the peace and dignity of Wisconsin" was held insufficient.—Williams v. State, 27 Wis. 402.

7 United States v. Boling, 4 Cr. C. C. 579, Fed. Cas. No. 14621; United States v. Crittenden, Hemp. 61, Fed. Cas. No. 14890a; United States v. Lemmons, Hemp. 62, Fed. Cas. No. 15591a; United States v. Bader, 4 Woods C. C. 189, 16 Fed. 116; Jackson v. United States, 42 C. C. A. 452, 102 Fed. 473.

Omission of formal conclusion is not fatal, as it in no way prejudices the defendant. — Frisbie v. United States, 157 U. S. 160, 39 L. Ed. 657, 15 Sup. Ct. Rep. 586.

8 ALA.—Harrison v. State, 144 Ala. 20, 40 So. 508. LA.—State v. Travis, 39 La. Ann. 356, 1 So. 817; State v. Scott, 48 La. Ann. 293, 19 So. 141; State v. Thompson, 51 La. Ann. 1089, 25 So. 954. N. C.—State v. Beatty, 61 N. C. (Phil.) 52. OHIO — Olendorf v. State, 64 Ohio St. 118, 59 N. E. 892. TENN.—Rice v. State, 50 Tenn. (3 Heisk.) 215. TEX.—Stebbins v. State, 31 Tex. Cr. Rep. 294, 20 S. W. 552; Manovitch v. State, 50 Tex. Cr. Rep. 260, 96 S. W. 1.

In Missouri, however, it seems the rule is otherwise, and the failure of the first count in an indictment to contain the formal conclusion is not rendered valid by the formal conclusion of the second count.—State v. Wade, 147 Mo. 73, 47 S. W. 1070.

9 McGuire v. State, 37 Ala. 161.

10 State v. Cadle, 19 Ark. 613; State v. Hoyle, 20 Ark. 156; Williams v. State, 47 Ark. 230, 1 S. W. 149.

souri,[11] South Carolina,[12] Virginia,[13] West Virginia,[14] and perhaps elsewhere, each count is required to end with the formal conclusion.

"*A true bill,*" endorsed at the end of an indictment, after the required formal conclusion, constitutes no part of the indictment.[15]

§ 330. WHERE STATUTE CREATES OR MODIFIES AN OFFENSE, CONCLUSION SHOULD BE STATUTORY. "Contra formam statuti," or its equivalent, "contrary to the form of the statute," is not universally required;[1] and where it is required, its omission will not be fatal in those cases in which the indictment is otherwise sufficient.[2] But where

11 State v. Stacy, 103 Mo. 11, 15 S. W. 147; State v. Furgeson, 152 Mo. 92, 53 S. W. 427; State v. Sanders, 158 Mo. 610, 81 **Am. St. Rep.** 330, 59 S. W. 993; State v. Cook, 170 Mo. 210, 70 S. W. 483; State v. Clevenger, 25 Mo. App. 655.

Slight variations not fatal, where there is a substantial compliance with the required form.—State v. Niehaus, 188 Mo. 304, 87 S. W. 473.

"Grand jurors do say," omitting "upon their oaths aforesaid," indictment insufficient, because they do not find and present upon oaths. —State v. Furgeson, 152 Mo. 92, 53 S. W. 427; State v. Sanders, 158 Mo. 610, 81 **Am. St. Rep.** 330, 59 S. W. 993.

"Grand," omitted before "jurors," does not render indictment bad, where otherwise the required conclusion of the count is intact. —State v. Evans, 158 Mo. 589, 59 S. W. 994.

"By means aforesaid," instead of "in manner aforesaid," does not render the indictment bad.—State v. Gleason, 172 Mo. 259, 72 S. W. 676.

12 State v. Strickland, 10 S. C. (10 Rich.) 191.

13 Com. v. Carney, 4 Gratt. (Va.) 546; Thompson v. Com., 20 Gratt. (Va.) 724.

14 State v. McClung, 35 W. Va. 280, 13 S. E. 654.

15 Thomas v. State, 8 Tex. App. 344.

1 ARK.—Brown v. State, 13 Ark. 96. IOWA—State v. Stroud, 99 Iowa 16, 68 N. W. 450. KY.—Com. v. Kennedy, 54 Ky. (15 B. Mon.) 531; Kitchen v. Com., 14 Ky. L. Rep. 764. LA.—State v. Russell, 33 La. Ann. 135. MINN.—O'Connell v. State, 6 Minn. 279; State v. Coon, 18 Minn. 518. MISS.—Smith v. State, 58 Miss. 867. NEV.—State v. Harris, 12 Nev. 414. N. J.—State v. Berry, 9 N. J. L. (4 Halst.) 374. VA.—Vance v. Com., 2 Va. Cas. 162.

2 State v. Cadle, 19 Ark. 613; State v. Culbreath, 71 Ark. 80, 71 S. W. 254; Chiles v. Com., 2 Va. Cas. 260.

"Statutes" instead of "statute," where the formality is required, does not vitiate the indictment.—

a statute creates an offense, or declares a common-law offense, when committed under particular circumstances, not necessarily in the original offense, punishable in a different manner from what it would have been without such circumstances; or where the statute changes the nature of the common-law offense to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should conform to the statute creating or changing the nature of the offense, and should, at common law, conclude against the form of the statute.[3] Under a statute revising and absorbing the common law, the conclusion must be statutory.[4] When the constitu-

Michael v. State, 40 Fla. 265, 23 So. 944.

3 1 Hale 172, 189, 192; Dougl. 441; 1 Salk. 370; 13 East 258; 5 Mod. 307; 2 Ld. Raym. 1104; 1 Saund. 135a, n. 3, 4; 2 Hawk., ch. 23, § 99, ch. 25, § 116; Bac. Ab. Indictment, H. 4; Burn, J., Indict. ix; Cro. C. C. 39; 1 Chitty on Pleading 358; 2 Hale 189. ALA.—Beasley v. State, 18 Ala. 525. IND.—Fuller v. State, 1 Blackf. 63. ME.—Brown's Case, 3 Me. (3 Greenl.) 177; State v. Soule, 20 Me. 19. MD.—State v. Evans, 7 Gill & J. 290. MASS.—Com. v. Northampton, 2 Mass. 116; Com. v. Inhabitants of Springfield, 7 Mass. 9; Com. v. Inhabitants of Stockbridge, 11 Mass. 279; Com. v. Cooley, 27 Mass. (10 Pick.) 37. N. J.—State v. Morris Canal & Banking Co., 22 N. J. L. (2 Zab.) 537. N. Y.—People v. Enoch, 13 Wend. 159, 27 Am. Dec. 197; In re Hughes, 4 City Hall Rec. 132; People v. Cook, 2 Park. Cr. Rep. 12. N. C.—State v. Dick, 6 N. C. (2 Murph.) 388; State v. Dunkley, 25 N. C. (3 Ired.) 116; State v. Minton, 61 N. C. (Phill.) 196; State v. Ratts, 63 N. C. 503; State v. Dill, 75 N. C. 257; State v. Lawrence, 81 N. C. 522; State v. Foy, 82 N. C. 679. PA.—Com. v. Searle, 2 Binn. 332, 4 Am. Dec. 446; Com. v. Searle, 6 Binn. 332; White v. Com., 6 Binn. 179, 6 Am. Dec. 443; Russell v. Com., 7 Serg. & R. 489; Chapman v. Com., 5 Whart. 427, 34 Am. Dec. 565; Warner v. Com., 1 Pa. 154, 44 Am. Dec. 114. S. C.—State v. Posey, 4 Strohb. 103; State v. Gray, 14 Rich. 174; State v. Ripley, 2 Brev. 300; State v. McKettrick, 14 S. C. 346. TENN.—State v. Humphreys, 1 Tenn. (1 Overt.) 307. FED.—United States v. Norris, 1 Cr. C. C. 411, Fed. Cas. No. 15899.

As to relations of statutes to common law, see, supra, § 282.

Complaint for violation of ordinance should conclude "against the statute," etc., and also "against the peace and dignity," etc.—State v. Soragan, 40 Vt. 450.

4 Com. v. Cooley, 27 Mass. (10 Pick.) 37; Com. v. Dennis, 105 Mass. 162.

tion does not forbid, a statutory conclusion may be dispensed with by statute.[5]

§ 331. —— OTHERWISE WHEN STATUTE DOES NOT MODIFY OFFENSE. It is otherwise where the statute is only declaratory of what was a previous offense at common law, without adding to or altering the punishment.[1] And where a statute only inflicts a punishment on that which was *an offense* before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude "contra formam statuti," etc.[2] This is clearly the case when the statute only mitigates the common law punishment.[3]

5 **This is the case in England.**—Castro v. R., L. R. 6 App. Ca. 229, 44 L. J. (N. S.) 351, L. R. 5 Q. B. D. 490, 14 Cox C. C. 546.

1 Deac. Crim. Law 661; State v. Evans, 7 Gill & J. (Md.) 290; People v. Enoch, 13 Wend. (N. Y.) 175, 27 **Am. Dec.** 197; State v. Jim, 7 N. C. (3 Murph.) 3; Warner v. Com., 1 Pa. 154, 44 **Am. Dec.** 114; Vance v. Com., 2 Va. Cas. 12.

See Kerr's Whart. Crim. Law, §§ 31, 32.

2 1 Saund. 135a, n. 3, 6; 2 Roll. Abr. 82. ALA.—State v. Stedman, 7 Port. 495. N. Y.—People v. Cook, 2 Park. Cr. Rep. 12. N. C.—State v. Jim, 7 N. C. (3 Murph.) 3; State v. Ratts, 63 N. C. 503. PA.—Com. v. Searle, 2 Binn. 332, 4 **Am. Dec.** 446; White v. Com., 6 Binn. 179, 6 **Am. Dec.** 443; Russell v. Com., 7 Serg. & R. 489. VT.—State v. Burt, 25 Vt. 373. VA.—Chiles v. Com., 2 Va. Cas. 260.

See, infra, § 337.

3 State v. Lawrence, 81 N. C. 521; State v. Thorne, 81 N. C. 555.

In Arkansas, the omission of the words "contrary to the form of the statute in such case made and provided," does not vitiate the indictment under the Code (Dig., ch. 52, § 98), though the offense be created by statute.—State v. Cadle, 19 Ark. 613.

In Kentucky, by the Code, an indictment is sufficient if it show intelligibly the offense intended to be charged, and need not conclude "against the form of the statute."—Com. v. Kennedy, 54 Ky. (15 B. Mon.) 531.

In Massachusetts, a conclusion "against the peace and the statute," is good.—Com. v. Caldwell, 14 Mass. 330.

Though in the same state it was held insufficient to charge the offense as committed against the law in such case made and provided. — Com. v. Stockbridge, 11 Mass. 279.

In the United States courts, a conclusion "contrary to the true intent and meaning of the act of Congress, in such case made and provided," has been held sufficient. —United States v. La Costa, 2 Mas. C. C. 129, Fed. Cas. No. 15548; United States v. Smith, 2 Mas. C. C. 143, Fed. Cas No. 16338.

Last averment of an indictment of a former conviction, does not constitute any objection to giving the indictment the ordinary conclusion.[4]

§ 332. —— SUCH CONCLUSION DOES NOT CURE DEFECTS. An indictment in which the statute is defectively set forth is not cured by a statutory conclusion.[1]

§ 333. CONCLUSION NEED NOT BE IN PLURAL. Where the offense is governed or limited by two statutes, there have been various distinctions taken respecting the conclusion against the form of the statutes in the plural or the statute in the singular. The rule given by the older writers is, that where an offense is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be, that a conclusion in the singular will suffice.[1] The common practice now is to conclude in the singular in all cases,

Compare: United States v. Crittenden, Hempst. C. C. 61, Fed. Cas. No. 14980a.

Indictment charging A. with having committed an offense, made such by a statute, "in contempt of the laws of the United States of America," is bad.—United States v. Andrews, 2 Paine C. C. 451, Fed. Cas. No. 14455.

The proper office of the conclusion, contra formam statuti, is to show the court the action is founded on the statute, and is not an action at common law.—Crain v. State, 10 Tenn. (2 Yerg.) 390.

One count concluding "contra formam," etc., does not cure another without the proper conclusion.—State v. Soule, 20 Me. 19.

But such a conclusion of the final count has been held in Alabama to validate prior counts defective in this respect.—McGuire v. State, 1 Ala. Sel. Ca. 69, 37 Ala. 161.

4 People v. O'Brien, 64 Cal. 53, 28 Pac. 59.

1 2 Hawk., ch. 25, § 110. Supra, § 279.

1 1 Hale 173; Sid. 348; Owen 135; 2 Leach 827; 1 Dyer 347a; 4 Co. 48; 2 Hawk., ch. 25, § 117. See: IND.—Bennett v. State, 3 Ind. 167. ME.—Butman's Case, 8 Me. (8 Greenl.) 113. N. Y.—Kane v. People, 9 Wend. (N. Y.) 203. N. J.—State v. Jones, 9 N. J. L. (4 Halst.) 357, 17 Am. Dec. 483; Townley v. State, 18 N. J. L. (3 Harr.) 311; State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. N. C.—State v. Bell, 25 N. C. (3 Ired.) 506. S. C.—State v. Robbins, 1 Strobh. 355. FED.—United States v. Trout, 4 Biss. C. C. 105, Fed. Cas. No. 16542. ENG.—R. v. Adams, 1 Car. & M. 299, 41 Eng. C. L. 167; R. v. Pim, R. & R. 425.

though in Maryland,[2] and in Indiana,[3] it has been held that when an offense is prohibited by one act of assembly, and the punishment prescribed and affixed by another, the conclusion should be against the acts of assembly.

Though there is but one statute prohibiting an offense, it is not fatal for the indictment to conclude contrary to the "statutes."[4]

§ 334. STATUTORY CONCLUSION MAY BE REJECTED AS SURPLUSAGE. In a common law indictment, the words "contra formam statuti" may be rejected as surplusage.[1] And where an offense, both by statute and common law, is

2 State v. Cassell, 2 Harr. & Gill (Md.) 407. See, also, State v. Pool, 13 N. C. (2 Dev.) 202.

3 Francisco v. State, 1 Ind. 179; King v. State, 2 Ind. 523. See Crawford v. State, 2 Ind. 132.

Where an indictment for murder concluded contra formam statuti, and by the statute of 1843 the punishment of that crime was death; but by the act of 1846 the punishment is either death or imprisonment in the state prison at hard labor during life, at the discretion of the jury, it was held that the conclusion of the indictment in the singular, to wit, contra formam statuti, was correct.—Bennett v. State, 3 Ind. 167.

4 Carter v. State, 2 Ind. 617; Townley v. State, 18 N. J. L. (3 Harr.) 311.

Contra: State v. Cassel, 2 Harr. & G. (Md.) 407; State v. Abernathy, 44 N. C. (Busb.) 428.

1 2 Hale 190; Alleyn 43; 1 Salk. 212, 213; 5 T. R. 162; 2 Leach 584; 2 Salk. 460; 1 Ld. Raym. 1163; 1 Saund. 135, n. 3; 2 Hawk., ch. 25, § 115; Bac. Ab. Indict. H. 2; Burn., J., Indict. ix. CONN.—Knowles v. State, 3 Day 103; Southworth v. State, 5 Conn. 325. IDA.—People v. Buchanan, 1 Ida. 681. ILL.—Maloney v. People, 132 Ill. App. 184. KY.—Com. v. Gregory, 32 Ky. (2 Dana) 417. MASS.—Com. v. Hoxey, 16 Mass. 385. MICH.—People v. Arnold, 46 Mich. 268, 9 N. W. 406. MINN.—State v. Crummey, 17 Minn. 72. MO.—State v. Boll, 59 Mo. 321; State v. Schloss, 63 Mo. 361. N. H.—State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; State v. Baily, 31 N. H. 521 (unnecessary words may be stricken out where indictment good with their elimination); State v. Gove, 34 N. H. 510; State v. Straw, 42 N. H. 393; State v. Russell, 45 N. H. 83. N. J.—Cruiser v. State, 18 N. J. L. (4 Har.) 206. N. Y.—People v. Conger, 1 Wheel. Cr. Cas. 448. PA.—Penn v. Bell, Add. 171, 1 Am. Dec. 298; Respublica v. Newell, 3 Yeates 407, 2 Am. Dec. 381; Com. v. Kay, 14 Pa. Sup. Ct. 376. R. I.—State v. Bacon, 27 R. I. 252, 61 Atl. 252. S. C.—White v. State, 15 S. C. 381. TENN.—Haslip v. State, 5 Tenn. (4 Hayw.) 273. VT.—State v. Burt, 25 Vt. 373.

Where common-law misdemeanor made felony by statute, "against form of statute" is not

badly laid under the statute, the judgment may be given at common law.[2]

XVII. Joinder of Offenses.

§ 335. COUNTS FOR OFFENSES OF THE SAME CHARACTER AND THE SAME MODE OF TRIAL, MAY BE JOINED. A defendant, as has been already seen, can not generally be charged with two distinct offenses in a single count. It is otherwise, however, when we approach the question of the introduction of a series of distinct counts. Offenses, it is held, though differing from each other, and varying in the punishments authorized to be inflicted for their perpetration, and though committed at different times, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided that the offenses be of the same general character, and provided the mode of trial is the same.[1] In misdemeanors, the joinder of several offenses will not vitiate the

surplusage. — State v. Gore, 34 N. H. 510.

2 Com. v. Lanigan, 2 Boston Law Rep. 49; State v. Phelps, 11 Vt. 117, 34 Am. Dec. 672.

1 ALA. — Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Henry v. State, 33 Ala. 389; Quinn v. State, 49 Ala. 353; Turner v. State, 92 Ala. 1, 9 So. 613; Carleton v. State, 100 Ala. 130, 14 So. 472; Lowe v. State, 134 Ala. 154, 32 So. 273. ARK.—Baker v. State, 4 Ark. (4 Pike) 56; Orr v. State, 18 Ark. 540. CAL.—People v. Garcia, 58 Cal. 102; People v. Jailles, 146 Cal. 301, 79 Pac. 961. GA.—Hoskins v. State, 11 Ga. 92. IND.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494. IOWA — State v. McPherson, 9 Iowa 53. KAN.—State v. Chandler, 31 Kan. 201, 1 Pac. 787. LA.—State v. Diskin, 35 La. Ann. 46; State v. Sandoz, 37 La. Ann. 376. MASS.—Charlton v. Com., 46 Mass. (5 Met.) 532; Josslyn v. Com., 47 Mass. (6 Met.) 236; Com. v. Costello, 120 Mass. 358; Com. v. Brown, 121 Mass. 69. MO.—State v. Kibby, 7 Mo. 317; Klein v. State, 78 Mo. 627. N. Y.—People v. Rynders, 12 Wend. 425; People (ex rel. Tweed) v. Liscomb, 3 Hun 760; People v. Dunn, 90 N. Y. 104. N. C.—State v. Slagle, 82 N. C. 653. PA.—Edge v. Com., 7 Pa. St. 275; Mills v. Com., 13 Pa. St. 631; Nicholson v. Com., 96 Pa. St. 503. VA.—Dowdy v. Com., 9 Gratt. 727, 60 Am. Dec. 314. FED.—Pointer v. United States, 151 U. S. 396, 38 L. Ed. 208, 14 Sup. Ct. Rep. 410; United States v. O'Callahan, 6 McL. C. C. 596, Fed. Cas. No. 15910; United States v. Wentworth, 11 Fed. 52; United States

prosecution in any stage.[2] Hence, it is the constant practice to permit counts for several libels or assaults to be joined in the same indictment.[3] And in a leading case,[4] under several counts for a conspiracy alleging several conspiracies of the same kind, on the same day, the prosecutor was allowed to give in evidence several conspiracies on different days.[5]

In what cases election will be compelled will be considered in a future section.[6]

§ 336. ASSAULTS ON TWO PERSONS CAN BE JOINED. It was once said that a person could not be prosecuted upon one

v. Howells, 65 Fed. 402. ENG.—R. v. Fussell, 3 Cox C. C. 291.

Contra: When punishments differ in character.—Norvell v. State, 50 Ala. 174.

In California it is by statute provided that only one offense is to be included in an indictment.—People v. De Coursey, 61 Cal. 134.

Compare: Kerr's Cal. Penal Code, 1915, § 954.

In Massachusetts the law is not changed by the statute of 1861.

United States Revised Statutes, § 1024 (2 Fed. Stats. Ann., 1st ed., p. 337, 2 id., 2d ed., p. 676), provides that changes which may be joined in one indictment may be consolidated by order of the court.—United States v. Bennett, 17 Blatchf. C. C., Fed. Cas. No. 14572.

This, however, does not justify joining incongruous counts.—United States v. Gaston, 28 Fed. 848.

2 ALA.—Quinn v. State, 49 Ala. 353. IND.—Weinzorpflin v. State, 7 Blackf. 186. KAN.—State v. Schweiter, 27 Kan. 499. N. Y.—People v. Costello, 1 Den. 83. PA.—Com. v. Gillespie, 7 Serg. & R. 476; Harman v. Com., 12 Serg. & R. 69. TEX.—State v. Randle, 41 Tex. 292. WIS.—State v. Gummer, 22 Wis. 441. FED.—United States v. Porter, 2 Cr. C. C. 60, Fed. Cas. No. 16072; United States v. Peterson, 1 W. & M. C. C. 305, Fed. Cas. No. 16037. ENG.—R. v. Benfield, 2 Burr. 984, 97 Eng. Repr. 666; R. v. Jones, 2 Camp. 132; R. v. Kingston, 2 East 468; Young v. R., 3 T. R. 105.

See Kerr's Whart. Crim. Law, § 1219; also, infra, § 343.

3 Ibid.

4 R. v. Levy, 2 Stark. N. P. 458. See Res. v. Hevice, 2 Yeates (Pa.) 114. Kerr's Whart. Crim. Law, § 1654.

5 See, also, R. v. Broughton, 1 Trem. P. C. 111, where the indictment charged no less than twenty distinct acts of extortion.

Indictment against Mayor Hall, tried in New York, October, 1872, contained four counts for each of fifty-five different acts, containing two hundred and twenty counts in all.

In Com. v. Wilson, 9 Del. Co. Rep. (Pa.) 357, there were twenty-seven counts charging sale of impure milk, based on different legislative acts.

6 Infra, § 343.

indictment for assaulting two persons, each assault being a distinct offense.[1] But in a subsequent case,[2] the court held this position not to be law, and said: "Can not the king call a man to account for a breach of the peace, because he broke two heads instead of one? It is a prosecution in the king's name for the offense charged, and not in the nature of an action, where a person injured is to recover separate damages."[3]

§ 337. —— So IN CONSPIRACY AND ASSAULT. So may be joined counts for a misdemeanor with counts for a conspiracy to commit a misdemeanor,[1] and assault with assault with intent.[2]

§ 338. COMMON LAW AND STATUTORY OFFENSES MAY BE JOINED. An indictment may also contain a count at common law and another under a statute.[1] Such as the common-law offense of keeping a bawdy-house and the statutory offense of being a common prostitute.[2]

§ 339. —— AND SO OF FELONY AND MISDEMEANOR. Nor does it vary the case that one offense is a felony and the other a misdemeanor, one being part of the same transaction with the other.[1] Thus in an English case reserved,

1 R. v. Clendon, 2 Ld. Raym. 1572, 92 Eng. Repr. 517, 2 Str. 870, 93 Eng. Repr. 905.

2 R. v. Benfield, 2 Burr. 984, 97 Eng. Repr. 664. See, supra, § 303, for other cases.

3 Supra, § 303.

1 Kerr's Whart. Crim. Law, § 1654; Thomas v. People, 113 Ill. 531; Com. v. Gillespie, 7 Serg. & R. (Pa.) 476, 477, 10 Am. Dec. 475, 6 Pittsb. L. J. 283; Com. v. Kurz, 14 Pa. Dist. Rep. 141; R. v. Murphy, 8 Car. & P. 297, 34 Eng. C. L. 744.

2 People v. Sweeny, 55 Mich. 586, 22 N. W. 50. Supra, § 296.

1 MASS.—Com. v. Ismahl, 134 Mass. 201. PA.—Com. v. Sylvester, Brightly R. 331, 6 Pittsb. L. J. 283; Com. v. Sylvester, 4 Pa. L. J. 283, Brightly 331. S. C.—State v. Williams, 2 McC. 301; State v. Thompson, 2 Strobh. 12, 47 Am. Dec. 588. FED.—In re Lane, 135 U. S. 443, 34 L. Ed. 219, 10 Sup. Ct. Rep. 760. See, infra, § 341.

2 Wooster v. State, 55 Ala. 217. See Com. v. Schoen, 25 Pa. Sup. Ct. 211.

1 Herman v. People, 131 Ill. 594, 9 L. R. A. 182, 22 N. E. 471; George v. People, 167 Ill. 451, 47 N. E. 741; Staeger v. Com., 103 Pa. St. 469; State v. Strickland, 10 S. C. 191.

it was held by Lord Campbell, C. J., Cresswell, J., Coleridge, J., Platt, B., and Williams, J., that it is no ground for arresting a judgment upon conviction of felony that the indictment contained a count for a misdemeanor.[2] And indictments will be sustained which join larceny with conspiracy to defraud, both based on the same transaction;[3] and a felony with a misdemeanor, forming distinct stages in the same offense.[4] It has been held, however, that murder can not be joined with conspiracy to murder;[5] nor rape with incest;[6] though these rulings are open to doubt.

§ 340. COGNATE FELONIES MAY BE JOINED. Where two or more distinct felonies are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed,[1] but the indictment will not be quashed or set aside on demurrer where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense, or for cognate offenses;[2] though when the offenses developed in the evidence are distinct, the prosecution, as will presently be seen, will be compelled before verdict to elect that on

2 R. v. Ferguson, 29 Eng. Law & Eq. 536, 6 Cox C. C. 454.

3 Henwood v. Com., 52 Pa. St. 424.

4 People v. Satterlee, 5 Hun (N. Y.) 167; Stevick v. Com., 78 Pa. St. 460; Hunter v. Com., 79 Pa. St. 503, 21 Am. Rep. 83; Staeger v. Com., 14 Pittsb. L. J. (N. S.) 231; infra, § 343.

5 United States v. Scott, 4 Biss. C. C. 29, Fed. Cas. No. 16241, sed quære.

See, infra, § 342.

So in Georgia, as to joinder of robbery and assault.—Davis v. State, 57 Ga. 66.

6 State v. Thomas, 53 Iowa 214, 4 N. W. 908, Beck and Day, JJ., dissenting. See, infra, § 341.

1 CAL.—People v. Garcia, 58 Cal. 102. FLA.—McGahahin v. State, 17 Fla. 665. N. C.—State v. Reel, 80 N. C. 442. TENN.—Womack v. State, 47 Tenn. (7 Cold.) 508. VA.—Lazier v. Com., 10 Gratt. 708.

See, also, infra, §§ 343, 358.

Such joinder is not bad on demurrer. See State v. Smalley, 50 Vt. 736.

2 State v. Elsham, 70 Iowa 531, 31 N. W. 66; State v. Lockwood, 58 Vt. 378, 3 Atl. 539.

which it relies.[3] And it is a common practice to join counts for distinct felonies, when constructed on different sections of the same statute.[4] Thus, for instance, in indictments under the Massachusetts statute for arson or burglary, where the common law offense is divided into distinct grades, counts may be joined embracing each section.[5]

§ 341. SUCCESSIVE GRADES MAY BE JOINED. The common-law rule is that counts for felony and for misdemeanor should not be joined,[1] but such joinder furnishes no ground for a motion in arrest of judgment.[2] The gen-

3 ALA.—Hubbard v. State, 72 Ala. 164. CAL.—People v. Thompson, 28 Cal. 214; People v. Valencia, 43 Cal. 552. CONN.—State v. Tuller, 34 Conn. 281. IND.—Weinzorpflin v. State, 7 Blackf. 186; Mershorn v. State, 51 Ind. 14; Short v. State, 63 Ind. 376; State v. Weil, 89 Ind. 286. LA.—State v. Jacob, 10 La. 141. ME.—State v. Nelson, 29 Me. 329. MASS.—Charlton v. Com., 46 Mass. (5 Met.) 532; Com. v. Hills, 64 Mass. (10 Cush.) 530; Com. v. Cain, 102 Mass. 487; Com. v. Sullivan, 104 Mass. 552. N. J.—Donnelly v. State, 26 N. J. L. (2 Dutch.) 463, 601. N. Y.—Kane v. People, 8 Wend. 203. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. S. C.—State v. Strickland, 10 S. C. 191; State v. Scott, 15 S. C. 434. TENN.—Wright v. State, 23 Tenn. (4 Humph.) 194; Cash v. State, 29 Tenn. (10 Humph.) 111. TEX.—Fisher v. State, 33 Tex. 792; Gonzales v. State, 12 Tex. App. 657. WIS.—Ketchingham v. State, 6 Wis. 426. ENG.—R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986.

See, also, infra, §§ 359 et seq.

Charging two murders committed on same day in same county with same kind of instrument, election is in discretion of trial judge.—Pointer v. United States, 151 U. S. 396, 38 L. Ed. 208, 14 Sup. Ct. Rep. 410.

In People v. DeCoursey, 61 Cal. 134, it was held that larceny and embezzlement could not be joined.

4 See Com. v. Pratt, 137 Mass. 98.

5 Com. v. Hope, 39 Mass. (22 Pick.) 1; Com. v. Sullivan, 104 Mass. 552.

1 GA.—Davis v. State, 57 Ga. 66; Gilbert v. State, 65 Ga. 449. MO.—Hildebrand v. State, 5 Mo. 548. TEX.—Weatherby v. State, 1 Tex. App. 643. FED.—United States v. Scott, 4 Biss. C. C. 29, Fed. Cas. No. 16241. ENG.—Rex v. Gough, 1 M. & R. 71.

Burglary mixed with another felony, indictment for the greater necessarily included the lesser offense. See 1 Hale P. C. 549; People v. Garnett, 29 Cal. 262.

2 ARIZ.—Territory v. Duffield, 1 Ariz. 70, 25 Pac. 476. CAL.—People v. Shotwell, 27 Cal. 394; People v. Frank, 28 Cal. 513; People v. Garnett, 29 Cal. 622; People v. Jim Ti, 32 Cal. 62; People v. Burgess, 35 Cal. 118. IDA.—People v.

eral rule in this country is that felonies and misdemeanors, forming part of the development of the same transaction, may in like manner be joined.[3] Thus, where an assault is an ingredient of a felony, as in the case of rape, and assault with intent to commit rape; or larceny and conspiracy to steal;[4] or where accessorship is joined to the principal offense;[5] or where the misdemeanor is of the nature of a corollary to the felony, as in forgery and uttering;[6] as in larceny and the receiving of stolen goods;[7] and this is the case also in burglary and receiv-

Stapleton, 2 Ida. 52, 3 Pac. 6. S. C.—State v. Strickland, 10 S. C. 191. VT.—State v. Stevens, 81 Vt. 455, 70 Atl. 1061. ENG.—R. v. Ferguson, 6 Cox C. C. 454, 29 Eng. L. & Eq. 536.

3 ALA.—Ben v. State, 22 Ala. 9, 58 Am. Dec. 234. ILL.—Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621. MASS.—Com. v. McLaughlin, 66 Mass. (12 Cush.) 612. N. H.—State v. Lincoln, 49 N. H. 464. N. C.—State v. Johnson, 50 N. C. (5 Jones) 221; State v. Morrison, 85 N. C. 561. OHIO—Barton v. State, 18 Ohio 221. PA.—Henwood v. Com., 52 Pa. St. 424; Stevick v. Com., 78 Pa. St. 466; Hunter v. Com., 79 Pa. St. 503, 21 Am. Rep. 83; Hutchinson v. Com., 82 Pa. St. 472; Staeger v. Com., 14 Pittsb. L. J. 231.

Burglary and assault to commit burglary can not be joined by separate counts in same indictment in Rhode Island.—State v. Fitzsimons, 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446.

Two offenses committed on different days and entirely different violations of law, can not be joined in the same indictment.—Com. v. Grube, 57 Pittsb. L. J. 691.

4 Kerr's Whart. Crim. Law, § 1654; Cawley v. State, 37 Ala. 152; State v. Hood, 51 Me. 363; State v. Watts, 82 N. C. 656; Henwood v. Com., 52 Pa. St. 424.

See, supra, §§ 335, 336, chapter on "Writ of Error," div. II.

5 Infra, § 343.

6 Foute v. State, 83 Tenn. (15 Lea) 712; Boles v. State, 13 Tex. App. 650.

Compare: State v. Henry, 59 Iowa 391, 13 N. W. 343.

7 ALA. — State v. Coleman, 5 Port. 32. GA.—Stephen v. State, 11 Ga. 225; Johnson v. State, 61 Ga. 212. ILL.—Bennett v. People, 96 Ill. 102. IND.—Keefer v. State, 14 Ind. 246. LA.—State v. Moultrie, 33 La. Ann. 1146. ME.—State v. Stimpson, 45 Me. 608. MD.—State v. Sutton, 4 Gill 495; Buck v. State, 2 Harr. & J. 426. MASS.—Com. v. Adams, 73 Mass. (7 Gray) 43; Com. v. O'Connell, 94 Mass. (12 Allen) 451. MO.—State v. Daubert, 42 Mo. 243. N. C.—State v. Speight, 69 N. C. 72; State v. Baker, 70 N. C. 530; State v. Lawrence, 81 N. C. 522. PA.—Harman v. Com., 12 Serg. & R. 69. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. S. C.—State v. Gaffney, Rice 431; State v. Boyes, 1 McM. 191; State v. Montague, 2 McC. 257; State v. Posey, 7 Rich. 484. VA.—Dowdy v. Com., 9 Gratt. 727,

ing;[8] a joinder is good. So, by Judge Woodbury, it was ruled, that if there be two counts in one indictment for offenses committed at the same time and place, and of the same class, but different in degree, as one for a revolt, and another for an attempt to excite it, the judgment will not be arrested, though a verdict of guilty be returned on both.[9]

60 Am. Dec. 314. FED.—United States v. Prior, 5 Cr. C. C. 37, Fed. Cas. No. 16092. ENG.—R. v. Hilton, Bell 201, 8 Cox 87; R. v. Fowler, 3 Car. & P. 413, 14 Eng. C. L. 637; R. v. Ferguson, 6 Cox C. C. 454; R. v. Huntley, 8 Cox C. C. 260; R. v. Craddock, 2 Den. C. C. 31.

As to election, see, infra, § 343.

When the offenses are cognate, "it matters not that the offenses alleged in the several counts are of different grades, and call for different punishments."—Earl, J., Hawker v. People, 75 N. Y. 496.

8 Com. v. Darling, 129 Mass. 112; State v. Strickland, 10 S. C. 191.

9 United States v. Peterson, 1 Woodb. & M. C. C. 305, Fed. Cas. No. 16037.

In New York, when by statute an offense comprises different degrees, an indictment may contain counts for the different degrees of the same offense, or for any of such degrees.—Rev. Stat., part iv, ch. 11, tit. 3, art. 2, § 51.

Under United States Revised Statutes, § 1024 (2 Fed. Stats. Ann., 1st ed., p. 337, 2 id., 2d ed., p. 676), separate offenses of the same class growing out of the same transaction may be united.—United States v. Jones, 69 Fed. 973; Anderson v. Moyer, 193 Fed. 499.

—Joinder of conspiracy and murder not authorized by this provision unless it appears upon the face of the indictment that the counts refer to the same act or transaction, or that they are acts or transactions connected together. —United States v. Scott, 4 Biss. C. C. 29, Fed. Cas. No. 16241; United States v. Durkee, Hoff. Op. 535, Fed. Cas. No. 15008.

Burglary and larceny may be joined. Where an indictment charges in one count a breaking and entering of a building, with intent to steal, and in another count, a stealing in the same building on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, can not be reversed on error, because the record does not show whether one offense only, or two were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved.—Crowley v. Com., 52 Mass. (11 Met.) 575; Kite v. Com., 52 Mass. (11 Met.) 581; Com. v. Birdsall, 69 Pa. St. 482, 8 Am. Rep. 283; People v. Garnett, 29 Cal. 622.

Contra: Wilson v. State, 20 Ohio 26.

A count in an indictment, which charges the breaking and entering

It has also been held that seduction can be joined with fornication and bastardy.[10]

§ 342. JOINDER OF DIFFERENT OFFENSES NO GROUND FOR ERROR. It was formerly held, that if the legal judgment on each count would be materially different, as in felony and misdemeanor, then the joinder of several counts would be bad on demurrer, in arrest of judgment, or on error,[1] though this objection could be cured at the trial by taking a verdict on the counts only that can be joined.[2] At present, after a general verdict of guilty, it is considered no objection to an indictment, on motion in arrest, that offenses of different grades and requiring different punishments are charged in the different counts.[3] If any

in the night-time of a shop adjoining to a dwelling-house, with intent to commit a larceny, may be joined with a count which charges the stealing of goods in the same shop, and the defendant, if found guilty generally, may be sentenced for both offenses. But if the breaking and entering, and the actual stealing, are charged in one count, only one offense is charged, and the defendant, on conviction, can be sentenced to one penalty only. —Davis v. State, 57 Ga. 66; Josslyn v. Com., 47 Mass. (6 Met.) 236; State v. Nelson, 14 Rich. (S. C.) 169, 94 Am. Dec. 130.

Embezzlement and larceny may be joined in same indictment.—Kerr's Whart. Crim. Law, §§ 1674, 1675.

See People v. DeCoursey, 61 Cal. 135.

10 Nicholson v. Com., 91 Pa. St. 390.

1 Young v. R., 3 T. R. 103; Hancock v. Haywood, 3 T. R. 435; but see 1 East P. C. 408; 1 Chitty's C. L. 254, 255; Hildebrand v. State, 5 Mo. 548; State v. Merrill, 44 N. H. 624; State v. Freels, 22 Tenn. (3 Humph.) 228.

Compare: Buck v. State, 1 Ohio St. 61.

Indictment not showing on its face whether two distinct offenses are charged or merely the same offense in different forms, the misjoinder may be taken advantage of in error.—White v. People, 8 Colo. App. 289, 45 Pac. 539.

2 R. v. Jones, 8 Car. & P. 776, 34 Eng. C. L. 1016.

3 ALA.—Covey v. State, 4 Port. 186. ME.—State v. Hood, 51 Me. 363. MASS.—Carlton v. Com., 46 Mass. (5 Met.) 532. MO.—State v. Mallon, 75 Mo. 355. N. J.—Stone v. State, 20 N. J. L. (1 Spen.) 404. N. Y.—Kane v. People, 8 Wend. 203. N. C.—State v. Speight, 69 N. C. 72; State v. Reel, 80 N. C. 442. PA.—Com. v. Birdsall, 69 Pa. St. 482, 8 Am. Rep. 283. W. VA.—Moody v. State, 1 W. Va. 337. FED.—United States v. Stetson, 3 Woodb. & M. C. C. 164, Fed. Cas.

one of the counts is sufficient, the court, it has been argued, will render judgment upon such count; and if all the counts are sufficient, judgment will be rendered on the count charging the highest offense.[4] There is also high authority, to be hereafter noticed, to the effect that when there is a verdict of guilty on each of a series of counts, there may be a specific sentence imposed on each,[5] though it is otherwise in respect to counts which are defective.[6]

So far as concerns the jury, on the trial of an indictment charging distinct offenses in separate counts, the better course is to pass upon each count separately, applying to it the evidence bearing on the question of the defendant's guilt of the offense therein charged.[7] At the same time, where two counts are for successive stages of the same crime, the practice is to take a general verdict, which carries the greater offense; or where good and bad counts are joined, a verdict on the good counts.[8]

§ 343. ELECTION WILL NOT BE COMPELLED WHERE OFFENSES ARE CONNECTED. As a general rule, when two

No. 16390. ENG.—R. v. Ferguson, 6 Cox C. C. 454.

4 Infra, §§ 771, 910. ALA.—Cowley v. State, 37 Ala. 152. CAL.—People v. Shotwell, 27 Cal. 394. CONN.—State v. Merwin, 34 Conn. 113; State v. Tuller, 34 Conn. 281. FLA.—Cribbs v. State, 9 Fla. 409. GA.—Dean v. State, 43 Ga. 218. ME.—State v. Hood, 51 Me. 363. MD.—Manly v. State, 7 Md. 149. MO.—State v. McCue, 39 Mo. 112; State v. Core, 70 Mo. 491. N. J.—Cook v. State, 24 N. J. L. (4 Zab.) 843. PA.—Com. v. McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; Hutchinson v. Com., 82 Pa. St. 472. S. C.—State v. Crank, 2 Bail. 66, 23 Am. Dec. 117; State v. Nelson, 14 Rich. L. 169, 94 Am. Dec. 130; State v. Glover, 27 S. C. 602, 4 S. E. 564. VT.—State v. Hooker, 17 Vt. 658. ENG.—R. v. Ferguson, 6 Cox C. C. 454.

For general verdict in larceny and receiving.—State v. Baker, 70 N. C. 530.

As to how far bad count vitiates verdict, see, infra, chapter on "Sentence," div. II.

5 Com. v. Birdsall, 69 Pa. St. 482, 8 Am. Rep. 283.

6 Adams v. State, 52 Ga. 565.

7 Com. v. Carey, 103 Mass. 214. Compare: State v. Tuller, 34 Conn. 281.

8 Infra, chapter on "Verdict."

offenses charged form parts of one transaction, the one an ingredient or corollary of the other, the prosecutor will not be ordinarily called upon to elect upon which charge he will proceed.[1] Between larceny and stolen goods, therefore, an election will not be compelled when the evidence is such that it is doubtful of which offense the defendant was guilty;[2] or between a charge of assault

In Pennsylvania, where a count for a misdemeanor is joined to a count for felony, the jury can not, in acquitting the prisoner, impose costs upon him; and though such a verdict be rendered and judgment ordered, the county is liable for the costs.—Wayne v. Com., 26 Pa. St. 154.

1 ALA.—Mayo v. State, 30 Ala. 32. DEL.—State v. Manluff, 1 Houst. 268. D. C.—United States v. Neverson, 1 Mack. 152. GA.—State v. Hogan, R. M. Charlton 474. ILL.—Ker v. People, 110 Ill. 627, 51 **Am. Rep.** 706. IND.—Miller v. State, 51 Ind. 405; Wall v. State, 51 Ind. 453. KAN.—State v. Crimmins, 31 Kan. 376, 2 Pac. 574; State v. Skinner, 34 Kan. 256, 8 Pac. 420; State v. Fisher, 37 Kan. 404, 15 Pac. 606. LA.—State v. Jacob, 10 La. Ann. 141. ME.—State v. Flye, 26 Me. 312. MD.—State v. Bell, 27 Md. 675, 92 **Am. Dec.** 658. MASS.—Com. v. Ismahl, 134 Mass. 201. MICH.—People v. Sweney, 55 Mich. 586, 22 N. W. 50. MISS.—Sarah v. State, 28 Miss. 267, 61 **Am. Dec.** 544. MO.—State v. Jackson, 17 Mo. 554; State v. Mallon, 75 Mo. 355; State v. Houx, 109 Mo. 654, 32 **Am. St. Rep.** 686, 19 S. W. 35. NEB.—Candy v. State, 8 Neb. 482. N. Y.—People v. Costello, 1 Den. 83; Armstrong v. People, 70 N. Y. 38; People v. Satterlee, 5 Hun 167; People v. Reavy, 45 Hun 418. N. C.—State v. McNeill, 93 N. C. 552. PA.—Com. v. Manson, 2 Ashm. 31. S. C.—State v. Nelson, 14 Rich. L. 169, 94 **Am. Dec.** 130. TEX.—Masterson v. State, 20 Tex. App. 574. VA.—Dowdy v. Com., 9 Gratt. 727, 60 **Am. Dec.** 314. ENG.—R. v. Jones, 2 Camp. 132; R. v. Wheeler, 7 Car. & P. 170, 32 Eng. C. L. 556; R. v. Hartell, 7 Car. & P. 475, 32 Eng. C. L. 715; R. v. Austin, 7 Car. & P. 796, 32 Eng. C. L. 877; R. v. Pulham, 9 Car. & P. 281, 38 Eng. C. L. 172.

Between different items of a continuous taking election will not be compelled.—R. v. Ward, 10 Cox C. C. 42.

Election required only when felonies not of the same character are charged in the different counts of the indictment.—Baker v. State, 25 Tex. App. 1, 8 **Am. St. Rep.** 427, 8 S. W. 23.

Offenses must be individuated to sustain a demand for an election.—Peacher v. State, 61 Ala. 22.

Principal of election applicable only where there is evidence of distinct transactions.—Black v. State, 83 Ala. 81, 3 **Am. St. Rep.** 691, 3 So. 814.

2 GA.—State v. Hogan, R. M. Charlt. 474. ILL.—Andrews v. People, 117 Ill. 195, 7 N. E. 265. IND.—Engleman v. State, 2 Ind. 91, 52 **Am. Dec.** 494; Keefer v.

and battery and one of rape, arising out of the same transaction;[3] or seduction on two different days.[4] And the prosecutor will not be compelled to elect where a count, charging a person with being accessory before the fact, is joined with one charging him with being accessory after;[5] nor where the defendant is indicted as a principal in the first degree in one count, and as principal in the second degree or accessory in another count;[6] nor when several defendants in homicide are charged with assaulting with different weapons.[7] On the same principle, where there are counts in an indictment for forging a bill, acceptance, and indorsement, the prosecutor is not driven to elect on which he will proceed.[8] Of course no election will be compelled when the counts vary only in form.[9] But where two assaults at different times are proved an election will be compelled;[10] and where two defendants were indicted for a conspiracy and for a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy, but no evi-

State, 4 Ind. 246; Glover v. State, 109 Ind. 391, 10 N. E. 282. LA.—State v. Laque, 37 La. Ann. 853. MD.—State v. Bell, 27 Md. 675, 92 Am. Dec. 658. MO.—State v. Daubert, 42 Mo. 242. N. C.—State v. Morrison, 85 N. C. 561. VA.—Dowdy v. Com., 9 Gratt. 727, 60 Am. Dec. 314.

See, also, cases cited supra, § 341.

3 Mills v. State, 52 Ind. 187.

Otherwise where evidence shows two distinct assaults not part of the same transaction (Williams v. State, 77 Ala. 53), or where on one charge several like offenses are proven.—State v. Norris, 122 Iowa 154, 79 N. W. 999.

4 Hausenfluck v. Com., 85 Va. 702, 8 S. E. 683.

5 Tompkins v. State, 17 Ga. 356; R. v. Blackson, 8 Car. & P. 43.

In R. v. Brannon, Law Times, Feb. 28, 1880, p. 319, Cockburn, C. J., required the prosecution to elect between two counts, one charging the defendant as principal, the other as accessory after the fact.

6 Williams v. State, 69 Ga. 11; State v. Testerman, 68 Mo. 408; Simms v. State, 10 Tex. App. 131; R. v. Gray, 7 Car. & P. 164, 32 Eng. C. L. 553.

7 Williams v. State, 54 Ga. 401; Gonzales v. State, 5 Tex. App. 584.

8 R. v. Young, Peake's Add. Cas. 228.

9 Stewart v. State, 58 Ga. 577.

10 Williams v. State, 77 Ala. 53; Busby v. State, 77 Ala. 661; State v. Hutchings, 24 S. C. 142.

dence against one of them as to the libel, an election was required.[11] The defendant is entitled to an acquittal on the abandoned counts if there be no nolle prosequi as to them.[12]

§ 344. —— OBJECT OF ELECTION IS TO REDUCE TO A SINGLE ISSUE. Abandoning the artificial and now in most jurisdictions obsolete distinction between felonies and misdemeanors, we may hold, therefore, summing up what has been already said, the following conclusions:

1. Cognate offenses may be joined in separate counts in the same indictment.

2. If this is done in such a way as to oppress the defendant, the remedy is a motion to quash.

3. It is permissible, in most States, to join several distinct offenses, to each of which fine or imprisonment is attachable; and upon a conviction on each count, to impose a sentence on each.[1]

4. Yet as to offenses of high grade in all States, and in some States as to all offenses, the court will not permit more than a single issue to go to the jury, and hence will require an election on the close of the prosecution's case,[2] except in those cases in which offenses are so blended that it is eminently for the jury to determine which count it is that the evidence fits.[3]

11 R. v. Murphy, 8 Car. & P. 297, 34 Eng. C. L. 744.

12 Ibid. State v. McNeill, 93 N. C. 552; State v. Sorrell, 98 N. C. 738, 4 S. E. 630.

1 See, infra, chapter on "Sentence," div. II.

2 State v. Brown, 58 Iowa 298, 12 N. W. 318.

3 Supra, §§ 338, 340, Kerr's Whart. Crim. Law, §§ 673, 1294. ALA.—Elam v. State, 26 Ala. 48; Cochrane v. State, 30 Ala. 542. ARK.—State v. Jourdan, 32 Ark. 203; State v. Lancaster, 36 Ark. 55. DEL.—State v. Early, 3 Harr. 561. GA.—Tompkins v. State, 17 Ga. 356; Gilbert v. State, 65 Ga. 449. ILL.—Goodhue v. People, 94 Ill. 37. IND.—Long v. State, 56 Ind. 182, 26 Am. Rep. 19; Kidder v. State, 58 Ind. 68; Snyder v. State, 59 Ind. 105. ME.—State v. Nelson, 29 Me. 329. MICH.—People v. Jenness, 5 Mich. 305. MO.—State v. Testerman, 68 Mo. 408. N. Y.—Kane v. People, 8 Wend. 203; Lanergan v. People, 39 N. Y. 39; People v. Austin, 1 Parker Cr. Rep. 154. N. C.—State v. Haney, 19 N. C. (2 Dev. & B.) 390. OHIO—Bainbridge v. State, 30 Ohio St.

The object of the rule, it may be added, is, first, to enable the defendant to prepare properly for his defense; and, secondly, to protect him, by an individualization of the issue, in case a second prosecution is brought against him. On the other hand, we must remember that there are a series of minor offenses in which a joinder is a benefit to the defendant, even though he should be convicted on each count, as he is thus saved from an accumulation of costs that might have a crushing effect. There are numerous lines of cases in which, where separate indictments are introduced to cover a series of simultaneous or closely consecutive offenses (*e. g.,* as in the cases of the famous tea suits before Judge Washington, in which a separate libel was brought for each of a thousand chests of tea alleged to have been smuggled), the court will require, in order to save the defendant from unnecessary vexation, if not ruin, that the cases be consolidated.[4]

§ 345. Election at discretion of court. Whether a court will compel a prosecuting officer to elect which count to proceed on rests in the discretion of the court, and can not ordinarily be assigned for error.[1] But when

264. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. S. C.—State v. Sims, 3 Strobh. 137. VT.—State v. Smith, 22 Vt. 74; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90. FED.—United States v. Dickenson, 2 McL. C. C. 325, Fed. Cas. No. 14958. ENG.—R. v. Hart, 7 Car. & P. 652, 32 Eng. C. L. 805; R. v. Truman, 8 Car. & P. 727, 34 Eng. C. L. 986; R. v. Vandercomb, 2 Leach 816; R. v. Hinley, 2 M. & R. 524; R. v. Smith, R. & R. 295.

4 Indictments may be consolidated in the federal courts under statute has been already seen. Supra, § 335. See, also, State v. McNeill, 93 N. C. 552.

1 ALA.—Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383. ARK.—Baker v. State, 4 Ark. 56. CONN.—State v. Tuller, 34 Conn. 281. ILL.—Beasley v. People, 89 Ill. 571. IND.—McGregor v. State, 16 Ind. 9; Griffith v. State, 36 Ind. 406; Snyder v. State, 59 Ind. 105; Beaty v. State, 82 Ind. 228; Dantz v. State, 87 Ind. 398. KAN.—State v. Cremmis, 31 Kan. 376, 2 Pac. 574. LA.—State v. Cazeau, 8 La. Ann. 109. ME.—State v. Flye, 26 Me. 312; State v. Nelson, 29 Me. 329; State v. Hood, 51 Me. 363. MD.—State v. Bell, 27 Md. 675, 92 Am. Dec. 658; Gilson v. State, 54 Md. 447; State v. Blackeney, 96 Md. 711, 54 Atl. 614.

two distinct felonies are put in evidence, under separate counts, against protest, this rule, in its rigor, can not be applied.[2] When, however, several guilty acts (as in case of adultery) are put in evidence to make out a case, it is not error that election is not compelled, when it is not specially asked for.[3]

§ 346. ELECTION MAY BE AT ANY TIME BEFORE VERDICT. The general rule is that where the indictment shows on its face that an election is proper, the motion to compel such election should be made at the time the indictment is read to the jury.[1] But in as much as the repugnancy may not appear until the evidence is developed, it is not in such a case just to compel an election until the prosecutor knows what to elect. Hence, when necessary to justice, the motion has been held to be in time where

MASS.—Com. v. Hills, 64 Mass. (10 Cush.) 530; Com. v. Sullivan, 104 Mass. 552; Pettes v. Com., 126 Mass. 245; Com. v. Pratt, 137 Mass. 98. MISS.—Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; Strawbern v. State, 37 Miss. 422, 2 Mor. St. Cas. 1338; George v. State, 39 Miss. 570, 2 Mor. St. Cas. 1419; Teat v. State, 53 Miss. 439. MO.—State v. Jackson, 17 Mo. 544, 59 Am. Dec. 281; State v. Leonard, 22 Mo. 449; State v. Porter, 26 Mo. 206; State v. Gray, 37 Mo. 463; State v. Daubert, 42 Mo. 242; State v. Pitts, 58 Mo. 556; State v. Green, 66 Mo. 632. N. H.—State v. Lincoln, 48 N. H. 464. N. Y.—People v. Baker, 3 Hill 159; Nelson v. People, 23 N. Y. 293; People v. White, 55 Barb. 606; La Beau v. People, 33 How. Pr. 66, 69; Tay v. People, 12 Hun 212. PA.—Com. v. Birdsall, 69 Pa. St. 482. OHIO—Bailey v. State, 4 Ohio St. 440. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96; State v. Fitzsimon, 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446. S. C.—State v. Hutchins, 24 S. C. 142; State v. Bouknight, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451. TENN.—Wright v. State, 23 Tenn. (4 Humph.) 194; Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599. VA.—Dowdy v. Com., 9 Gratt. 727, 60 Am. Dec. 314; State v. Smith, 24 Va. 814. FED.—United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572. ENG.—R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986; R. v. Fussell, 3 Cox C. C. 291; Young v. R., 3 T. R. 106.

Compelling election where an election may deprive state of a substantial right, is reviewable error.—State v. Bailey, 50 Ohio St. 636, 36 N. E. 233.

2 Womack v. State, 47 Tenn. (7 Cold.) 508.

3 State v. Witham, 72 Me. 531. See Whart. Cr. Ev., § 194.

1 Gilbert v. State, 65 Ga. 449.

made before verdict.[2] To elect a count is virtually to withdraw the others from the consideration of the jury;[3] though ordinarily the motion should be made before the defendant opens his case.[4]

In Iowa it has been said that when the repugnancy is of record, the time for an application to compel election is before plea; that if the defendant has pleaded not guilty, he should be allowed to withdraw his plea in order to make a demand for such an election; but that there is no inconsistency in permitting him to require such an election while his plea of not guilty is still pending,[5] because where that plea is made to the whole indictment, it will still be good as to such charge as remains after an election is made.[6]

After verdict, the course is not to elect a particular count, but to enter a nolle prosequi as to those on which judgment is not asked.[7]

At any time before verdict it is within the power of the prosecution to make the election, though this should ordinarily be done before summing up.[8]

§ 347. COUNTS SHOULD BE VARIED TO SUIT CASE. Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits;[1] but this must

2 ALA.—Elam v. State, 26 Ala. 48; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383. MISS.—Wash v. State, 22 Miss. (14 Smed. & M.) 120. N. H.—State v. Lincoln, 49 N. H. 464. S. C.—State v. Sims, 3 Strobh. 137. TENN.—Womack v. State, 47 Tenn. (7 Cold.) 508.

3 Mills v. State, 52 Ind. 187.

4 GA.—Gilbert v. State, 65 Ga. 449. TEX.—Fisher v. State, 33 Tex. 792; Lunn v. State, 44 Tex. 65; Simms v. State, 10 Tex. App. 131. W. VA.—State v. Smith, 24 W. Va. 814. ENG.—R. v. Murphy, 8 Car. & P. 297, 34 Eng. C. L. 744.

5 State v. Abrahams, 6 Iowa 117, 71 Am. Dec. 399; State v. Hale, 44 Iowa 96.

6 State v. Abrahams, 6 Iowa 117, 71 Am. Dec. 399.

7 State v. Reel, 80 N. C. 442.

8 Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; State v. Barr, 78 Vt. 97, 62 Atl. 43.

1 Howard v. State, 34 Ark. 433; Beasley v. State, 89 Ill. 571; State v. Shepard, 33 La. Ann. 1216; State v. Smith, 24 W. Va. 814.

To counts of this class, Massa-

be done in such a manner as to clearly show upon the face of the indictment that the matter and things set forth in the different counts are descriptive of one and the same offense.[2] Thus, he may vary the ownership of articles stolen, in larceny;[3] of houses burned, in arson;[4] or the fatal instrument and other incidents, in homicide.[5]

chusetts statute 1861 does not apply. See Com. v. Andrews, 132 Mass. 263.

2 People v. Thompson, 28 Cal. 216; People v. Garcia, 58 Cal. 102; People v. Jailles, 146 Cal. 301, 79 Pac. 965.

3 Cooper v. State, 79 Ind. 206. As to verdict, see, infra, § 740; State v. Nelson, 29 Mo. 329; Com. v. Dobbin, 2 Pars. (Pa.) 380.

4 Newman v. State, 14 Wis. 393; R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986.

5 See Kerr's Whart. Crim. Law, § 673; Hunter v. State, 40 N. J. L. (11 Vr.) 495.

As to averment of weapon, see, supra, § 261.

Reason for the rule is thus excellently stated by Chief Justice Shaw:

"To a person unskilled and unpracticed in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea: a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third, alleging a death by the joint result of both causes combined."—Bemis's Webster Case, 471; Webster Case, 59 Mass. (5 Cush.) 533; Pettes v. Com., 126 Mass. 245. See, also, State v. Johnson, 10 La. Ann. 456; United States v. Furlong, 18 U. S. (5 Wheat.) 184, 5 L. Ed. 64.

Rule in England: How generally the same practice exists in England may appear from the very pertinent inquiry of Alderson, B., in a recent case: "Why may there not be as many counts for receiving as there are for stealing—one for each? It is really only one offense, laying the property in different persons. It is

Hence a verdict of guilty on four counts, charging the murder to have been committed with a knife, a dagger, a dirk, and a dirk-knife, is not double or repugnant, since the same kind of death is charged in all the counts.[6]

§ 348. Two counts precisely alike defective. As both in civil and criminal pleading two counts charging the same thing would be bad on special demurrer for duplicity—though the fault in civil pleading is cured by plead-

one stealing, and one receiving; and because there was some doubt as to the person to whom the property really belonged, the property is laid five different ways. If a late learned judge had drawn the indictment, you would very likely had it laid in fifty more."—R. v. Beeton, 2 Car. & K. 961, 61 Eng. C. L. 960.

To same effect, see People v. Thompson, 28 Cal. 214; Beasley v. People, 89 Ill. 571.

As to verdict to be taken in such cases, see, infra, chapter on "Verdict," div. I, last section.

—"**In R. v. Sillem** (2 H. & C. 431), an information (which might have been an indictment) charged certain persons in substance with having equipped for the Confederate States, then at war with the United States, a ship called the Alexandra. The information was framed upon 59 Geo. 3, ch. 69, and contained ninety-five counts. The first count charged an equipping with intent that the ship should be employed by certain foreign States, styling themselves the Confederate States, with intent to cruise against the Republic of the United States. The second count, instead of the Republic of the United States, mentioned the citizens of the Republic of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, etc. The fourth count was like the third, with the exception of returning to the expression 'citizens,' etc. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substituting 'furnish' for 'equip.' Eight more substituted 'fit out' for 'furnish.' In short, the indictment contained a number of counts obtained by combining every operative verb of the section on which it was founded with all the other operative words."—Report of English commissioners of 1879.

—**Lord Campbell** in R. v. Rowlands, 2 Den. C. C. 38, and Lord Denman in R. v. O'Connell, 11 Cl. & F. 374, censure the undue multiplication of counts; though under common law pleading, this, in complicated cases, can not be avoided. To split the charge in distinct indictments would unduly accumulate costs, and would expose the prosecution to an application to consolidate.

6 Donnelly v. State, 26 N. J. L. (2 Dutch.) 463, affirmed in error, 26 N. J. L. (2 Dutch.) 601.

See, also, supra, §§ 340 et seq.

ing over—it has been usual, by inserting the word "other" in a second count, to obviate this difficulty, through the fiction that the cause of action thus stated is new and distinct. The rule is clear, that when two counts setting out the same offenses occur, judgment will be arrested. "Neither, as we think," says Lord Denman, in a case in 1846, "can one offense, whether felonious or not, be properly charged twice over, when with one indictment or two; and as special demurrers are not necessary in criminal cases, we think that if the two counts in an indictment necessarily appear to be for the same charge, the objection might be taken in arrest of judgment. But still the court would, if possible, hold them not to be for the same offense; and certainly the omission of the word 'other' would not of itself make the same; though the insertion of the word 'other' would make them different."[1] In New Hampshire, however, it is said that where the same offense is described with formal variations in different counts, it is not necessary to allege the offense described in each of the several counts to be other and different from that described in the others.[2]

Even according to the strictest practice, the omission in an indictment, containing two counts, of an averment that they are for different offenses, is cured by a verdict of not guilty on one of the counts, or the entry of a nolle prosequi on that count.[3]

To same effect, see Jones v. State, 65 Ga. 621; Merrick v. State, 63 Ind. 637.

As to duplicity in such averments, see, supra, § 302.

Defendant can not use one count as evidence to disprove another count. See Edmonds v. State, 34 Ark. 720.

1 Campbell v. R., 11 Ad. & El., N. S. 800, 63 Eng. C. L. 799.

2 State v. Rust, 35 N. H. 438.

Indictment in first count charged defendant with the forging of a certain instrument, and in the second count charged another person with the uttering of the instrument, and then proceeded to charge the defendant with being an accessory before the fact to such utte ing; it was ruled in Massachusetts that but two counts were charged. — Pettes v. Com., 126 Mass. 242.

3 Com. v. Holmes, 103 Mass. 440.

The relative "said," used in one of the subsequent counts of an indictment referring to matter in a previous count, is always to be taken to refer to the count immediately preceding where the sense of the whole indictment does not forbid such a reference.[4]

§ 349. ONE BAD COUNT CAN NOT BE AIDED BY ANOTHER. Where the first count of an indictment is bad, or is abandoned by the prosecution, a subsequent count may be sustained, even though it refers to the first count for some allegations, and without repeating them.[1] Generally, however, one bad count can not help another bad count, which is defective in a distinct way.[2]

Even in good counts, it is unsafe to attempt to supply a material averment by mere reference to a preceding count. Time and place may be thus implied, but not, it seems, descriptive averments which enter into the vitals of the offense.[3]

§ 350. COUNTS MAY BE TRANSPOSED AFTER VERDICT. There may be cases, it seems, in which counts may be transposed after verdict, so as to invest the second with the incidents of the first, or vice versa. Thus, in an English case, A. and B. were indicted for the murder of C., by shooting him with a gun. In the first count A. was charged as principal in first degree, B. as present, aiding and abetting him; in the second count B. as principal in first degree, A. as aiding and abetting. The jury convicted both, but said they were not satisfied as to which fired the gun. It was held that the jury were not bound

4 Sampson v. Com., 5 Watts & S. (Pa.) 385; Boles v. State, 13 Tex. App. 650.

1 Com. v. Miller, 2 Par. (Pa.) 480; State v. Lea, 41 Tenn. (1 Cold.) 175.

2 State v. Longley, 10 Ind. 482.

3 FLA.—Keech v. State, 15 Fla. 591. ME.—State v. Nelson, 29 Me. 329. PA.—Sampson v. Com., 5 Watts & S. 385. WIS.—State v. Lyon, 17 Wis. 237. ENG.—R. v. Dent, 1 Car. & K. 249, 47 Eng. C. L. 248, 2 Cox C. C. 354; R. v. Martin, 9 Car. & P. 213, 38 Eng. C. L. 133.

But see, supra, §§ 342 et seq., as to practice in courts for receiving stolen goods.

to find the prisoners guilty of one or other of the counts only (Maul., J., dissentiente); and that notwithstanding the word "afterward" in the second count, both the counts related substantially to the same person killed, and to one killing, and might have been transposed without any alteration of time or meaning.[1]

The effect of a bad count after verdict will be considered hereafter.[2]

XVIII. Joinder of Defendants.

1. Who May Be Joined.

§ 351. JOINT OFFENDERS CAN BE JOINTLY INDICTED. When more than one join in the commission of an offense, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately.[1] Thus, if several[2] commit a robbery, burglary, or murder, they may be indicted for it jointly[3] or separately; and the

1 R. v. Downing, 1 Den. C. C. 52.

2 Infra, chapter on "Verdict," div. I, and chapter on "Writ of Error," div. II.

1 ALA.—Lindsey v. State, 48 Ala. 169. ARK.—Johnson v. State, 13 Ark. (8 Eng.) 684; Volmer v. State, 34 Ark. 487. CAL.—People v. Plyler, 121 Cal. 160, 53 Pac. 553. KY.—Shelbyville & E. T. P. R. Co. v. Com., 9 Ky. L. Rep. 244. MICH.—People v. Long, 56 Mich. 549, 23 N. W. 217. MISS.—Woods v. State, 81 Miss. 164, 32 So. 998; Howard v. State, 83 Miss. 378, 35 So. 653. MO.—State v. Gay, 10 Mo. 440. N. H.—State v. Nowell, 60 N. H. 199; State v. Wilson, 61 N. H. (Phil.) 237 (in affray). PA.—Com. v. Miller, 2 Pars. Eq. Cas. 480; Com. v. Casey, 14 Pa. Co. Ct. Rep. 389. S. C.—State v. McDowell, Dud. L. 346. TEX.—Lewellen v. State, 18 Tex. 538. FED.—United States v. Holland, 3 Cr. C. C. 254, Fed. Cas. No. 15377; United States v. O'Callahan, 6 McL. C. C. 596, Fed. Cas. No. 15910.

As to joint punishment, see, infra, chapter on "Sentence," div XIV.

As to when co-defendants can be witnesses for each other, see Whart. Crim. Ev., § 445.

As to Michigan practice, see Stuart v. People, 42 Mich. 255, 3 N. W. 863.

Defendant properly charged, judgment not arrested because indictment charges several jointly with offense not capable of being jointly committed. — Weatherford v. Com., 73 Ky. (10 Bush) 196.

2 Supra, § 343; Com. v. McLaughlin, 66 Mass. (12 Cush.) 615; Com. v. O'Brien, 107 Mass. 208; R. v. Giddins, 1 Car. & M. 634, 41 Eng. C. L. 344.

3 2 Hale 173; State v. Blan, 69

same where two or more commit a battery,[4] or are guilty of extortion;[5] or are concerned in a common violation of the Lord's day;[6] or are engaged in the same boat in unlawfully fishing.[7] And parties to the crime of adultery may be indicted jointly;[8] though where two are jointly indicted for fornication or adultery, and are tried together, and one party is found guilty and the other not guilty, no judgment can be rendered against the former.[9] Where property has been obtained under false pretenses, and the false pretenses were conveyed by words spoken by one defendant in the presence of others, all of whom acted in concert together, all parties may be indicted jointly.[10] And where two persons are jointly indicted and one only is tried, a separate count charging the latter alone with the crime is unnecessary.[11]

§ 352. —— But not when offenses are several. But where the offenses are necessarily several there can be no joinder.[1] It is true that where a libellous song was sung by two men, it was held that they might be indicted

Mo. 317; Rucker v. State, 7 Tex. App. 549.

4 State v. Lonon, 19 Ark. 577; Lewis v. State, 33 Ga. 131; Fowler v. State, 50 Tenn. (3 Heisk.) 154 (where the indictment was against two for assault and battery upon three).

5 Kane v. People, 8 Wend. (N. Y.) 203; R. v. Trafford, 1 Barn. & Ad. 874, 20 Eng. C. L. 726; R. v. Atkinson, 1 Salk. 382, 91 Eng. Rep. 333.

6 Com. v. Sampson, 97 Mass. 407.

7 Com. v. Weatherhead, 110 Mass. 175.

8 Com. v. Elwell, 43 Mass. (3 Met.) 190, 35 Am. Dec. 398; State v. Mainor, 28 N. C. (6 Ired.) 340.

But see Kerr's Whart. Crim. Law, § 1602.

9 State v. Mainor, 28 N. C. (6 Ired.) 340.

10 R. v. Young, 3 T. R. 98.

11 Weatherford v. Com., 73 Ky. (10 Bush) 196; State v. Bradley, 9 Rich. (S. C.) 168.

1 Infra, § 366. ALA.—Elliott v. State, 26 Ala. 78; McGehee v. State, 58 Ala. 360. MISS.—Howard v. State, 83 Miss. 378, 35 So. 653. TENN.—State v. Powell, 71 Tenn. (3 Lea) 164. FED.—United States v. Kazinski, 2 Spr. 7, Fed. Cas. No. 15508.

Though see, Young v. R., 3 T. R. 106; R. v. Kingston, 1 East 468.

In State v. Deaton, 92 N. C. 788, it was held that two could not be jointly indicted for drunkenness. But suppose two should agree to get drunk together?

jointly;[2] and the same view has been taken where two or more persons join in any other kind of publication of a libel; yet if the utterance of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. Two or more can not be jointly indicted for perjury,[3] or for seditious, obscene, or blasphemous words, or the like, because such offenses are in their nature distinct.[4] And if A. and B. are jointly indicted and tried for gaming, and the evidence shows that A. and others played at one time when B. was not present, and B. and others played at another time when A. was not present, no conviction can be had against them.[5] If, also, the offense charged does not wholly arise from the joint act of all the defendants, but from some personal and particular act or omission of each defendant (*e. g.*, as with larceny and receiving, or receiving at distinct times),[6] the indictment must charge them severally and not jointly.[7] And it has been held that when A. strikes B. on one day, and C. strikes B. on another, A. and C. can not be included jointly in one count.[8]

2 R. v. Benfield, 2 Burr. 985. See Kerr's Whart. Crim. Law, § 1924.

3 R. v. Phillips, 2 Str. 921, Kerr's Whart. Crim. Law, § 1517.

4 Cox v. State, 76 Ala. 66; State v. Roulstone, 35 Tenn. (3 Sneed) 107.

5 Elliott v. State, 26 Ala. 78; Lindsey v. State, 48 Ala. 169; Galbreath v. State, 36 Tex. 200; State v. Homan, 41 Tex. 155.

Contra: Com. v. McChord, 32 Ky. (2 Dana) 242.

For joint game there can be joint indictment.—Coog v. State, 4 Port. (Ala.) 180; State v. Homan, 41 Tex. 155; Com. v. McGuire, 1 Va. Cas. 119.

6 Horne v. State, 37 Ga. 80, 92 Am. Dec. 49; Stephens v. State, 14 Ohio 386; United States v. Kazinski, 2 Spr. 7, Fed. Cas. No. 15508; R. v. Dove, 2 Den. C. C. 92, 4 Cox C. C. 478; infra, § 366.

7 People v. Hawkins, 34 Cal. 181; Baker v. People, 105 Ill. 452; Com. v. Jones, 136 Mass. 173; Vaughn v. State, 4 Mo. 530; Com. v. Miller, 2 Pars. (Pa.) 480; R. v. Messingham, 1 M. C. C. 257; R. v. Parr, 2 M. & Rob. 346.

8 R. v. Devett, 8 Car. & P. 639, 34 Eng. C. L. 936.

Infra, § 366.

Concert justifies joinder. — Although the acts are several yet there can be no exception to a

§ 353. —— So as to officers with separate duties. Persons holding different offices with separate duties can not be jointly indicted for a misdemeanor in office.[1] Thus, an indictment charging such an offense against the inspectors, clerks, and judge of an election, was held bad on demurrer.[2]

§ 354. Principals and accessories can be joined. Principals in the first and second degree, and accessories, before and after the fact, may all be joined in the same indictment, and they may be convicted of different degrees;[1] or the principals may be indicted first, and the accessories after the conviction of the principals.[2] And their relation may be transposed in alternate counts.[3]

§ 355. In conspiracy at least two must be joined. In conspiracy, where one can not be indicted for an offense committed by himself alone, the acquittal of all charged in the same indictment with him, as co-defendants, must

joinder if concert be inferred. And this is good, although the only evidence for the prosecution is of separate acts, at separate times and places, done by several persons charged as accessories, upon which a conviction is had.—R. v. Barber, 1 Car. & K. 442, 47 Eng. C. L. 442.

Several receivers.—Although as a rule several receivers can not be jointly charged in the same count with separate and distinct acts of receiving.—R. v. Pulham, 9 Car. & P. 281, 38 Eng. C. L. 172.

—Too late, after verdict, to object that they should have been indicted separately.—R. v. Hayes, 2 M. & Rob. 156.

1 State v. Hale, 97 N. C. 474, 1 S. E. 683; Com. v. Ziest, 5 Lanc. L. Rev. (Pa.) 138.

Otherwise when officers concur in extortion.—R. v. Tisdale, 20 Up. Can. Q. B. 272.

2 Com. v. Miller, 2 Pars. (Pa.) 481.

1 2 Hale 173; Kerr's Whart. Crim. Law, §§ 269, 270. CONN.—State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54. MASS.—Mask v. State, 32 Mass. (15 Pick.) 405; Com. v. Drew, 57 Mass. (3 Cush.) 384; Com. v. Felton, 101 Mass. 14. N. Y.—Klein v. People, 31 N. Y. 229. S. C.—State v. Putnam, 18 S. C. 175, 44 Am. Rep. 569. ENG.—R. v. Greenwood, 2 Den. C. C. 453; R. v. Moland, 2 Mood. C. C. 270.

2 People v. Valencia, 45 Cal. 304. See Kerr's Whart. Crim. Law, §§ 239 et seq.

3 Supra, § 350; Hawley v. Com., 75 Va. 847.

of course extend to him,[1] nor when the jury fail to agree as to one of two co-conspirators, can there be a conviction of the other.[2] In an indictment for conspiracy, less than two can not possibly be joined;[3] a wife and husband together not being sufficient. A charge of conspiracy can not be sustained against two defendants one of whom was at the time of the offense insane.[4] One defendant may be tried alone, when his co-conspirators are alleged to be unknown,[5] or when such conspirators are dead, or absent, or previously convicted.[6]

From the peculiar character of the pleading in conspiracy, a new trial as to one defendant is a new trial as to all.[7]

§ 356. IN RIOT, THREE MUST BE JOINED. In an indictment for riot, when the offense is not charged to have been committed with persons unknown, unless three of the parties named are proved to have been concerned, they must all be acquitted.[1] Where there is an allegation of defendants unknown, or there are co-defendants,

1 IND. — Turpin v. State, 4 Blackf. 72. N. Y.—People v. Howell, 4 John. 296. N. C.—State v. Mainor, 28 N. C. (6 Ired.) 340. TENN.—State v. Allison, 11 Tenn. (3 Yerg.) 428. ENG.—R. v. Kinnersley, 1 Str. 193, 93 Eng. Rep. 467; R. v. Sudbury, 12 Mod. 262, 1 Ld. Raym. 484, 91 Eng. Rep. 1222.

As to conspiracy, see Kerr's Whart. Crim. Law, §§ 1655 et seq.

As to verdict, see, infra, § ....

2 R. v. Manning, L. R. 12; Q. B. D. 241; 51 L. T. N. S. 121.

3 State v. Covington, 4 Ala. 603; State v. Sam, 13 N. C. (2 Dev.) 569; Com. v. Manson, 2 Ashm. (Pa.) 31; United States v. Cole, 5 McL. C. C. 513, Fed. Cas. No. 14832; R. v. Gompertz, 9 Ad. & El. N. S. (9 Q. B.) 824, 58 Eng. C. L. 823.

See, also, Kerr's Whart. Crim. Law, §§ 100, 1659; infra, §§ ...., ...

4 See Brackenridge's Miscellanies 223.

5 United States v. Miller, 3 Hughes C. C. 553, Fed. Cas. No. 15774; Kerr's Whart. Crim. Law, § 1655.

6 State v. Buchanan, 5 Har. & J. (Md.) 500; R. v. Cooke, 5 Barn. & C. 538, 11 Eng. C. L. 574; R. v. Cooke, 7 Dow. & R. 673, 16 Eng. C. L. 316; R. v. Kenrick, 5 Ad. & El. N. S. (5 Q. B.) 49, 48 Eng. C. L. 48.

Supra, § 146.

7 R. v. Gompertz, 9 Ad. & El. N. S. (9 Q. B.) 824, 58 Eng. C. L. 823. Infra, §§ ...., ...

1 Penn v. Hurston, Addis. (Pa.) 334.

dead or absent, or previously convicted, the case is otherwise.[2] The effect of charging the offense to have been committed by persons "unknown" has been further considered under another head.[3]

§ 357. HUSBAND AND WIFE MAY BE JOINED. As has been seen in another volume, there is no technical objection to an indictment joining a married woman with her husband.[1] And this rule has been applied to indictments for assault;[2] for keeping disorderly and gaming houses;[3] for forcible entry and detainer;[4] for murder;[5] for stealing and receiving.[6]

The presumptions of law in such cases are elsewhere considered.[7]

§ 358. MISJOINDER MAY BE EXCEPTED TO AT ANY TIME. Misjoinder of defendants, when apparent on the record, may be made the subject of a demurrer, a motion in arrest of judgment, or writ of error; or the court will in some cases quash the indictment.[1] When the misjoinder appears in evidence an acquittal may be ordered. If, however, two be improperly found guilty separately on a

As to riot, see Kerr's Whart. Crim. Law, § 1861.

2 State v. Egan, 10 La. 698; Klein v. People, 31 N. Y. 229; R. v. Scott, 3 Burr. 1262, 97 Eng. Repr. 822.

As to verdict, see, infra, § ....

3 Supra, §§ 146, 153; Kerr's Whart. Crim. Law, §§ 1658, 1863.

1 Kerr's Whart. Crim. Law, § 93. ALA.—Rather v. State, 1 Port. 132. ME.—State v. Nelson, 29 Me. 329. MASS.—Com. v. Trimmer, 1 Mass. 476; Com. v. Lewis, 42 Mass. (1 Met.) 151; Com. v. Tryon, 99 Mass. 442. MO.—State v. Bentz, 11 Mo. 27. S. C.—State v. Collins, 1 McC. 355. ENG.—R. v. Matthews, 1 Den. C. C. 596; R. v. Hammond, 1 Leach 499; R. v. Sergeant, 1 Ry. & M. 352, 21 Eng. C. L. 764.

2 State v. Parkerson, 1 Strobh. (S. C.) 169; R. v. Cruse, 8 Car. & P. 541, 34 Eng. C. L. 881.

3 Com. v. Murphy, 68 Mass. (2 Gray) 510; Com. v. Cheney, 114 Mass. 281; State v. Bentz, 11 Mo. 27; R. v. Williams, 10 Mod. 63; R. v. Dixon, 10 Mod. 335.

4 State v. Harvey, 3 N. H. 65.

5 R. v. Cruse, 8 Car. & P. 541, 34 Eng. C. L. 881.

6 R. v. M'Athey, 9 Cox C. C. 251.

7 Kerr's Whart. Crim. Law, § 96.

1 Young v. R., 3 T. R. 103-106; 1 Stra. 623; Com. Dig. Ind. H.

As to new trial, see, infra, § ....

Error does not lie in such cases. See State v. Underwood, 77 N. C. 502; State v. Lindsay, 78 N. C. 499.

joint indictment, the objection may, in general, be cured by producing a pardon or entering a nolle prosequi as to the one of them who stands second on the verdict. During the trial the difficulty may be relieved by a nolle prosequi, or an acquittal of a defendant improperly joined. If there be error in this respect a new trial may be granted.[2]

§ 359. DEATH NEED NOT BE SUGGESTED ON RECORD. Where two persons are indicted for a conspiracy, and one of them dies before the trial, and it proceeds against both, it is no mistrial, and entry of a suggestion of the death on the record is unnecessary.[1]

2. Severance.

§ 360. DEFENDANTS MAY ELECT TO SEVER. Where several persons are jointly indicted, they may be tried separately, at the election of the prosecution[1] or of the defendants. The prosecution may sever as a matter of right;[2] but the question of severance is usually raised by the defendants themselves, as to whom the matter is left to the discretion of the court.[3] Where they elect to

2 When the indictment charges A. and B. only as conspirators, a nolle prosequi as to A. has been held to operate as an acquittal of B.—State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476. See State v. Tom, 13 N. C. (2 Dev. L.) 569.

1 R. v. Kenrick, 5 Ad. & El. N. S. (5 Q. B.) 49, 48 Eng. C. L. 48.

1 Com. v. Hughes, 11 Phila. 430.

2 State v. Thompson, 13 La. Ann. 515; State v. Bradley, 9 Rich. (S. C.) 168; State v. McGrew, 13 Rich. (S. C.) 313.

3 ALA.—Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431; Wade v. State, 40 Ala. 74; Parmer v. State, 41 Ala. 416. ILL.—Maton v. People, 15 Ill. 536. IND.—Lawrence v. State, 10 Ind. 453. LA.—State v. Johnson, 38 La. Ann. 18. ME.—State v. Conley, 39 Me. 78. MASS.—Com. v. Jenks, 138 Mass. 484. NEV.—State v. McLane, 15 Nev. 345. N. H.—State v. Doolittle, 58 N. H. 92. OHIO—Whitehead v. State, 10 Ohio St. 449. PA.—Com. v. Manson, 2 Ashm. 31. R. I.—State v. O'Brien, 7 R. I. 336. S. C.—State v. Wise, 7 Rich. L. 412; State v. McGrew, 13 Rich. 316. TENN.—Robinson v. State, 69 Tenn. (1 Lea) 673. VA.—Curran's Case, 7 Gratt. 619; Com. v. Lewis, 25 Gratt. 938. FED.—United States v. Collyer, Bowlby's Wharton on

be tried separately, and where the application is granted by the court, the prosecuting officer may elect whom he will try first,[4] which is usually at his discretion.[5] But after the jury have been sworn, and part of the evidence heard, it is usually too late for either defendant to demand a separate trial.[6]

§ 361. SEVERANCE SHOULD BE GRANTED WHEN DEFENSES CLASH. Where the defenses of joint defendants are antagonistic, it is proper to grant a severance.[1] And this is eminently the case where one joint defendant has made

Homicide, 708-710, Fed. Cas. No. 14838.

When the wife of one defendant is a witness for the others. See Com. v. Easland, 1 Mass. 15; Com. v. Manson, 2 Ashm. (Pa.) 31; Whart. Crim. Ev., § 445.

At common law, a severance will not be granted to enable one defendant to be a witness for the other; as even on separate trials this result could not be reached.—United States v. Gibert, 2 Sumn. C. C. 19, Fed. Cas. No. 15204.

When, however, there is no evidence against a particular defendant, or the evidence is but slight, the court may direct an acquittal of such defendant, so as to rehabilitate him as a witness.—Com. v. Eastman, 55 Mass. (1 Cush.) 189; 48 Am. Dec. 596; State v. Roberts, 15 Mo. 28. See Whart. Crim. Ev., § 445.

In Tennessee this is a statutory right.—State v. Knight, 62 Tenn. (3 Baxt.) 418; Robinson v. State, 69 Tenn. (1 Lea) 673.

In Texas, also, it is a statutory right.—Slawson v. State, 7 Tex. 63; Rucker v. State, 7 Tex. App. 549; Krebs v. State, 8 Tex. App. 15.

A verdict of insanity of one joint defendant works a severance. See Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.

4 Jones v. State, 1 Kelly (Ga.) 610; Com. v. Berry, 71 Mass. (5 Gray) 93 (riot); People v. McIntyre, 1 Park. Cr. Rep. 371; People v. Stockham, 1 Park. Cr. Rep. 424.

5 Patterson v. People, 46 Barb. (N. Y.) 625.

As to misdemeanors, see People v. White, 55 Barb. (N. Y.) 606.

Holding that in such cases error does not lie. See State v. Lindsay, 78 N. C. 499.

As to calling one as a witness for the other, see Whart. Crim. Ev., § 445.

6 McJunkins v. State, 10 Ind. 140.

1 ALA.—Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431; Thompson v. State, 25 Ala. 41. ILL.—Maton v. People, 15 Ill. 536. ME.—State v. Soper, 16 Me. 293, 33 Am. Dec. 665. MASS.—Com. v. Robinson, 67 Mass. (1 Gray) 555. MISS.—Mask v. State, 32 Miss. 405. TENN.—Roach v. State, 45 Tenn. (5 Cold.) 39. FED.—United States v. Marchant, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700; United States v. Kelly, 4 Wash. C. C. 528, Fed. Cas. No. 15516.

In Texas this is by statute.—

a confession implicating both, and which the prosecution intends to offer on trial.[2]

§ 362. In conspiracy and riot, severance. In conspiracy and riot, though it was once thought otherwise,[1] it is now held the defendants may claim separate trials. And when the case is tried jointly, the court must direct the jury that they are not to permit one defendant to be prejudiced by the other's defense.[2]

3. Verdict and Judgment.

§ 363. Joint defendants may be convicted of different grades. Joint defendants may be convicted of different grades.[1] Thus, where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder, and another of manslaughter, and on such a verdict being rendered it will not be disturbed by the court as irregular.[2] So, also, in assault and battery, one may be found guilty of assault and another of battery.[3] A fortiori a verdict is good in ordinary cases where the jury convict one, and acquit or disagree as to the other.[4]

Willey v. State, 22 Tex. App. 408, 3 S. W. 570.

2 Com. v. James, 99 Mass. 438.

1 Com. v. Manson, 2 Ashm. (Pa.) 31; supra, § 355.

2 Com. v. Robinson, 67 Mass. (1 Gray) 555.

As to Virginia practice, see Acts 1877-8, ch. xvii, § 31.

As to New Hampshire, see State v. Doolittle, 58 N. H. 92.

In Ohio, by statute, joint defendants can claim separate trials by right. Crim. Proc., § 153.

1 Brown v. State, 28 Ga. 209; Klein v. People, 31 N. Y. 229; White v. People, 32 N. Y. 465; Shouse v. Com., 5 Pa. St. 83; State v. Arden, 1 Bay (S. C.) 487; R. v. Butterworth, R. & R. 520. See R. v. Dove, 2 Den. C. C. 86, 4 Cox C. C. 428, 2 Eng. L. & Eq. Rep. 532, 2 Benn. & Heard Lead. Cases 138; Whart. Crim. Ev., § 136.

2 Mask v. State, 32 Miss. 406; United States v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15301.

Compare: Hall v. State, 8 Ind. 439.

3 White v. People, 32 N. Y. 465.

4 See, supra, § 355; State v. Vinson, 37 La. Ann. 792; Com. v. Wood, 12 Mass. 313; Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; R. v. Cooke. 5 Barn. & C. 538,

§ 364. DEFENDANTS MAY BE CONVICTED SEVERALLY. Where one of several defendants is tried alone, he may be convicted alone;[1] nor is it ground of exception that the others who were jointly indicted were not tried.[2]

§ 365. SENTENCE IS TO BE SEVERAL. In an indictment against two or more, when the charge is several as well as joint, the conviction is several;[1] so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. To this rule there are exceptions, as in case of conspiracy or riot, to which the agency of two or more is essential; but violations of the license law, not being within the reason of these exceptions, come under the general rule.[2] Subject to these exceptions when parties are jointly indicted and con-

11 Eng. C. L. 574, 7 Dow. & Ry. 673, 16 Eng. C. L. 316; R. v. Taggart, 1 Car. & P. 201, 12 Eng. C. L. 123.

On an indictment against three, a joint verdict finding each defendant guilty by name is in substance a distinct verdict against each defendant.—Fife v. Com., 29 Pa. St. 429.

Several defendants, verdict joint or several in form, is several in effect.—R. v. Mowbery, 6 T. R. 638.

1 **This is prescribed** in Rev. Stats. U. S., § 1036, 2 Fed. Stats. Ann. (1st ed.), p. 353, 2 id. (2d ed.), p. 692.

2 Supra, § 355, and cases cited; Cruce v. State, 59 Ga. 84; Com. v. McChord, 32 Ky. (2 Dana) 243; State v. Bradley, 30 La. Ann. (Pt. I) 326; State v. Clayton, 11 Rich. (S. C.) 581.

1 State v. Smith, 24 N. C. (2 Ired.) 402; State v. Brown, 49 Vt. 437.

As to joint receivings, Kerr's Whart. Crim. Law, § 1235.

In case of assault charge is several. — Com. v. Griffin, 38 Mass. (21 Pick.) 523; Jennings v. Com., 105 Mass. 586; Com. v. O'Brien, 107 Mass. 208; R. v. Carson, R. & R. 303.

2 Com. v. Griffin, 57 Mass. (3 Cush.) 523.

As to adultery, see State v. Lyerly, 52 N. C. (7 Jones) 159.

One defendant on an indictment is not liable for the costs of others jointly indicted with him.—Moody v. People, 20 Ill. 315; State v. McO'Blenis, 21 Mo. 272.

One attorney's or clerk's costs only can be collected on a joint verdict.—Com. v. Sprinkle, 5 Leigh (Va.) 650. See Calico v. State, 4 Ark. (4 Pike) 430; Searight v. Com., 13 Serg. & R. (Pa.) 301.

victed, they should be sentenced severally,[3] and the imposition of a joint fine is erroneous.[4]

§ 366. OFFENSE MUST BE JOINT TO JUSTIFY JOINT VERDICT. To convict of a joint charge, the act proved must be joint. One offense proved against one defendant, and a subsequent offense against another, can not justify a conviction, unless the offenses are overt acts of treason or conspiracy, which are charged as such.[1] Thus, two defendants can not be convicted upon proof that each one committed an act constituting an offense similar to the act charged in the indictment.[2] And so a man and a woman can not be jointly convicted of a single act of adultery upon the admission by one of an act of adultery committed at one time, and an admission by the other of an act of adultery committed at another time.[3]

XIX. Statutes of Limitation.

§ 367. CONSTRUCTION TO BE LIBERAL TO DEFENDANT. While, as will be hereafter seen, courts look with disfavor on prosecutions that have been unduly delayed,[1] there is, at common law, no absolute limitation which prevents the prosecution of offenses after a specified

3 See cases cited supra in this section; Straughan v. State, 16 Ark. 37; Curd v. Com., 53 Ky. (14 B. Mon.) 386; Waltzer v. State, 3 Wis. 785.

4 Curd v. Com., 53 Ky. (14 B. Mon.) 386; State v. Gay, 10 Mo. 440; State v. Berry, 21 Mo. 504; State v. Hollencheik, 61 Mo. 302.

1 Supra, § 352; R. v. Pulham, 9 Car. & P. 281, 38 Eng. C. L. 172; R. v. Dove, 2 Den. C. C. 86; R. v. Hempstead, R. & R. 344.

Compare: R. v. Barber, 1 Car. & K. 442, 47 Eng. C. L. 442.

2 Stevens v. State, 14 Ohio 386.

3 Com. v. Cobb, 80 Mass. (14 Gray) 57.

In gaming, joint indictments have been sustained against parties taking separate parts in the same game.—Com. v. McChord, 32 Ky. (2 Dana) 242.

Contra: Elliott v. State, 26 Ala. 78; Lindsay v. State, 48 Ala. 169; Johnson v. State, 13 Ark. (8 Eng.) 685; State v. Homan, 41 Tex. 155.

In England, it is said that when there is a joint conviction for separate acts, the conviction may be sustained as to the party proved to have committed the first felony in order of time.—R. v. Gray, 2 Den. C. C. 87.

1 See, infra, § 377.

time has arrived. Statutes to this effect have been passed in England and in the United States, which we now proceed to consider. We should at first observe that a mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intendment to be made in favor of either party. Neither grants the right to the other; there is therefore no grantor against whom the ordinary presumptions of construction are to be made. But it is otherwise when a statute of limitation is granted by the State. Here the State is the grantor, surrendering by act of grace its rights to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.[2] Independently of these views, it must be remembered

[2] This is well exhibited in a famous metaphor by Lord Plunkett, of which it is said by Lord Brougham (Works, etc., Edinb. ed. of 1872, iv 341) that "it can not be too much admired for the per

that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion, even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should be vigorously maintained. They are not merely acts of grace, but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained.[3]

§ 368. STATUTE NEED NOT BE SPECIALLY PLEADED. Although at one time it was thought otherwise, the rule is now generally accepted that the plea may be taken ad-

fect appropriateness of the figure, its striking and complete resemblance, as well as its raising before us an image previously familiar to the mind in all particulars, except its connection with the subject for which it is so unexpectedly but naturally introduced." "Time," so runs this celebrated passage, "with his scythe in his hand, is ever mowing down the evidences of title; wherefore the wisdom of the law plants in his other hand the hour-glass, by which he metes out the periods of that possession that shall supply the place of the muniments his scythe has destroyed." In other words, the defense of the statute of limitations is one not merely of technical process, to be grudgingly applied, but of right and wise reason, and, therefore, to be generously dispensed. The same thought is to be found in another great orator:

λαβὲ δέ μοι καὶ τὸν τῆς προθεσμίας νόμον . . . . δοκεῖ γάρ μοι καὶ ὁ Σόλων οὐδενὸς ἄλλου ἕνεκα θεῖναι αὐτὸν, ἢ τοῦ μὴ συκοφαντεῖσθαι ὑμᾶς. τοῖς μὲν γὰρ ἀδικουμένοις ἱκανὰ τὰ πέντε ἔτη ἡγήσατο εἶναι εἰσπραξασθαι. κατὰ δὲ τῶν ψευδομένων τὸν χρόνον ἐνόμισε σαφέστατον ἔλεγχον ἔσεσθαι. καὶ ἅμα ἐπειδὴ ἀδύνατον ἦγνω ὂν τούς τε συμβαλλόντας καὶ τοὺς μάρτυρας ἀεὶ ζῆν τὸν νόμον ἀντὶ τούτων ἔθηκεν, ὕπως μάρτυς εἴη τοῦ δικαίου τοῖς ἐρήμοις. Demosthenes, pro Phorm. ed. Reiske, p. 952.

To the same effect may be noticed Woolsey's Polit. Phil., § 123; and see United States v. Norton, 91 U. S. 566, 23 L. Ed. 454.

[3] A qui tam action on the act prohibiting the slave-trade is within the limitation of the federal statute.—Adams v. Woods, 2 Cr. C. C. 336, Fed. Cas. No. 5251.

So is an action for a penalty under the Consular Act of 1803.—Parsons v. Hunter, 2 Sumn. C. C. 419, Fed. Cas. No. 10778.

Two years' limitation of suits for penalties is repealed by implication by act of 28th February, 1839, which extends the time to five years.—Stimpson v. Pond, 2 Curt. C. C. 502, Fed. Cas. No. 13455; United States v. Fehrenback, 2 Woods. C. C. 175, Fed. Cas. No. 15083. See People v. Haun, 44 Cal. 96.

vantage of on the general issue.[1] But the defense should be interposed before conviction, and can not, unless appearing on the indictment, be made subsequently.[2]

§ 369. INDICTMENT SHOULD AVER OFFENSE WITHIN STATUTE, OR, IF EXCLUDED BY STATUTE, SHOULD, BY STRICT PRACTICE, AVER FACTS OF EXCEPTION. Ordinarily, as we have seen,[1] the offense must be laid in the indictment within the time fixed by the statute of limitations. On the other hand, where the statute does not impose an absolute and universal bar, but only a bar in certain lines of cases, the prosecution may lay the offense outside the statute, and may prove, without averring it in the indictment, that the defendant was within the exceptions of the statute.[2] Where this view obtains, the fact that the offense

1 GA.—McLane v. State, 4 Ga. 335. IND.—Hackney v. State, 8 Ind. 494; Hatwood v. State, 18 Ind. 492. IOWA—State v. Hussey, 7 Iowa 409. N. H.—State v. Robinson, 29 N. H. (9 Frost.) 274. N. Y.—**Contra:** People v. Roe, 5 Park. Cr. Rep. 231. N. C.—State v. Carpenter, 74 N. C. 230. PA.—Com. v. Ruffner, 28 Pa. St. 259, overruling Com. v. Hutchinson, 2 Pars. 453. TENN.—State v. Bowling, 29 Tenn. (10 Humph.) 52. FED.—United States v. Cook, 84 U. S. (17 Wall.) 168, 21 **L. Ed.** 538; United States v. Watkins, 3 Cr. C. C. 441, Fed. Cas. No. 16649; United States v. White, 5 Cr. C. C. 73, Fed. Cas. No. 16676; United States v. Smith, 4 Day (Conn.) 121, Fed. Cas. No. 16332; United States v. Brown, 2 Low. 267, Fed. Cas. No. 14665; Johnson v. United States, 3 McL. C. C. 89, Fed. Cas. No. 7418. ENG.—R. v. Phillips, R. & R. 369.

As to duplicity in such pleas, see United States v. Shorey, 9 Int. Rev. Rec. 201, Fed. Cas. No. 16280.

2 Supra, § 180; State v. Thomas, 30 La. Ann. (Pt. I) 301.

1 Supra, § 179.

2 ILL.—Lamkin v. People, 94 Ill. 101. IND.—State v. Rust, 8 Blackf. 195. ME.—State v. Hobbs, 39 Me. 212. N. Y.—People v. Van Santvoord, 9 Cow. 655. PA.—Com. v. Hutchinson, 2 Pars. 453. TENN.—State v. Bowling, 29 Tenn. (10 Humph.) 52. FED.—United States v. Cook, 84 U. S. (17 Wall.) 168, 21 **L. Ed.** 538; United States v. White, 5 Cr. C. C. 73, Fed. Cas. No. 16676; United States v. Ballard, 3 McL. C. C. 469, Fed. Cas. No. 14507.

In United States v. Cook, 84 U. S. (17 Wall.) 168, 21 **L. Ed.** 538, an indictment charged the accused with the commission, more than two years previously, of certain acts amounting to an offense as defined by an act of Congress; another act limited prosecutions for this and other offenses to two years, unless the accused had been a fugitive from justice. On demurrer the indictment was held

is on the face of the indictment prima facie barred can not be taken advantage of by demurrer, or motion to quash, nor a fortiori by arrest of judgment.[3] But where a statute exists limiting all prosecutions within fixed periods, the more exact course is to state the time correctly in the indictment, and then aver the exception, and this mode of pleading is now generally required.[4] Perhaps the conflict may be reduced by appealing to the tests heretofore asserted,[5] and holding that when the exception is part of the limitation it must be pleaded,[6] but when it is

good, though it did not allege that the accused was within the exception.

3 See, supra, § 179. COLO.—Packer v. People, 26 Colo. 306, 57 Pac. 1087. GA.—Clark v. State, 12 Ga. 350. IOWA—State v. Hussey, 7 Iowa 409. LA.—State v. Thomas, 30 La. Ann. (Pt. I) 301. ME.—State v. Thrasher, 79 Me. 17, 7 Atl. 814. N. Y.—People v. Van Santvoord, 9 Cow. 655. PA.—Com. v. Hutchinson, 2 Pars. 453. S. C.—State v. Howard, 15 Rich. L. 274. TENN.—State v. Bowling, 29 Tenn. (10 Humph.) 52. FED.—United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; United States v. White, 5 Cr. C. C. 73, Fed. Cas. No. 16676. ENG.—R. v. Treharne, 1 Moody 298.

As to arrest of judgment.—White v. State, Texas, reported in Cent. L. J. Dec. 13, 1878, 6 Tex. App. 476.

4 CAL.—People v. Miller, 12 Cal. 291. GA.—McLane v. State, 4 Ga. 335. IND.—State v. Rust, 8 Blackf. 195; see Hatwood v. State, 18 Ind. 492. LA.—State v. Bilbo, 19 La. Ann. 76; State v. Pierce, 19 La. Ann. 90; State v. Bryan, 19 La. Ann. 435. MICH.—People v. Gregory, 30 Mich. 371. MO.—State v. English, 2 Mo. 182; State v. Hobbs, 39 Mo. 212; State v. Meyers, 68 Mo. 266. N. H.—State v. Robinson, 29 N. H. (9 Fost.) 274. VT.—State v. G. S., 1 Tyl. 295; Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758. VA.—Sledd v. Com., 19 Gratt. 818. WASH.—State v. Myrberg, 56 Wash. 586, 105 Pac. 624.

Contra: State v. Ball, 30 W. Va. 386, 4 S. E. 645.

Elementary rule of criminal pleading that when the time for prosecuting an offense is limited, the indictment must lay the offense within the time limited, or it will be fatally defective, even after verdict.—Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758.

When plea of limitation is good on the face of the indictment, the burden of proof is on the state to overthrow a plea of the statute.—State v. Snow, 30 La. Ann. 401. See State v. Williams, 30 La. Ann. 842.

5 Supra, § 288.

6 Church v. People, 10 Ill. App. 222.

contained in a subsequent clause, and is clearly matter of rebuttal, then such a particularity is not needed.[7]

In any view a special averment that the offense was committed within the statute is unnecessary.[8]

§ 370. STATUTE, UNLESS GENERAL, OPERATES ON OFFENSES IT SPECIFIES, ONLY. Statutory words of description must be taken in their technical exclusive sense, when it appears they are used as specifications. Thus, "penalty" has been held to include only civil suits,[1] and "deceit" has been ruled not to include "conspiracy."[2] On the other hand, on reasoning already given, when an offense is described, not as the technical term for a species, distinguished from other specific terms, but as nomen generalissimum, then it is to have a wide and popular construction.

§ 371. STATUTE IS RETROSPECTIVE. As a rule, statutes of limitation apply to offenses perpetrated before the passage of the statute as well as to subsequent offenses.[1]

7 Garrison v. State, 87 Ill. 96; see State v. Gill, 33 Ark. 129, and also article by Mr. Heard in 1 Crim. Law Mag. 451.

8 Supra, §§ 207, 288; though see State v. Noland, 29 Ind. 212.

1 State v. Thomas, 8 Rich. (S. C.) 295; State v. Free, 2 Hill (S. C.) 628.

2 State v. Christianburg, 44 N. C. (Busbee) 46.

1 Com. v. Hutchinson, 2 Pars. (Pa.) 453. But see Martin v. State, 24 Tex. 61; Adams v. Woods, 2 Cr. C. C. 342, Fed. Cas. No. 18100; United States v. White, 5 Cr. C. C. 73, Fed. Cas. No. 16676; Johnson v. United States, 3 McL. C. C. 89, Fed. Cas. No. 7418; United States v. Ballard, 3 McL. C. C. 469, Fed. Cas. No. 14507.

As to common-law offenses in the District of Columbia, see: United States v. Slacum, 1 Cr. C. C. 485, Fed. Cas. No. 16311; United States v. Porter, 2 Cr. C. C. 60, Fed. Cas. No. 16072; United States v. Watkins, 3 Cr. C. C. 442, Fed. Cas. No. 16649.

In New York, the Act of 1873, extending the time for finding an indictment from three to five years, has been held not to cover offenses committed before its passage.—People v. Martin, 1 Park. Cr. Rep. 187, 2 Edm. Sel. Cas. 28, 7 Leg. Obs. 40, referring to People v. Carnal, 6 N. Y. 463; Ely v. Holton, 15 N. Y. 595; Sanford v. Bennett, 24 N. Y. 20; Shepperd v. People, 25 N. Y. 406; Hastings v. People, 28 N. Y. 400; Stone v. Fowler, 47 N. Y. 566; Amsbry v. Hinds, 48 N. Y. 57; Moore v. Mausert, 49 N. Y. 332; Hathaway v. John-

But the repeal of the statute of limitations does not affect the crimes and offenses committed prior to such repeal.[2]

§ 372. STATUTE BEGINS TO RUN FROM COMMISSION OF CRIME—CONTINUOUS OFFENSES. The statute begins to run on the day of the commission of the offense.[1] This, as is well said, is to be dated from the period when the crime is consummated.[2]

Instantaneous crimes, such as killing and arson, are consummated when they reach the point of completion. When a distinct result is necessary to completion, *i. e.*, death to homicide, it becomes part of the crime, no matter how long it may be delayed, and the offense is fixed

son, 55 N. Y. 93, 14 Am. Rep. 186; Mongeon v. People, 55 N. Y. 613; Palmer v. Conway, 4 Den. 375, 376; Watkins v. Haight, 18 John. 138; Dash v. Van Cluck, 7 John. 477, 5 Am. Dec. 291; Johnson v. Burrell, 2 Hill 238; Calkins v. Calkins, 3 Barb. 305; McMannis v. Butler, 49 Barb. 176, 181; and see New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; People ex rel. Ryan v. Green, 58 N. Y. 295, 303, 304, cited in letter to Alb. L. J. of Sept. 23, 1875.

In Pennsylvania it has been held that an act extending a statute of limitation is not ex post facto as to a crime against which the statute had not run at the time of the extension.—Com. v. Duffy, 96 Pa. St. 506, 42 Am. Rep. 554.

2 Garrison v. People, 87 Ill. 96; People v. Martin, 1 Park. Cr. Rep. (N. Y.) 187, 2 Edm. Sel. Cas. 28, 7 Leg. Obs. 40.

In New Jersey it was at one time held that where a crime was committed more than two years before the repeal of a statute limiting prosecutions to two years after the commission of a crime prosecuted, the repeal of the statute and extension of the time of prosecution were not ex post facto as to such crime.—State v. Moore, 42 N. J. L. (13 Vr.) 208.

This, however, was subsequently overruled.—State v. Moore, 43 N. J. L. (14 Vr.) 203; 39 Am. Rep. 558. See Kerr's Whart. Crim. Law, § 42. See criticism in Whart. Com. Am. Law, § 472.

1 McEntie v. Sandford, 42 N. J. L. (13 Vr.) 200; State v. Asbury, 26 Tex. 82.

As to federal statutes bearing on revenue and pension offenses, see United States v. Hirsh, 100 U. S. 33, 25 L. Ed. 539; United States v. Coggin, 9 Biss. C. C. 416, 3 Fed. 492, 10 Rep. 687.

In Louisiana the limitation in homicide runs from the death and not from the wound.—State v. Taylor, 31 La. Ann. 851.

2 Berner, Lehrbuch d. Strafrechts, 1871, p. 301.

in the moment of the killing. With instantaneous crimes, therefore, the statute begins with the consummation (Vollendung); with continuous crimes, it begins with the ceasing of the criminal act or neglect.

Continuous offenses,—such as nuisances, the carrying of concealed weapons, use of false weights, etc.,—endure after the period of concoction, and as long as the offense by the defendant's action or permission continues to exist.[3]

In bigamy, the statute runs from the bigamous marriage, unless the offense is made by statute continuous.[4] In the latter case the statute does not begin to run while the bigamous marriage relation continues.[5]

The time of the commission of the offense is to be determined by parol proof.[6]

§ 373. INDICTMENT OR INFORMATION SAVES STATUTE. The procedure which must be instituted in order to save the statute is, in the federal statutes, "indictment or information," and in the statutes of most of the States, "indictment." The finding of an informal presentment is not sufficient to take the case out of the statute;[1] nor

[3] **As to what is a continuous offense**, see, supra, § 167; Buckalew v. State, 62 Ala. 334, 34 Am. Rep. 22.

Nuisance is a continuing offense. See State v. Guibert, 73 Mo. 20.

[4] Scoggins v. State, 32 Ark. 205; Gise v Com., 81 Pa. St. 428.

As to the operation of the statute on continuous offenses, see United States v. Irvine, 98 U. S. 450, 25 L. Ed. 193.

[5] See Brewer v. State, 59 Ala. 101; Scoggins v. State, 32 Ark. 205; State v. Sloan, 55 Iowa 217, 7 N. W. 516.

Contra: Gise v. Com., 81 Pa. St. 428.

See Kerr's Whart. Crim. Law, § 2016.

[6] Smith v. State, 62 Ala. 29.

When bar of statute intervenes. Where an indictment found December 13, 1880, charged an offense on December 13, 1878, this was held not to be barred by a two years' limitation.—Savage v. State, 18 Fla. 909; State v. Beasley, 21 W. Va. 777.

[1] United States v. Slacum, 1 Cr. C. C. 485, Fed. Cas. No. 16311.

Sufficient in some jurisdictions. See, post, § 374.

will a former indictment on which a nolle prosequi was entered serve to take the case out of the statute.[2]

"Information," in the federal statutes,[3] means not "complaint" by a prosecutor, but the technical ex officio information filed by the government. Under such statutes, though the indictment must be found to prevent the bar of the statute, the defendant need not be sentenced within the limitation.[4]

§ 374. In some jurisdictions statute saved by warrant or presentment. In England, on the other hand, and in jurisdictions where "indictment" or "information" is not required, the usual warrant issued by a magistrate on a preliminary complaint is enough to save the statute,[1] and the same seems to be true in Alabama,[2] and South Carolina,[3] and perhaps in other states. And that is clearly the case with a presentment by a grand jury, though the indictment was not found until after the statute expired;[4] and so it is held to be with a commitment or binding over by a magistrate.[5]

2 United States v. Ballard, 3 McL. C. C. 469, Fed. Cas. No. 14507. See, infra, § 376.

3 United States v. Slacum, 1 Cr. C. C. 485, Fed. Cas. No. 16311.

4 Com. v. The Sheriff, 3 Brew. (Pa.) 394 (Brewster, J., 1869).

1 R. v. Parker, 9 Cox C. C. 475, Leigh & C. 459.

Contra: R. v. Hull, 2 F. & F. 16.

2 Foster v. State, 38 Ala. 425; Ross v. State, 55 Ala. 177.

3 State v. Howard, 15 Rich. (S. C.) 274.

4 Brock v. State, 22 Ga. 98; and see R. v. Brooks, 1 Den. C. C. 217, 2 Car. & K. 402, 61 Eng. C. L. 401, 2 Cox C. C. 436.

5 R. v. Austin, 1 Car. & K. 621, 47 Eng. C. L. 619.

One or two analogous cases under the English statute may not be here out of place. In R. v. Willace, 1 East P. C. 186, it was holden upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those acts. See, also, R. v. Brooks, 1 Den. C. C. 217, 2 Car. & K. 402, 61 Eng. C. L. 401.

But proof by parol that the prisoner was apprehended for treason respecting the coin, within three months after the offense was committed, was holden not to be sufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced.—R. v. Phillips, R. & R. 369.

§ 375. WHEN FLIGHT SUSPENDS STATUTE, IT IS NOT RENEWED BY TEMPORARY RETURN. Whether the exceptions to the statute must be specially averred in indictment, has been just noticed.

It is not necessary to constitute the exception of a person "fleeing from justice," that the defendant should have been unintermittingly absent from the jurisdiction. If he flees from a prosecution, mere occasional returns will not start the statute afresh.[1] The same rule applies to concealment of guilt.[2]

But to soldiers enlisting in the army and then remov-

In R. v. Killminster, 7 Car. & P. 228, 32 Eng. C. L. 585, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offense, and was ignored; four years afterward another bill was found against him for the same offense, and upon an objection that the proceeding was out of time, Coleridge, J., doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed. He reserved the point, but the defendant was acquitted upon the merits. See, also, Tilladam v. Inhabitants of Bristol, 4 Nev. & M. 144.

In a remarkable case in Georgia, it was held that on an indictment for a major offense, to which the statute does not apply, but which includes a minor offense, covered and shielded by the statute, where the jury convicted of the minor offense, the statute may be applied to the major offense. — Clark v. State, 12 Ga. 350.

1 United States v. White, 5 Cr. C. C. 116, Fed. Cas. No. 16677. See State v. Barton, 32 La. Ann. 278; State v. Vines, 34 La. Ann. 1073.

A fleeing from justice does not necessarily import a fleeing from prosecution begun.—United States v. Smith, 4 Day (Conn.) 123, Fed. Cas. No. 16332.

A person may flee from justice though no process was issued against him.—United States v. White, 5 Cr. C. C. 39, Fed. Cas. No. 16675.

The defendant is not entitled to the benefit of the limitation, if within the two years he left any place, or concealed himself, to avoid detection or punishment for any offense.—United States v. White, 5 Cr. C. C. 73, Fed. Cas. No. 16676.

Although he should within the two years have returned openly to the place where the offense was committed, so that, with ordinary diligence and due means, he might have been arrested.—United States v. White, 5 Cr. C. C. 116, Fed. Cas. No. 16677.

2 See Watkins v. State, 68 Ga. 832; Robinson v. State, 57 Ind. 113; State v. Hoke, 84 Ind. 137.

ing, this exception does not apply;[3] and the same reason would be good as to all removals under direction of the State.[4]

§ 376. Failure of defective indictment does not revive statute. The failure of a defective indictment, and the presentation of a new and correct indictment after the statute has begun to run, does not revive the statute.[1] The statute, as to the particular offense, was put aside by the commencement of legal proceedings against the defendant, and remains inoperative until these legal proceedings terminate. And this termination can not be until a final judgment is reached on the merits.[2] It is possible, however, to conceive of a statute so couched as to make a judgment on mere technical grounds a termination of the prosecution, so that a new indictment would be regarded as a new prosecution. And it has been held that when an indictment is quashed, the time of its pendency is to be taken out of the statute.[3]

§ 377. Courts look with disfavor at long delay in prosecution. In cases of secret offense, where the prosecutor is the sole or principal witness, and where, after a short lapse of time, the defendant, unless previously notified, must in the nature of things have great difficulty, from the evanescent character of memory, in col-

3 Graham v. Com., 51 Pa. St. 255, 88 Am. Dec. 581.

4 See United States v. Brown, 2 Lowell 267, Fed. Cas. No. 14665.

Sentence to imprisonment in another county soon after commission of crime does not prevent running of statute.—Com. v. Woodward, 1 Chester Co. Rep. 102.

1 See Bube v. State, 76 Ala. 73; Gill v. State, 38 Ark. 524; State v. Baker, 30 La. Ann. 1134; State v. Curtis, 30 La. Ann. 1166.

2 Foster v. State, 38 Ala. 425; State v. Johnston, 50 N. C. (5 Jones) 221; State v. Hailey, 51 N. C. (6 Jones) 42; Com. v. Sheriff, 3 Brewst. (Pa.) 394.

A prosecution continues when an indictment is dismissed, and the matter immediately submitted to a grand jury, and a new indictment found, without releasing the defendant.—Tully v. Com., 76 Ky. (13 Bush) 142. See United States v. Ballard, 3 McL. C. C. 469, Fed. Cas. No. 14507; supra, § 373.

3 See Coleman v. State, 71 Ala. 312; State v. Morrison, 31 La. Ann. 311; State v. Owen, 78 Mo. 367.

lecting evidence aliunde as to alibi, the policy of the law is to compel a speedy prosecution. Eminently is this the case with sexual prosecutions, especially those which are capable of being used for the extortion of money. Hence courts, as will hereafter be seen, look with disfavor on prosecutions for rape in which the prosecutrix does not make immediate complaint. And there are cases when the delay is marked and unexcused, when an acquittal will be directed. This course was taken by a learned English judge (Alderson) in a case of bestiality, where nearly two years (not quite the statutory limitation) was allowed by the prosecutor to pass before institution of proceedings.[1]

§ 378. STATUTE NOT SUSPENDED BY FRAUD. The enumeration of specific exceptions is exhaustive, and the statute can not be suspended in favor of the prosecution by any allegations of fraud on the part of the defendant. Thus, where it appears that an alleged misdemeanor was committed more than two years before the warrant was issued, and that the defendant was all the time a resident of the State, the prosecution can not save the bar of the statute by showing that the defendant put the prosecutor on a wrong scent, and concealed the crime until a few weeks before the arrest.[1]

§ 379. UNDER STATUTE, INDICTMENTS UNDULY DELAYED MAY BE DISCHARGED. In the federal courts and in the courts of several of the States restrictions exist requiring trials in criminal cases to take place within a specified period after the institution of the prosecution.[1] The power of

[1] R. v. Robins, 1 Cox C. C. 114.

[1] Com. v. The Sheriff, 3 Brewst. (Pa.) 394.

The statute runs in favor of an offender, although it was not known to the officers of the United States that he was the person who committed the offense. — United States v. White, 5 Cr. C. C. 39, Fed. Cas. No. 16675.

[1] As to Georgia, see Roebuck v. State, 57 Ga. 154.

See Esselborn, In re, 20 Blatchf. 1, 8 Fed. 904, where it was held that a defendant would be discharged if the grand jury he was

discharging a prisoner under the Pennsylvania statute,[2] providing for a discharge if there has been no trial for the first two terms is limited, it is held, to the court in which he was indicted; and the Supreme Court will not interfere if the commitment is unexceptionable on the face of it.[3] A prisoner who stands indicted for aiding and abetting another to commit murder, and who was not tried at the second term, is not entitled to be discharged under the third section of the act if the principal has absconded, and proceedings to outlawry against him were commenced without delay, but sufficient time had not elapsed to complete them.[4] A prisoner, also, is not entitled to demand a trial at the second term if he has a contagious or infectious disease, which may be communicated in the court to the prejudice of those present.[5] Nor

bound over to was discharged without acting on his case.—Adams v. State, 65 Ga. 516.

As to rule in California, see Ex parte Fennessy, 54 Cal. 101.

In Nebraska the defendant may be discharged at the end of the first term unless the prosecution show reasons why it has not proceeded. — Ex parte Two Calf, 11 Neb. 221, 225, 9 N. W. 44.

When failure to call case not ground for discharge. — That a mere failure to call up a case without good reason will not be ground for a discharge when defendant is out on bail, see United States v. Thorne, 15 Fed. 739.

2 See, infra, chapter on "Motion for Continuance and Change of Venue," et seq., where this subject is discussed in connection with the right to a continuance.

3 Ex parte Walton, 2 Whart. (Pa.) 501.

Intermediate finding of second indictment for the same offense does not deprive the defendant of his rights.—Brooks v. People, 88 Ill. 327.

4 Com. v. Sheriff etc. of Allegheny, 16 Serg. & R. (Pa.) 304, Gibson, C. J., dissenting.

5 Ex parte Phillips, 7 Watts. (Pa.) 363.

In Virginia it was required, "when any prisoner committed for treason or felony shall apply to the court the first day of the term, by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witnesses against him can not be produced in time, the court shall set him at liberty, upon his giving bail, in such penalty as they shall think reasonable, to appear before them at a day to be appointed of the succeeding term. Every person charged with such crime, who shall be indicted before or at the second term after

does the statute cover the case of a person who has been tried and convicted, but has obtained a new trial.[6] The defendant, also, to avail himself of the statute[7] must have been diligent in pressing for trial.[8] Whether such a discharge is a bar to further prosecution is hereafter discussed.[9]

§ 380. STATUTES HAVE NO EXTRA-TERRITORIAL EFFECT. Statutes of limitation, unless the words of the law expressly direct the contrary, are acts of grace, binding only the sovereign enacting them, and have no extra-territorial force.[1] If, to apply this principle to the present question, a foreigner commits an offense in England

he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from imprisonment, if he be detained for that cause only, and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict."—R. C. of Va., ch. 169, § 28.

The excuses above enumerated are not exclusive. Whenever the commonwealth has just ground for delay, discharge will be refused.—Adcock's Case, 8 Gratt. (Va.) 662.

—When the accused has been tried and convicted, and a new trial awarded to him, although he should not be again tried till after the third term from his examination, he is not entitled to a discharge.—2 Va. Cas. 162; Davis's Va. Cr. Law 422. And see Foster v. State, 38 Ala. 425; In re Scrafford, 21 Kan. 735.

It has been decided that the word "term," where it occurs in this act, means, not the prescribed time when the court should be held, but the actual session of the court.—2 Va. Cases 363.

An analogous statute exists in Ohio, Rev. Stat. 7309.—But this statute does not entitle the prisoner to a discharge when good ground for continuance is shown by the state, or when the adjournment is necessitated by the court not having time to try the case.—Johnson v. State, 42 Ohio St. 207.

6 Com. v. Sup. of Prisons, 97 Pa. St. 210.

7 Gallagher v. People, 88 Ill. 335; Edwards, Ex parte, 35 Kan. 99, 10 Pac. 539.

Statute does not apply to fugitives from justice.—Com. v. Hale, 13 Phila. (Pa.) 452.

8 Patterson v. State, 49 N. J. L. 326, 8 Atl. 305.

9 Infra, chapter on "Pleas," division VI, 7.

1 Whart. Confl. of L., §§ 534-544, 939.

or the United States, it could never be pretended that he could plead that in his own country the period for prosecution had expired. And so where jurisdiction is based on allegiance, as in case of political offenses against the United States committed abroad, the defendant, when put on trial in the country of his allegiance, would not be permitted to set up the limitations of the forum delicti commissi. In either case the law as to limitation is that of the court of process. And in this view most foreign jurists coincide.[2] Fœlix, however, seems to think, that in case of a difference in this respect in the codes of States having concurent jurisdiction, the milder legislation is to be preferred.[3]

2 Berner, Wirkungskreis der Strafgesetze, p. 164; Köstlin, Syst. Deutsc. Straf., p. 24; Bar, § 143, p. 568.

3 II. No. 602.

CHAPTER XVII.

INDICTMENT—SPECIFIC CRIMES.

Introductory.

§ 381. In general. It is the purpose to collect in this chapter, under the various specific crimes and offenses, the principal cases giving the general rules governing the drawing and sufficiency of indictments and informations charging the respective crimes and offenses. As many of these crimes and offenses are purely statutory, the pleader must in all cases consult the statute of the particular jurisdiction denouncing the given crime or offense, and conform to its requirements. For example, the statutes in the various States denouncing and punishing abduction of a female, under a designated age, for purposes of prostitution, and the like, are as variant as the several States, almost. Some of these statutes specifically require that the female shall have been of previous chaste character,[1] or shall have been lawfully in the custody and control of the person or persons from whom taken,[2] and the like. The averments in an indictment or information charging such an offense must meet each of these varying requirements and conditions by alleging previous chaste character, lawful custody and control, and the like. What is true of abduction is also true of other specific crimes and offenses.

No general rules, applicable alike in all jurisdictions, can be given, because of the varying requirements under the different statutes; but it is thought, and trusted, that what is herein collected will prove both convenient and helpful, but should always be consulted in connection

1 See, infra, § 384, footnote 6. 2 See, infra, § 382, footnote 9.

with the wording and provisions of the statute under which the pleader is acting, and the difference in this respect, if any, from the statute under which the decision given was made.

CHAPTER XVIII.

INDICTMENT—SPECIFIC CRIMES.

Abduction.

§ 382. In general. The crime of abduction of a female for purpose of concubinage, prostitution, having sexual intercourse with her, compelling marriage, and the like, is a purely statutory offense, and the indictment or information must be drawn to meet the requirements of the particular statute by alleging that the abduction was for the purposes therein denounced and in the manner therein prohibited.[1] The indictment or information may follow the language of the statute[2] without setting out the manner of detention,[3] but must aver that the abduction or detention was against the victim's will.[4] Where the statute enumerates two or more things, of the same general nature but not of the same class, in the disjunctive, an allegation of them in the conjunctive will render the indictment or information vulnerable to the objection that it charges two offenses.[5]

1 Vander Linden v. Oster, 37 S. D. 112, 156 N. W. 911.

As to forms of indictment for abduction in its various phases, see Forms Nos. 161-238.

Information held insufficient to charge the crime of abduction under S. D. Pen. Code, §§ 333-335.—Vander Linden v. Oster, 37 S. D. 112, 156 N. W. 911.

2 As Ky. Gen. St. 1883, ch. 29, art. iv, § 9.

3 Cargill v. Com., (Ky.) 13 S. W. 916.

4 See authorities footnote 7, this section.

5 "Prostitution or concubinage"

Unlawfully, maliciously, etc. An indictment or information for abduction in any of its phases, as provided by the specific act, where the act denounced and prohibited, when unlawfully done constitutes the offense denounced, need not allege that the accused acted maliciously, wilfully, or feloniously.[6] But where the statute provides that the taking away of a woman unlawfully and against her will for specified purposes shall constitute the offense, then the indictment or information must allege that the taking away was unlawful and against the woman's will.[7]

Enticing from parents or guardian of an unmarried female under a designated age being charged, it need not be averred that accused knew the female was under the statutory age,[8] or that the parents or guardians had the legal custody,[9] in the absence of a statutory provision making legal custody an element; but it must be alleged that the taking was against the will and without the consent of such parents or guardian.[10]

Inartistically drawn indictment or information is sufficient as against an objection that it is unintelligible in those cases where it contains all the averments required by the statute.[11]

in the statute, indictment or information charging "prostitution and concubinage." See, infra, § 387, footnote 2.

6 Higgins v. Com., 94 Ky. 54, 9 Am. Cr. Rep. 20, 21 S. W. 231.

7 State v. Hromadko, 123 Iowa 665, 99 N. W. 560; Wilder v. Com., 81 Ky. 591; Krambiel v. Com., 2 S. W. 555; Hoskins v. Com., 7 Ky. Law Rep. 41.

Forcible detention being charged in the indictment does not constitute an allegation that the detention was against the woman's will. —Wilder v. Com., 81 Ky. 591.

8 People v. Fowler, 88 Cal. 136, 25 Pac. 1110.

9 People v. Fowler, 88 Cal. 136, 25 Pac. 1110; State v. Sager, 99 Minn. 54, 108 N. W. 812.

10 **Against will and consent of the parents.** — Where the indictment charged that the accused enticed "the said female to leave the house of her parents" without averring the names of the parents or that the enticement was against their will and consent, it was held bad, in Jones v. State, 84 Tenn. (16 Lea) 466.

11 State v. Johnson, 115 Mo. 480, 9 Am. Cr. Rep. 7, 22 S. W. 463.

Surplusage does not vitiate an indictment otherwise good;[12] as, an indictment charging the abduction of a female under the statutory age from her parents for the purpose of concubinage which adds the unnecessary allegation "for the purpose of having sexual intercourse with him the said" defendant.[13]

§ 383. For purpose of compelling marriage.[1] In an indictment or information charging the abduction or detaining[2] of a woman to induce or compel her marriage to the accused or to another, there must be an averment that the act was unlawful and against the woman's will; but neither the means by which the abduction was effected, nor from what place the woman was taken, nor the manner in which detained is required to be set out, such indictments being good where they merely follow the words of the statute.[3]

Taking from parents or guardian of girl under statutory age for purpose of, or of compelling, marriage to self or to another, being charged, neither the means by which the abduction was effected, from what place, nor from whose custody the girl was taken need be alleged,[4] neither need it be alleged to whom she was to be married, that the intention of accused was that she should be married before the statutory age, or that parents or guardian had the legal charge of her person.[5]

12 See, supra, § 200.

13 State v. Overstreet, 43 Kan. 299, 23 Pac. 572; People v. Parshall, 6 Park. Cr. Rep. (N. Y.) 129.

Additional allegation of an intent to do other and different acts not set out in the statute, does not vitiate the indictment.—People v. Parshall, 6 Park. Cr. Rep. (N. Y.) 129.

1 As to forms charging this offense, see Forms Nos. 161-166.

2 As to forms for detaining a woman to compel her marriage to the accused or another, see Forms Nos. 182-186.

3 Cargill v. Com., (Ky.) 13 S. W. 916.

4 State v. Keith, 47 Minn. 559, 50 N. W. 691.

5 State v. Sager, 99 Minn. 54, 108 N. W. 812 (under Minn. Gen. Stats., 1894, § 6529).

§ 384. **For purpose of prostitution.** An indictment or information charging abduction for purpose of prostitution should follow closely the language of statute under which drawn, although the use of words of equivalent import with those employed in the statute will suffice, if the instrument is otherwise sufficient;[1] but where the statutory words are "for purposes of prostitution,"[2] an allegation of abduction "for the purpose of having illicit sexual intercourse with her" charges no offense,[3] and the indictment or information must be quashed on motion therefor;[4] neither is an averment which alleges the act was done "for the purpose of unlawfully and feloniously prostituting her, and for the purpose of having carnal intercourse with her," sufficient within such a statute.[5]

Previous chaste character is not an element in the offense, in the absence of specific statutory provision, and need not be alleged or proven, for in such a case the chastity or unchastity of the female is wholly immaterial;[6] but where the provision of the statute relates to

1 **Equivalent allegation.**—An allegation that the female was enticed away "with the felonious intent of rendering" the female enticed "a prostitute" is equivalent to alleging that it was done "for the purpose of prostitution." —Nichols v. State, 127 Ind. 406, 26 N. E. 839.

2 **As in the Indiana statute.**—2 Gavin & H. Ind. Stats., p. 441, § 16.

3 Osborn v. State, 52 Ind. 526, 1 Am. Cr. Rep. 25; Com. v. Cook, 53 Mass. (12 Met.) 93; Carpenter v. People, 8 Barb. (N. Y.) 603.

Compare: State v. Overstreet, 43 Kan. 299, 23 Pac. 572, holding that an indictment or information otherwise good, charging the abduction of a girl under the statutory age from her parents for the purpose of concubinage, is not vitiated by the addition of the words "for the purpose of having sexual intercourse with the" accused.

4 Osborn v. State, 52 Ind. 526, 1 Am. Cr. Rep. 25.

5 Miller v. State, 121 Ind. 294, 23 N. E. 94.

6 Cargill v. Com., 93 Ky. 578, 20 S. W. 782; Com. v. Wilson, 17 Ky. L. Rep. 578, 32 S. W. 166; State v. Strattman, 100 Mo. 540, 13 S. W. 814; State v. Rogers, 108 Mo. 202, 18 S. W. 976 (female under statutory age); State v. Bobbst, 131 Mo. 328, 32 S. W. 1149; State v. Sibley, 131 Mo. 519, 33 S. W. 167; Brown v. State, 72 Md. 477, 20 Atl. 140 (girl under statutory age enticed from home); State v. Hairston, 121 N. C. 582, 28 S. E. 492 (girl under statutory age).

females of previous chaste character, the indictment or information must aver and the proof show that the female was of previous chaste character.[7] Under some statutes,[8] however, it is held that such an averment is not necessary,[9] the fact of previous unchastity being a matter of defense.[10]

§ 385. For illicit sexual intercourse. Indictment or information charging accused "unlawfully and feloniously detained" a named female "against her will with intent to have carnal intercourse with her" has been held sufficient.[1] It is not necessary to allege whether the accused succeeded in his purpose.[2] Under the Missouri statute[3] actual concubinage need not be alleged,[4]

7 See People v. Roderigas, 49 Cal. 9; Com. v. Whitaker, 131 Mass. 225; Carpenter v. People, 8 Barb. (N. Y.) 603.

"Previous chaste character," in such a statute, means actual chaste and pure conduct, as contradistinguished from good reputation for chastity.—Lyons v. State, 52 Ind. 426 (abduction case); State v. Gates, 27 Minn. 52, 6 N. W. 404 (abduction case); Carpenter v. People, 8 Barb. (N. Y.) 603 (abduction case).

An individual personally chaste, not merely of good reputation for chastity.—Kauffman v. People, 11 Hun (N. Y.) 82 (abduction case).

Means one who never had sexual intercourse.—Powell v. State, (Miss.) 20 So. 4 (in seduction case).

Previous unchastity. — Woman who has been previously in the habit of illicit intercourse, but reformed and been thereafter chaste from principle, is within the definition.—See State v. Timmens, 4 Minn. 325 (seduction case).

Prior acts of illicit intercourse may be shown.—Lyons v. State, 52 Ind. 426.

8 **As in Tennessee** under Shannon's Code, § 6462.

9 Griffin v. State, 109 Tenn. 17, 70 S. W. 61.

10 Jenkins v. State, 83 Tenn. (15 Lea) 674; Scruggs v. State, 90 Tenn. 81, 15 S. W. 1074; Griffin v. State, 109 Tenn. 17, 70 S. W. 61.

1 Porter v. Com., 7 Ky. Law Rep. 364.

2 Smith v. Com., (Ky.) 127 S. W. 790. See State v. Richards, 88 Wash. 160, 152 Pac. 720.

That is not an element of the offense. See State v. Knost, 207 Mo. 18, 105 S. W. 616.

3 Rev. Stats., 1899, § 1842; Ann. Stats., 1906, § 1273.

As to sufficient indictment under this statute, see State v. Beverly, 201 Mo. 550, 100 S. W. 463; State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

4 State v. Knost, 207 Mo. 18, 105 S. W. 616.

neither is it necessary to allege any matter not an element of the offense.[5] An allegation that accused took female away without the consent of her parents or guardian is not necessary.[6]

Attempt to commit the offense may be properly alleged to have been by means of "persuasion, entreaty, advice, flattery, promises, and other means to the prosecuting attorney unknown,"[7] or, in case of an indictment, "to the grand jury unknown."

§ 386. ENTICEMENT TO HOUSE OF ILL-FAME. Where the statute[1] makes it a crime to take or entice a female to a house of ill-fame, or elsewhere, for the purpose of prostitution, an indictment or information charging the offense must aver that the place to which the female was taken was a house of ill-fame, or a place of like character within the prohibition of the statute,[2] and the particular house or place must be alleged;[3] but it is sufficient to name one house of ill-fame or other prohibited place to which the female was taken.[4]

Previous chaste character of the female, under the California statute[5] and all with like provisions, must be alleged in the indictment or information, and proven on the trial.[6]

5 That not an element of the offense.—State v. Knost, 207 Mo. 18, 105 S. W. 616.

6 State v. Kebler, 228 Mo. 367, 128 S. W. 721.

7 State v. Richards, 88 Wash. 160, 152 Pac. 720.

1 Such as Ind. Rev. Stats., § 1993; La. Act of 1890, No. 134, p. 175; N. J. Act March 14, 1910, § 1, Pamp. Laws, p. 24.

As to sufficiency of indictment under the Louisiana Act, see State v. Sanders, 136 La. 1059, 68 So. 125.

2 Miller v. State, 121 Ind. 294, 23 N. E. 94; State v. DeMarco, 81 N. J. L. 43, 79 Atl. 418.

3 Nichols v. State, 127 Ind. 406, 26 N. E. 839.

4 State v. Savant, 115 La. 226, 38 So. 974.

5 Kerr's Cyc. Pen. Code, § 266.

6 People v. Roderigas, 49 Cal. 9, approved in Com. v. Whitaker, 131 Mass. 225 (an enticement case), and Harvey v. Territory, 11 Okla. 159, 65 Pac. 838, applying the rule in a prosecution for seduction.

§ 387. JOINDER OF COUNTS AND DUPLICITY. A count for the abduction of a daughter under the statutory age against the will of her parents, may be joined with a count for abducting the daughter and marrying her.[1] It has been said that where the statute denounces the abduction of a female for purpose of "prostitution or concubinage," an averment charging the abduction in the conjunctive as for purpose of "prostitution and concubinage" renders the indictment open to the objection of duplicity in that it charges two distinct offenses in one count;[2] but it is held that under the New York statute[3] the use of the copulative form of allegation charging as taken "for the purpose of prostitution and sexual intercourse," is not subject to demurrer.[4]

1 State v. Tidwell, 5 Strob. (S. C.) 1.

2 State v. Goodwin, 33 Kan. 538, 5 Am. Cr. Rep. 1, 6 Pac. 899.

3 Pen. Code, § 282.

4 People v. Powell, 4 N. Y. Cr. Rep. 585.

CHAPTER XIX.

INDICTMENT—SPECIFIC CRIMES.

Abortion.

§ 388. In general.[1] An indictment charging the offense of procuring, or attempting to procure, an abortion, should follow the language or phraseology of the statute; but it is not fatal to depart therefrom, if the language or phrases used convey substantially the same meaning.[2] Thus, it has been held that the phrase "the procuring of a miscarriage" has practically the same meaning as "the procuring of an abortion";[3] that "woman with child" is equivalent to "pregnant woman" in the statute,[4] and the like. And it has been said that an indictment or information is not defective because it charges an attempt to procure the miscarriage and abortion of the mother

1 As to forms charging abortion, see Forms Nos. 239-264.

2 Under general rule that an indictment which charges an offense substantially in the language of the statute creating it.—Eckhardt v. People, 83 N. Y. 462, 38 Am. Rep. 462, affirming 22 Hun 525; People v. Quinn, 44 N. Y. St. Rep. 920, 18 N. Y. Supp. 569.

3 State v. Crook, 16 Utah 212, 51 Pac. 1091 (under Utah Comp. Stats., 1888, § 5046).

4 Eckhardt v. People, 83 N. Y. 462, 38 Am. Rep. 462, affirming 22 Hun 525.

rather than that of the child, where the intent to cause the premature birth and destruction of the child is also charged.[5]

Alternative use of different means alleged in an indictment for abortion does not render it bad.[6]

§ 389. CHARGING GRADE OF CRIME. The act of producing, or attempting to produce, an abortion, where it does not result in death,[1] may be a misdemeanor or a felony, according to the provision of the statute; and the statute may provide degrees of the offense upon which different penalties are inflicted. Care should be taken in the drawing of the indictment so as to charge the highest grade or degree of the offense of which accused can be convicted under the facts in the case. Where by statute abortion is a misdemeanor, an indictment for the misdemeanor will be good for that offense, although it contains some averments but not all the facts which would show that the criminal act alleged was a felony.[2] For example, the offense of administering a drug to a pregnant woman to produce a miscarriage, and the administering of the drug to kill the child, are two separate and distinct offenses; an indictment which alleges that the medicine was administered to produce a miscarriage is sufficient for the misdemeanor offense, although insufficient to charge the crime of manslaughter in killing the child.[3]

5 Mills v. Com., 13 Pa. St. 631.

6 See, ante, § 206; State v. Owens, 22 Minn. 238; State v. Gaul, 88 Wash. 295, 152 Pac. 1029.

In State v. Drake, 30 N. J. L. (1 Vr.) 422, however, it was held that an indictment charging that the defendant administered a certain poison or drug or medicine, or noxious thing, was defective in that it did not allege that he administered all of the prohibited things nor any one of them.

1 Misdemeanor by statute to employ means to procure miscarriage of a pregnant woman, the statute prescribing a penalty for the offense denounced, this fact will not take the criminal act out of the provisions of the statute making it manslaughter to kill another in the commission of an unlawful act, where death results from the abortion.—State v. Power, 24 Wash. 34, 63 L. R. A. 902, 63 Pac. 1112.

2 Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340.

3 Id.

§ 390. AVERMENTS NOT REQUIRED. Neither the name, quality, quantity or the effect[1] of the drug administered need be named in an indictment for procuring an abortion; and whether the drug administered was liquid, solid, or gaseous need not be alleged.[2] It is unnecessary to allege that the drug was noxious,[3] and, consequently, there need be no averment that the accused knew the noxious character thereof.[4]

§ 391. —— NAME AND MANNER OF USE OF INSTRUMENT. The rule governing as to the necessity of averring the

1 ALA.—Thomas v. State, 156 Ala. 166, 47 So. 257. ARK.—State v. Reed, 45 Ark. 333. COLO.—Dougherty v. People, 1 Colo. 514. DEL.—State v. Quinn, 2 Penn. 339, 45 Atl. 544. IND.—State v. Vawter, 7 Blackf. 592; Carter v. State, 2 Ind. 617. IOWA—State v. Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; State v. Moothart, 109 Iowa 130, 80 N. W. 301. MASS.—Com. v. Morrison, 82 Mass. (16 Gray) 224. MINN.—State v. Owens, 22 Minn. 238. MO.—State v. Van Houten, 37 Mo. 357. N. C.—State v. Crews, 128 N. C. 581, 38 N. E. 293. N. D.—State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. PA.—Com. v. W——, 3 Pittsb. 462. TEX.—Watson v. State, 9 Tex. App. 237; Cave v. State, 33 Tex. Cr. Rep. 335, 26 S. W. 503; Reum v. State, 49 Tex. Cr. Rep. 125, 90 S. W. 1109. WASH.—State v. Gaul, 88 Wash. 295, 152 Pac. 1029. ENG.—R. v. Phillips, 3 Camp. 73.

If the name of the drug is set out in the indictment the proof need not correspond thereto.—Dougherty v. People, 1 Colo. 514; Carter v. State, 2 Ind. 617; Rex v. Phillips, 3 Camp. 73.

See Cave v. State, 33 Tex. Cr. Rep. 335, 26 S. W. 503, where the court expressed doubt as to the sufficiency of the indictment because it did not name the means or state that they were unknown, but held it sufficient, following Watson v. State, 9 Tex. App. 237.

2 State v. Moothart, 109 Iowa 130, 80 N. W. 301.

3 State v. Vawter, 7 Blackf. (Ind.) 592; Com. v. Morrison, 82 Mass. (16 Gray) 224; State v. Mandeville, 88 N. J. L. 418, 96 Atl. 398.

Un-noxious character of drug used constitutes no defense, for, as has been well said, "a party who, with the necessary criminal intent uses any substance to produce a miscarriage, surely can not be held innocent because he mistakenly administered a drug or substance which did not produce the result intended. It is the intent and not the 'substance' used that determines the criminality."—State v. Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; State v. Watson, 30 Kan. 281, 1 Pac. 770; State v. Crews, 128 N. C. 581, 38 S. E. 293.

4 State v. Slagle, 83 N. C. 630.

name or nature of the drug administered,[1] applies with equal force to the instrument used, where the offense is committed, or attempted, by the use of an instrument. The general rule is that the name of the instrument need not be averred;[2] but there are cases to the effect that the character of the instrument used should be averred whenever it is possible to do so,[3] or that the name thereof is unknown to the grand jurors.[4]

1 See, supra, § 383.

2 ARK.—State v. Reed, 45 Ark. 333. CAL.—People v. Guaragna, 23 Cal. App. 120, 137 Pac. 279. MASS.—Com. v. Corkin, 136 Mass. 429, 4 **Am. Cr. Rep.** 15; Com. v. Thompson, 159 Mass. 56, 33 N. E. 1111; Com. v. Noble, 165 Mass. 13, 42 N. E. 328. N. Y.—People v. Lohman, 2 Barb. 216, 220.

3 **Description as "a certain instrument** or instruments suitable for the purpose of producing abortion" was held sufficient in Smartt v. State, 112 Tenn. 539, 80 S. W. 586.

Description as "a certain metallic instrument calculated to produce an abortion" was held sufficient in Reum v. State, 49 Tex. Cr. Rep. 125, 90 S. W. 1109.

Allegation "did unlawfully use a certain instrument" is an insufficient description where there was no averment that the nature of the instrument was unknown. — Com. v. Sinclair, 195 Mass. 100, 11 **Ann. Cas.** 217, 80 N. E. 799.

In the above case the court say: "The gist of the offense charged is the use of the instrument with the specific intent stated; but the description of the instrument and the mode of its use are material to describe and identify the charge."

In Massachusetts the old precedents of indictments contained averments of the nature, kind and description of the instrument which the defendant was charged with having used.—Com. v. Brown, 80 Mass. (14 Gray) 419; Com. v. Jackson, 81 Mass. (15 Gray) 187; Com. v. Snow, 116 Mass. 47; Com. v. Boynton, 116 Mass. 343; Com. v. Brown, 121 Mass. 96; Com. v. Corkin, 136 Mass. 429, 4 **Am. Cr. Rep.** 15; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471; Com. v. Coy, 157 Mass. 200, 214, 216, 32 N. E. 4; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910; Com. v. Thompson, 159 Mass. 56, 33 N. E. 1111; Com. v. Sinclair, 195 Mass. 100, 11 **Ann. Cas.** 217, 80 N. E. 799.

4 CAL.—People v. Guaragna, 23 Cal. App. 120, 137 Pac. 279. DEL.—State v. Quinn, 2 Penn. 339, 45 Atl. 544. ILL.—Baker v. People, 105 Ill. 452. MASS.—Com. v. Jackson, 81 Mass. (15 Gray) 187; Com. v. Snow, 116 Mass. 47; Com. v. Corkin, 136 Mass. 429, 4 **Am. Cr. Rep.** 15; Com. v. Thompson, 159 Mass. 56, 33 N. E. 328. N. H.—State v. Wood, 53 N. H. 488. N. D.—State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, **Ann. Cas.** 1912D, 1317.

In People v. Guaragna, 23 Cal. App. 120, 137 Pac. 279, the court says that the information would have been good if it had alleged

Manner of use of instrument, however, is different, and this must be set out, where known;[5] but indictment may allege that the manner of use is to the grand jury unknown,[6] in which case there need be no averment regarding the manner in which the instrument was used.[7]

Remedy for failure to aver name or nature of instrument, or its manner of use, and also to state that the same is unknown to the grand jury, is to ask for a bill of particulars, to which defendant is entitled as a matter of right;[8] a motion to quash the indictment for such failure to aver is properly overruled.[9]

§ 392. —— Pregnancy and quickening of woman. It is unnecessary under statute[1] to aver that the accused knew or suspected the woman was pregnant,[2] or that

that the character of the instrument was unknown, and obviously such an allegation would not render it more certain or efficacious than no averment at all.

5 Cochran v. People, 175 Ill. 28, 51 N. E. 845; State v. Bly, 99 Minn. 74, 108 N. W. 833; Smartt v. State, 112 Tenn. 539, 80 S. W. 586.

Sufficient allegation as to use: An allegation that the instruments were used "in and about and within the body" of the woman, sufficiently indicates the manner of committing the offense.—People v. Guaragna, 23 Cal. App. 120, 137 Pac. 279.

An allegation charging the unlawful use by "forcing, thrusting, and inserting said instrument into the private parts" of the named woman is sufficient.—Baker v. People, 105 Ill. 452.

An indictment is sufficient where it alleges that accused forced and thrust the instrument up into the womb and body of a pregnant woman.—Rhodes v. State, 128 Ind. 189, 25 **Am. St. Rep.** 429, 27 N. E. 186; Com. v. Wood, 68 Mass. (2 Gray) 85; Com. v. Jackson, 81 Mass. (15 Gray) 187; Com. v. Snow, 116 Mass. 47.

But in People v. Wah Hing, 15 Cal. App. 195, 114 Pac. 416, it was held that it was unnecessary to allege how the instruments were used, as it would be presumed that they were used upon her body.

6 State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, **Ann. Cas.** 1912D, 1317.

7 Thomas v. State, 156 Ala. 166, 47 So. 257; State v. Brown, 26 Del. 499, 85 Atl. 797.

8 Com. v. Sinclair, 195 Mass. 100, 11 **Ann. Cas.** 217, 80 N. E. 799.

9 Com. v. Sinclair, 195 Mass. 100, 11 **Ann. Cas.** 217, 80 N. E. 799.

1 **By statute** in Massachusetts. See Pub. Stats., ch. 207, § 9.

2 Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910.

Indictment against accomplice of the physician sufficient without averring the physician knew that

she had quickened,[3] although it was otherwise at common law;[4] and consequently in a charge of the administration, before the period of quickening, of a drug with the intent to produce an abortion or miscarriage, the pleader need not aver the drug was so administered for the purpose of causing a delivery before the period of quickening.[5]

§ 393. —— Malice. An indictment charging abortion is not defective because of a failure to aver that the act was maliciously done,[1] and without lawful justification;[2] neither is it necessary to allege that the offense was committed feloniously.[3]

§ 394. —— Negativing death. In those cases where death did not result from the abortion, an indictment charging the offense in the words of the statute is sufficient without the negative averment that defendant did not cause the death either of the woman or of the child;[1]

the woman was pregnant. — Fondren v. State, 74 Tex. Cr. Rep. 552, 169 S. W. 411.

3 State v. Smith, 32 Me. 370, 54 Am. Dec. 578; Com. v. Wood, 77 Mass. (11 Gray) 85; State v. Emerich, 13 Mo. App. 492; Mills v. Com., 13 Pa. St. 631, 634.

It is sufficient to allege that she was "big and pregnant."—Com. v. Demain, 6 Pa. Law J. 29, 3 Clark 487, Brightly N. P. 441.

4 See Com. v. Bangs, 9 Mass. 387.

5 Davis v. State, 96 Ark. 7, 130 S. W. 547.

1 Dougherty v. People, 1 Colo. 514; Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133; Com. v. Sholes, 95 Mass. (13 Allen) 554.

2 Com. v. Sholes, 95 Mass. (13 Allen) 554.

3 Com. v. Jackson, 81 Mass. (15 Gray) 187.

As to indictment for murder in producing, or attempting to produce, an abortion, see Forms Nos. 241, 250-255, 1223, 1224.

1 State v. Gedicke, 43 N. J. L. (14 Vr.) 86, 4 Am. Cr. Rep. 6. See Com. v. Wood, 77 Mass. (11 Gray) 85; Com. v. Thompson, 108 Mass. 461; State v. Dean, 85 Mo. App. 473.

The general rule is that where, by the statute, there is a gradation of offenses of the same species, as in the degrees of punishment annexed to the offense, it is not required to set forth a negative allegation. It is no objection to the indictment that it charges the acts which constitute the minor offense unaccompanied by any averment that the aggravating circumstances do not exist. In such a case the offense charged is to be deemed the minor offense, and punishable as such.—State v. Ged

but where death occurs that fact should be specifically alleged to reach the greater crime and subject the accused, on conviction, to the greater punishment.[2]

§ 395. NEGATIVING STATUTORY EXCEPTIONS. The general rules governing the negativing of exceptions have been already fully treated.[1] In an indictment charging the offense of abortion, where the exceptions constitute a part of the statutory offense, they must be negatived,[2] otherwise there will be no offense charged.[3] But where

icke, 43 N. J. L. (14 Vr.) 86, 4 Am. Cr. Rep. 6. See Larned v. Com., 53 Mass. (12 Metc.) 240; Com. v. Wood, 77 Mass. (11 Gray) 85.

2 State v. Drake, 30 N. J. L. (1 Vr.) 422.

Allegation as to whether or not death resulted is not a description of the offense, but merely goes to the degree of the punishment.—State v. Dean, 85 Mo. App. 473.

1 See, supra, §§ 288, 289.

2 Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133; State v. Meek, 70 Mo. 355, 35 Am. Rep. 427; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317.

Sufficient negativing of necessity of administering drug to save life. —State v. Jones, 4 Penn. (Del.) 109, 53 Atl. 858. See, also, State v. Gordy, 5 Penn. (Del.) 556, 60 Atl. 977.

The negation is sufficient where it avers that the acts were done with a specific intent, it not being then necessary for the preservation of the life of the deceased.—Beasley v. People, 89 Ill. 571.

To charge that the act was "unlawfully" done sufficiently negatives or precludes any inference or possibility that the act was done under circumstances of justification.—Com. v. Sholes, 95 Mass. (13 Allen) 554. See Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133.

Where the indictment alleged that the accused, with intent to procure a miscarriage, administered drugs to a pregnant woman, the same not being necessary to preserve her life, sufficiently negatived not only the necessity of the drugs but also the necessity of the miscarriage.—State v. Brown, 26 Del. 499, 85 Atl. 797.

Where the indictment alleges "that the employment of the said instrument not being necessary to preserve the life of the woman" without alleging that the miscarriage was not necessary, is defective and must be quashed on motion.—Bassett v. State, 41 Ind. 303; Willey v. State, 46 Ind. 363.

Insufficient negation.—An averment that the act was done "maliciously and without lawful justification" is not a sufficient negation of the exception "unless necessary to preserve her life."—State v. Stokes, 54 Vt. 178.

3 State v. Meek, 70 Mo. 355, 35 Am. Rep. 427.

An indictment simply charging that the defendant produced an

the exceptions set forth in the statute are merely matters of defense, which must be affirmatively proven, they need not be negatived in the indictment.[4]

§ 396. Publishing information where abortion may be procured.[1] Many of the States have statutes making it an offense to in anywise give or publish information as to where an abortion may be procured.[2] Under such a statute a charge of making public by print and writing, words and language that gave notice and information where advice might be obtained for procuring an abortion, and charging the circulation of such notice and information, must allege the manner in which the print and writing were made public, and how the writing and information were circulated;[3] but where the charge is the distributing of such advertisements, the indictment need not specifically allege guilty knowledge of the contents of the advertisement, it being sufficient to charge that accused knowingly distributed such advertisement.[4]

§ 397. Joinder of counts—Election. An indictment or information in four counts, charging criminal abortion under the statute,[1] two of the counts being used to state

abortion charges no offense; likewise it is insufficient to charge only that the abortion was produced when it was unnecessary to save the life of the mother.—State v. Meek, 70 Mo. 355, 35 Am. Rep. 427.

4 Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133; State v. Rupe, 41 Tex. 33.

1 For form of indictment, see Form No. 264.

2 As in Arkansas, Sand. & H. Dig., § 1640; California, Kerr's Cyc. Pen. Code, § 317; Connecticut, Gen. Stats. 1888, § 1413; Delaware, Laws, p. 930; Florida, Rev. Stats. 1892, § 2619; Idaho, Rev. Stats., § 6843; Indiana, Rev. Stats., § 1997; Maryland, Pub. Gen. Laws, p. 460; Massachusetts, Pub. Stats., p. 1166, § 10; Mississippi, Ann. Code, § 1217; Montana, Pen. Code, § 568; Nevada, Gen. Stats., § 4853; Ohio, Rev. Stats., § 7027; Rhode Island, Pub. Stats., p. 687, § 21.

3 State v. Fiske, 66 Vt. 434, 10 Am. Cr. Rep. 9, 20 Atl. 633.

4 Com. v. Hartford, 193 Mass. 464, 79 N. E. 784.

1 Drawn under How. Stats. of Mich., § 9107.

the same statutory crime of manslaughter by the use of different instruments, both of which are embodied in the statute, the counts are properly joined;[2] but if a fourth is added charging manslaughter at common law committed upon a day subsequent to the time mentioned in the former counts, two distinct and different offenses are charged, which are of a different nature, and on motion an election will be required by the court.[3]

§ 398. Duplicity. It is not duplicity in an indictment alleging abortion to charge, in the language of the statute, both the administration of drugs and the employment of instruments;[1] or to charge the use of drugs and medicines and by violence internally and externally applied to the woman;[2] or to charge both miscarriage and death, where the statute provides a penalty "if the woman miscarries or dies in consequence."[3]

2 People v. Sweeney, 55 Mich. 586, 22 N. W. 50; People v. Sessions, 58 Mich. 594, 26 N. W. 291; People v. McDowell, 63 Mich. 229, 30 N. W. 68.

3 People v. Aiken, 66 Mich. 460, 11 Am. St. Rep. 512, 7 Am. Cr. Rep. 345, 33 N. W. 821.

1 State v. Gaul, 88 Wash. 295, 152 Pac. 1029.

2 Reum v. State, 49 Tex. Cr. Rep. 125, 90 S. W. 1109.

3 Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

CHAPTER XX.

INDICTMENT—SPECIFIC CRIMES.

Adultery.

§ 399. In general.[1] The common-law offense of adultery has been changed and modified by statute in most of the states, and in some of the states[2] the common-law crime of adultery no longer exists, but the offense is known by some other designation. In such a state if the indictment charges adultery that fact will not vitiate it where otherwise sufficient, for the reason that the sufficiency does not depend upon the name by which the prosecuting officer designates the crime, but upon the specific allegations of facts; a wrong designation of the crime charged, or the absence of all designation, does not vitiate an indictment or information otherwise sufficient.[3]

Adultery not defined by the statute. An allegation that the accused "did unlawfully commit the crime of adultery by then and there having unlawful intercourse" with a person named, has been held to be sufficient, although the words "sexual" and "carnal" are omitted.[4]

1 See, also, Fornication, infra, §§ 698-707.

As to forms of indictment for adultery, see Forms Nos. 265 et seq.

2 As in Washington, under Ballinger's Ann. Codes and Stats., § 7231.

3 State v. Nelson, 39 Wash. 221, 81 Pac. 721.

4 United States v. Griego, 11 N. M. 392, 72 Pac. 20, reversed

Surplusage will not render bad an indictment or information for adultery which is otherwise good, such as an unnecessary allegation that it was found on the complaint of the injured husband or wife.[5]

§ 400. Following language of statute. An indictment or information charging adultery which follows the words of the statute creating or defining the offense, is sufficient.[1] The precise words of the statute need not be used, substantial compliance with the rule requiring the use of the language of the statute being sufficient;[2] but where the words of the statute are not followed, the indictment or information should allege the facts with certainty,[3] and certainty according to the common law is sufficient.[4] In such a case nothing can be taken by intend-

on another point in 12 N. M. 84, 75 Pac. 30.

5 State v. Mahan, 81 Iowa 121, 46 N. W. 855.

1 Lord v. State, 17 Neb. 526, 6 Am. Cr. Rep. 17, 23 N. W. 507; State v. Clark, 54 N. H. 456, 1 Am. Cr. Rep. 34; State v. Tally, 74 N. C. 322; State v. Stubbs, 108 N. C. 774, 13 S. E. 90.

Charging party with adultery, alleging that it was committed by her by permitting the man to have carnal knowledge of her body, is sufficient. — State v. Moore, 36 Utah 521, Ann. Cas. 1912A, 284, 105 Pac. 293.

2 Lyman v. People, 198 Ill. 544, 64 N. E. 974, affirming 98 Ill. App. 386; State v. Tally, 74 N. C. 322; Gorman v. Com., 124 Pa. St. 536, 23 W. N. C. 405, 17 Atl. 26.

3 Indictment sufficiently certain to apprise defendant what is charged.—State v. Nelson, 39 Wash. 221, 81 Pac. 721.

An indictment alleging that the defendants "did then and there unlawfully and illegally each with the other live together in an open state of adultery, the said C. being then and there a married man, having been previously married to one D., and the said L. S. being then and there a married woman, having been previously married to one E. S., contrary" etc., is sufficiently plain and certain.—Crane v. People, 168 Ill. 395, 48 N. E. 54, affirming 65 Ill. App. 492.

An indictment charging that the defendant, being a married man and having a wife alive, naming her, did commit adultery with a certain other woman, naming her, was held sufficient without alleging carnal knowledge and that the paramour was not his wife.—Helfrich v. Com., 33 Pa. St. 68, 75 Am. Dec. 579.

4 State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

ment; the accused must be brought within all the material words of the statute.[5]

§ 401. NAME AND DESCRIPTION OF PARTICEPS CRIMINIS. In an indictment or information charging adultery, nothing can be taken by intendment; in the description of the person, and otherwise, the accused must be brought clearly within all the material words of the statute.[1] It is essential to the crime of adultery that at least one of the parties shall be married, and this fact must be distinctly alleged in the indictment or information.[2] The sex[3] or race[4] of the party charged or of the particeps criminis need not be alleged, and the fact that the parties are described as "male" and "female," instead of "man" and "woman," as designated in the statute, is immaterial.[5]

In Pennsylvania, where a married woman is accused of adultery, the name of her husband must be set out,[6] but where a married man is charged, the name of his wife need not be set out.[7] In Texas, and perhaps elsewhere,

5 State v. Sekrit, 130 Mo. 401, 32 S. W. 977.

1 State v. Sekrit, 130 Mo. 401, 32 S. W. 977.

In Texas the indictment need not allege accused was not married to the particeps criminis where it alleges lawful marriage to another party who is designated.—Lee v. State, 47 Tex. Cr. Rep. 464, 83 S. W. 1110.

Varying grades of the offense being named in the statute, e. g., adultery, living in a state of adultery, and lewd and lascivious conduct, an indictment or information so framed that accused may be convicted of either on the evidence, seems not to be open to the objection that it charges more than one offense.—State v. Nelson, 39 Wash. 221, 81 Pac. 721.

2 Com. v. Reardon, 60 Mass. (6 Cush.) 78; State v. Bisbee, 75 Vt. 293, 54 Atl. 1081.

As to sufficiency of allegation, see Com. v. Hussey, 157 Mass. 415, 32 N. E. 362.

3 McLeod v. State, 35 Ala. 395; Hildreth v. State, 19 Tex. App. 195. See, also, infra, § 404, footnote 1.

4 Mulling v. State, 74 Ga. 10. See Butt v. State, 33 Ga. Supp. 56. See, infra, § 404, footnote 3.

5 Holland v. State, 14 Tex. App. 182.

6 Com. v. Carson, 4 Pa. Law J. 271, 2 Pars. Sel. Cas. 475.

7 Davis v. Com., (Pa.) 7 Atl. 194.

the rule is that the name of the husband of a married woman charged with adultery need not be set out.[8]

Name[9] *of particeps criminis* must be alleged;[10] and it may be necessary, under statutory provision, to allege whether the party was married or single. Thus, under one section of the Vermont statute it is adultery for a man to have sexual intercourse with a married woman other than his wife,[11] and under another section of the same statute it is adultery for a man to have sexual intercourse with an unmarried woman;[12] hence, in this state, an indictment which fails to allege whether the particeps criminis was married, is fatally defective,[13] because it fails to allege a material and essential fact under either

8 Collum v. State, 10 Tex. App. 708; Hildreth v. State, 19 Tex. App. 195; Lenert v. State, (Tex. Cr.) 63 S. W. 563.

9 **Indicted by name under which known,** a joint defendant not entitled to acquittal on showing true name of co-defendant not that under which indicted. — State v. Glaze, 9 Ala. 283.

10 State v. Vittum, 9 N. H. 519. See, however, obiter dictum in Farr v. Farr (a divorce case), 34 Miss. 597, criticizing this.

"Roxcena Jones" properly amended by adding "otherwise known as 'Rosa Jones,'" such amendment in nowise changing the proof required of the prosecution, and not requiring any further or different proof on the part of the defendant.—State v. Arnold, 50 Vt. 731.

"With a certain woman, whose name to said grand jurors is unknown," etc., in connection with an allegation that accused is a married man and the woman was not his wife, has been held to be a sufficient description of the particeps criminis.—Com. v. Thompson, 56 Mass. (2 Cush.) 551.

11 Vt. Stats., § 5057.

Under Illinois statute (Revised Stats. 1893, ch. 38, § 408), indictment is not defective for failure to state that the woman was married, there being an averment that the parties were not married to each other.—Lyman v. People, 98 Ill. App. 386, affirmed 198 Ill. 544, 64 N. E. 974.

"Lawfully married to another person" is sufficient under the Texas statute. — Lenert v. State, (Tex. Cr.) 63 S. W. 563.

In Massachusetts any form of words stating the woman was the wife of another, is sufficient. — Moore v. Com., 47 Mass. (6 Metc.) 243, 39 Am. Dec. 724; Com. v. Reardon, 60 Mass. (6 Cush.) 78.

12 Vt. Stats., § 5056.

13 See State v. Searle, 56 Vt. 516; State v. Bisbee, 75 Vt. 293, 15 Am. Cr. Rep. 460, 54 Atl. 1081.

In Illinois, however, on joint indictment for adultery it is immaterial that the indictment fails to state whether the woman was mar-

of said sections of the statute,[14] and the defect is not cured by verdict.[15]

Indictment against two for fornication and adultery, the fact that the woman is designated as a "spinster," is not ground for arresting judgment.[16]

§ 402. TIME AND PLACE. Every material fact which serves to constitute the offense charged should be alleged and set forth with precision and certainty as to time[1] and place.[2] After the time has been once stated with certainty it may be referred to in respect to other facts alleged by the terms "then" and "there" without repetition.[3] The offense may be charged as having been committed on a certain day without a continuando.[4] When a continuing offense is charged it may be alleged as taking place between certain dates.[5]

ried, where it is alleged she was not the wife of the other.—Lyman v. People, 98 Ill. App. 386, affirmed 198 Ill. 544, 64 N. E. 974.

14 State v. Bisbee, 75 Vt. 293, 15 Am. Cr. Rep. 460, 54 Atl. 1081.

15 Id. See Baker v. Sherman, 73 Vt. 26, 50 Atl. 633.

16 State v. Guest, 100 N. C. 410, 6 S. E. 253.

"Maiden," in an indictment, means simply "unmarried," not necessarily "virgin."—State v. Shedriock, 69 Vt. 428, 38 Atl. 75.

1 State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

It is enough to aver the crime was committed within the period of limitations without alleging specific acts on specific dates.—State v. Anderson, 140 Iowa 445, 118 N. W. 772.

Where the fact of committing the crime at a certain time and place with a certain woman is first alleged, but to the fact that she was a married woman and the wife of another no time was averred, the indictment is insufficient in not alleging the latter were facts at the time of the offense and not at the time of the indictment.—State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

2 State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

Contra: State v. Hinton, 6 Ala. 864.

3 State v. Thurston, 35 Me. 205, 58 Am. Dec. 695; State v. Eggleston, 43 Ore. 346, 77 Pac. 738.

4 State v. Glaze, 9 Ala. 283; Lyman v. People, 198 Ill. 544, 64 N. E. 974, affirming 98 Ill. App. 386; Swancoat v. State, 4 Tex. App. 105.

5 State v. Nelson, 39 Wash. 221, 81 Pac. 721.

§ 403. NOT HUSBAND AND WIFE. There must be an averment that the parties were not husband and wife.[1] Any form of words stating that she was the wife of some person other than the accused is sufficient.[2] It has been held to be proper to charge in one count that accused was married to another person then living, and in another count that the particeps criminis was married to another person then living.[3]

§ 404. UNNECESSARY ALLEGATIONS. Neither the sex[1] nor that the parties were of different sexes need be alleged,[2] nor that they are of different races.[3] It is unnecessary to aver to whom either spouse is married;[4] that the act was

1 Moore v. Com., 47 Mass. (6 Met.) 243, 39 Am. Dec. 724; Com. v. Reardon, 60 Mass. (6 Cush.) 79; Clay v. State, 3 Tex. App. 499.

Allegation that the woman is a single person is a sufficient allegation that she is not his wife.—State v. Clark, 54 N. H. 456, 1 Am. Cr. Rep. 34.

A charge that the defendant committed the crime with B., the wife of one C., the defendant being then and there a married man and having a lawful wife living sufficiently avers that the defendant was married to another than B. at the time.—State v. Hutchinson, 36 Me. 261.

Averment that woman "being lawfully married to another person" sufficiently avers that she was married to another than her co-defendant.—Lenert v. State, (Tex. Cr.) 63 S. W. 563.

2 Names v. State, 20 Ind. App. 168, 50 N. E. 401; Moore v. Com., 47 Mass. (6 Met.) 243, 39 Am. Dec. 724; Com. v. Reardon, 60 Mass. (6 Cush.) 79; State v. Parker, 57 N. H. 123; State v. Clark, 83 Vt. 305, 75 Atl. 534, Ann. Cas. 1912A, 261.

Giving the woman a surname different from that of the accused does not sufficiently raise the implication that she was not his wife, and is insufficient.—Moore v. Com., 47 Mass. (6 Met.) 243, 39 Am. Dec. 724.

3 Brown v. State, 69 Tex. Cr. Rep. 138, 154 S. W. 567.

1 See, supra, § 401, footnote 3.

2 McLeod v. State, 35 Ala. 395; State v. Dunn, 26 Ark. 34; State v. Lashley, 84 N. C. 754; Hildreth v. State, 19 Tex. App. 195.

3 Mulling v. State, 74 Ga. 10. See, supra, § 401, footnote 4.

4 Moore v. Com., 47 Mass. (6 Met.) 243, 39 Am. Dec. 724; Davis v. Com., 114 Pa. St. 49, 7 Atl. 194; Collum v. State, 10 Tex. App. 708; Hildreth v. State, 19 Tex. App. 195.

An allegation of the name of the defendant's wife is surplusage.—Bodkins v. State, 75 Tex. Cr. Rep. 499, 172 S. W. 216.

feloniously done;[5] or to allege either scienter,[6] or intent.[7] It is also unnecessary to name the town of residence of the defendant at the time of commission of the offense.[8] It is unnecessary to allege by whom or at whose instance prosecution is commenced,[9] or that it was upon complaint of a person authorized by statute to commence the action,[10]

5 State v. Anderson, 140 Iowa 445, 118 N. W. 772; State v. Clark, 83 Vt. 305, 75 Atl. 534, Ann. Cas. 1912A, 261.

Indictments or informations which did not use the word "felonious" or any equivalent term, upheld on demurrer, although no objection was made that such word was not used. See Love v. State, 124 Ala. 82, 27 So. 217; Crane v. People, 168 Ill. 395, 48 N. E. 54; Lyman v. People, 198 Ill. 544, 64 N. E. 974; State v. Chandler, 96 Ind. 592; State v. Hutchinson, 36 Me. 261; Com. v. Elwell, 2 Met. (Mass.) 190, 35 Am. Dec. 398; Com. v. Hussey, 157 Mass. 415, 32 N. E. 362; Com. v. Dill, 159 Mass. 61, 34 N. E. 84; State v. Clawson, 30 Mo. App. 139; Lord v. State, 17 Neb. 526, 23 N. W. 507; United States v. Griego, 11 N. M. 392, 72 Pac. 20; State v. Tally, 74 N. C. 322; Helfrich v. Com., 33 Pa. St. 68, 75 Am. Dec. 579; Grisham v. State, 10 Tenn. (2 Yerg.) 589; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144; Ketchingman v. State, 6 Wis. 426.

Where an indictment alleged that the defendant "did unlawfully and feloniously commit the crime of adultery by then and there having sexual intercourse with," etc., on demurrer being interposed because it did not allege that it was feloniously done, the court held that it was sufficiently charged that it was feloniously done.—Reynolds v. United States, 7 Ind. Terr. 51, 103 S. W. 762.

6 Com. v. Elwell, 43 Mass. (2 Allen) 190, 35 Am. Dec. 398; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144.

7 State v. Cutshall, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

Compare: State v. Chillis, Brayt. (Vt.) 131; State v. Miller, 60 Vt. 90, 12 Atl. 526; State v. Grace, 86 Vt. 470, 86 Atl. 162.

8 **Act of March 11th, 1807,** provided for a division of the fine between the state and the supervisors of the road in the town where defendant resided.—Duncan v. Com., 4 Serg. & R. (Pa.) 449.

9 State v. Brecht, 41 Minn. 50, 42 N. W. 602.

10 State v. Maas, 83 Iowa 469, 49 N. W. 1037; State v. Andrews, 95 Iowa 451, 64 N. W. 404; State v. Anderson, 140 Iowa 445, 118 N. W. 772; People v. Payment, 109 Mich. 553, 67 N. W. 689; State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Dlugi, 123 Minn. 392, 143 N. W. 971; State v. Hayes, 51 Ore. 466, 94 Pac. 751; State v. Ayles, 74 Ore. 153, 145 Pac. 19.

Better practice: While it is not necessary that the information should allege that the prosecution was commenced on the complaint of the other spouse, the better practice would be to allege the name of the spouse and that he

but the fact is required to be indorsed on the indictment or information under the provisions of the statute[11] in some states, and where so required a failure to comply with the statutory provision is fatal.[12]

Marriage need not be alleged, it has been held, because that fact is necessarily implied by the term "adultery,"[13] but it is thought that the rule requiring marriage to be alleged is the better rule, as nothing can be taken by intendment;[14] and it has been said that it is not necessary to allege that the particeps criminis was married.[15]

§ 405. JOINDER OF THE PARTIES. It is not necessary that both parties to the offense in the crime of adultery shall be indicted,[1] and while they may be jointly indicted,[2] it has been said to be the better practice to indict the parties separately.[3] Where the parties are jointly indicted the jury may convict one and acquit the other,[4] and one party may be legally tried and convicted alone.[5]

or she was the complaining and prosecuting witness in the case.—Stone v. State (Okla. Cr. App.), 155 Pac. 701.

11 As Iowa Code, § 4292.

12 See State v. Briggs, 68 Iowa 416, 27 N. W. 358.

13 State v. Hinton, 6 Ala. 864.

14 See, supra, § 401.

15 State v. Ling, 91 Kan. 647, 138 Pac. 582.

1 GA.—Wasden v. State, 18 Ga. 264; Bigby v. State, 44 Ga. 344; Disharoon v. State, 95 Ga. 351, 22 S. E. 698. IOWA—State v. Dingee, 17 Iowa 232. KAN.—State v. Ling, 91 Kan. 647, 138 Pac. 582. N. C.—State v. Cox, 4 N. C. (Term. Rep.) 165. R. I.—State v. Watson, 20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193. WASH.—State v. Nelson, 39 Wash. 221, 81 Pac. 721.

2 State v. Bartlett, 53 Me. 446; Com. v. Elwell, 43 Mass. (2 Met.) 190, 35 Am. Dec. 398; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207.

The general rule that where the same evidence as to the act which constitutes the crime applies to two or more they may be jointly indicted.—Com. v. Elwell, 43 Mass. (2 Met.) 190, 35 Am. Dec. 398.

But they can not be jointly indicted for living in adultery without alleging that they so lived with each other; otherwise it does not show they participated in the same offense.—Maull v. State, 37 Ala. 160.

3 State v. Dingee, 17 Iowa 232.

4 Com. v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248; Alonzo v. State, 19 Tex. App. 378, 49 Am. Rep. 207.

5 State v. Lyerly, 52 N. C. (7 Jones) 158; State v. Carroll, 30 S. C. 85, 14 Am. St. Rep. 883, 8 S. E. 433.

§ 406. JOINDER OF OFFENSES. There may be a joint indictment for adultery and fornication[1] and these offenses may be charged in one count,[2] or in separate counts.[3] And a person may be tried at one time on two separate indictments, one charging abduction for purpose of unlawful intercourse, and the other charging adultery with the same girl.[4] But under an indictment charging adultery there can not be a conviction for fornication[5] unless all the elements of fornication have been charged.[6]

§ 407. DUPLICITY. An indictment or information is not open to the charge of duplicity because charging between the same parties different acts of adultery at different times,[1] provided the different acts charged are contained in separate counts; if they are all charged in one count the indictment or information will be bad.[2]

1 The offense is sufficiently described by charging an unlawful "bedding and cohabiting together." —State v. Jolly, 20 N. C. (3 Dev. & B.) 110, 32 Am. Dec. 656.

2 State v. Cowell, 26 N. C. (4 Ired.) 231.

3 Garland v. State, 51 Tex. Cr. Rep. 643, 104 S. W. 898.

4 Com. v. Rosenthal, 211 Mass. 50, Ann. Cas. 1913A, 1003, 97 N. E. 609.

The reason being that one would have necessarily been misled as to the charge intended to be proved against him. — State v. Lash, 16 N. J. L. (1 Har.) 380, 32 Am. Dec. 397.

5 People v. Rouse, 2 Mich. N. P. 209; Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367; Pena v. State, 46 Tex. Cr. Rep. 458, 80 S. W. 1014.

6 Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367.

1 State v. Briggs, 68 Iowa 416, 27 N. W. 358; State v. Clawson, 30 Mo. App. 139; Ketchingman v. State, 6 Wis. 426.

2 Com. v. Fuller, 163 Mass. 499, 40 N. E. 764.

CHAPTER XXI.

INDICTMENT—SPECIFIC CRIMES.

Affray.

§ 408. NECESSARY AVERMENTS. An affray is a common-law offense, but it is defined and the punishment prescribed in many if not most of the states of the Union. The indictment or information,[1] whether drawn under the common law or under statute, must distinctly aver that the offense was committed in a public place,[2] by two or more persons;[3] but it need not aver what kind of a pub-

1 As to forms of indictment, see Forms Nos. 289-292.

2 IND.—State v. Weekly, 29 Ind. 206; State v. Williams, 64 Ind. 553. MO.—State v. Warren, 57 Mo. App. 502. N. C.—State v. Baker, 83 N. C. 649; State v. Griffin, 125 N. C. 692, 34 S. E. 513. S. C.—State v. Sumner, 5 Strobh. L. 53. TENN.—State v. Priddy, 23 Tenn. (4 Humph.) 429; State v. Heflin, 27 Tenn. (8 Humph.) 84.

An averment charging fighting occurred "in a certain public road and highway" is sufficient because the court will take judicial notice that "a public road and highway" is a public place.—State v. Warren, 57 Mo. App. 502.

Contra: State v. Weekly, 29 Ind. 206, holding that a "highway" is not necessarily "a public place," within the meaning of the statute.

An averment that the fighting occurred "in the town of Clarksville" is insufficient, because it might still have been in a private place there.—State v. Heflin, 27 Tenn. (8 Humph.) 84.

3 State v. Woody, 47 N. C. (2 Jones L.) 335; Simpson v. State, 13 Tenn. (5 Yerg.) 336; State v. Priddy, 23 Tenn. (4 Humph.) 429.

Averment defendants fought in a public place, without alleging whom or what they fought, is bad. —State v. Vanloan, 8 Ind. 182.

"Did unlawfully and voluntarily fight together," is sufficient.—State v. Billingsley, 43 Tex. 39.

Charging that defendants "did make an affray by fighting" shows that the defendants fought against each other.—State v. Beuthal, 24 Tenn. (5 Humph.) 519.

It seems that the contrary has been held in State v. Washington, 19 Tex. 128, 70 Am. Dec. 323, wherein fighting was not alleged in express terms, but it was alleged that the defendants with force and arms at a named time

lic place,[4] or describe it,[5] or even name any specific place.[6]

The facts constituting the offense must be specifically set out,[7] it not being sufficient to designate the offense by name merely;[8] but it is not necessary to allege in express terms that there was fighting, it being sufficient to charge that the defendants, at a certain time and place, were unlawfully assembled together, and being so unlawfully assembled and arrayed in a warlike manner, then and there did make an affray, to the great terror of divers good citizens,[9] or other like allegations showing the facts constituting the offense sought to be charged.[10]

Venue laid sufficiently where it is alleged that the offense took place within the county in which the indictment is found or information presented, without specifying the particular town or particular place where it occurred.[11]

and place were unlawfully assembled and arrayed in a warlike manner and did make an affray, to the terror of the citizens, is sufficient.

4 Wilson v. State, 50 Tenn. (3 Heisk.) 278.

5 Shelton v. State, 30 Tex. 431.

6 State v. Warren, 57 Mo. App. 502; State v. Baker, 83 N. C. 649; State v. Griffin, 125 N. C. 692, 34 S. E. 513; State v. Lancaster, 168 N. C. 377, 84 S. E. 529.

Charging mutual assault need not set forth the place in order that the court may see that it was a public place.—State v. Baker, 83 N. C. 649.

7 State v. Beuthal, 24 Tenn. (5 Humph.) 519.

Words alone do not constitute an affray, but accompanied by acts—e. g., mutually drawing knives or other weapons—and attempting to use them, does constitute the offense.—Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; Blackwell v. State, 119 Ga. 314, 46 S. E. 432 (drawing razor).

8 State v. Priddy, 23 Tenn. (4 Humph.) 429.

9 State v. Washington, 19 Tex. 128, 70 Am. Dec. 323; Saddler v. Republic, 1 Dall. Dec. (Tex.) 610.

10 "Beat, strike, kick, and bruise," "in an angry and quarrelsome manner, to the disturbance of others," etc., sufficiently alleges the facts.—State v. Dunn, 73 Mo. 586.

"Unlawfully and willingly fight together" in a public place is sufficient.—State v. Billingsley, 43 Tex. 93.

With force and arms, etc., did make an affray by fighting, sufficiently certain and definite.—State v. Beuthal, 24 Tenn. (5 Humph.) 519.

11 State v. Warner, 4 Ind. 604.

§ 409. CHARGING MUTUAL ASSAULT ALSO. It is thought to be good pleading to charge mutual assault as well as an affray, because where such assault is charged there may be a conviction of assault and battery where the evidence justifies, but does not warrant a conviction of an affray;[1] but if mutual assault is not charged, there can be no conviction of the lesser offense.[2]

1 State v. Brewer, 33 Ark. 176; State v. Allen, 11 N. C. (4 Hawks.) 356.

Charging fighting together by mutual and common consent, includes the charges of a mutual assault and battery.—State v. Wilson, 61 N. C. (Phil.) 237.

2 Childs v. State, 15 Ark. 204.

Conviction of affray bars subsequent conviction of assault and battery for the same cause.—Fritz v. State, 40 Ind. 18.

CHAPTER XXII.

INDICTMENT—SPECIFIC CRIMES.

Arson.

§ 410. In general.[1] An indictment for arson, as to its general form and requisites, is governed by the general rules laid down in the preceding chapter, as to general form, technical omissions,[2] clerical errors,[3] conclusion,[4]

1 As to forms of indictment, see Forms Nos. 292-337.

2 "Vi et armis," or its equivalent in English, need not be used in an indictment charging arson.—State v. Temple, 12 Me. 214. See, infra, § 417, footnote 4.

3 As to clerical errors, see, supra, §§ 322-328.

"Was" wilfully burned for "did" wilfully set fire to and burn, etc., held not to vitiate the indictment, on motion in arrest of judgment, it being a mere clerical error.—People v. Duford, 66 Mich. 90, 33 N. W. 28.

4 As to conclusion, see, supra, §§ 329-334.

and the like.[5] Everything essential to be proved on the trial in order to secure a conviction must be alleged, and as the offense is now a statutory one in probably all the states of the Union, the indictment or information should conclude "against the form of the statute," etc., or it will be bad.[6]

§ 411. —— Negativing exceptions. We have already seen that where there are provisos and exceptions in the enacting clause of a statute creating and punishing an offense,[1] or in the same clause,[2] they must be negatived in the indictment or information; but where they form no part of the definition of the offense,[3] and are not an element thereof, they need not be negatived.[4] Thus, an indictment or information charging arson need not negative the fact that the accused burned the building with the consent of the owner,[5] that being matter of evidence and defense.[6]

§ 412. —— Definiteness and certainty. An indictment or information charging arson must state all the facts and circumstances with definiteness and certainty.[1] It has been said that an averment in an indictment in the alternative of "burned or caused to be burned" is bad, for the reason that the facts and circumstances of the

5 Initials instead of Christian name in full, is not defective, under a statute regulating procedure in case of misnomer.—State v. Johnson, 93 Mo. 73, 5 S. W. 699.

See, also, supra, §§ 143, 144.

6 Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

See, supra, § 330.

1 See, supra, § 290.

2 See, supra, § 289.

3 See, supra, § 288.

4 Under Florida statute (Gen. Stats. 1906, § 3276), an intent to injure is not an element of the offense, and the offense described in § 3278 has intent to injure as an element, an information under the former section need not negative that the building was burned with intent to injure the insurer.—Goff v. State, 60 Fla. 13, 53 So. 327.

5 Crowder v. State, 77 Tex. Cr. Rep. 122, 177 S. W. 501.

6 Crowder v. State, 77 Tex. Cr. Rep. 122, 177 S. W. 501.

1 May v. State, 85 Ala. 14, 5 So. 14; People v. Hood, 6 Cal. 236; People v. Fairchild, 48 Mich. 31, 11 N. W. 773; Hennessey v. People, 21 How. Pr. (N. Y.) 239.

offense are not sufficiently set forth;[2] but this holding has been overruled in a later case by the same court.[3] The careful pleader will follow the general rule already discussed,[4] and allege all disjunctive statements in the statutes in the conjunctive form in the indictment or information.

§ 413. —— Surplusage and immaterial averments. An indictment or information charging arson following the form prescribed by code or statute,[1] or in the language of the statute,[2] is sufficient; and any unnecessary or immaterial allegation will not vitiate the indictment or information;[3] such additional and unnecessary matter will be treated as surplusage.[4] Thus where the burning constitutes arson, and is equally punishable, whether committed in the daytime or in the night-time, an allegation in the indictment or information charging the arson as having been committed "between the hour of sunset one day and the hour of sunrise the next day" will be treated

2 Horton v. State, 60 Ala. 72; People v. Hood, 6 Cal. 236, overruled on this point in People v. Myers, 20 Cal. 79; Whiteside v. State, 44 Tenn. (4 Cold.) 175.

3 In People v. Myers, 20 Cal. 76, the court saying, on p. 79, "the decision in People v. Hood, on this point, was made without due consideration, and should be overruled."

4 See, supra, § 278.

1 Cheatham v. State, 59 Ala. 40; Leonard v. State, 96 Ala. 108, 11 So. 307; Peinhardt v. State, 161 Ala. 70, 49 So. 831; Williams v. State, 4 Ala. App. 92, 58 So. 925.

2 People v. Harris, 263 Ill. 406, 105 N. E. 303; Allen v. State, 183 Ind. 37, 107 N. E. 471; State v. Caporale, 85 N. J. L. 495, 89 Atl. 1034; Tinker v. State, 77 Tex. Cr. 506, 179 S. W. 235.

In State v. Donovan, (Del.) 90 Atl. 220, the indictment was held insufficient, although substantially in the language of the statute.

"Corn-crib containing corn," in an indictment charging arson, includes or is equivalent to the statutory words "corn-pen containing corn."—Cook v. State, 83 Ala. 62, 3 Am. St. Rep. 688, 3 So. 849.

3 Surplus allegation as to ownership can not alter the nature of the offense.—Peinhardt v. State, 161 Ala. 70, 49 So. 831.

4 See, supra, § 200.

Indictment will not be held bad where the part demurred to is surplusage.—State v. Snellgrove, 71 Ark. 101, 71 S. W. 266.

as surplusage.[5] "As a prison" in an allegation for arson of a "house used as a prison," is surplusage;[6] and so, also, is "feloniously," under a statute making a wilful burning arson;[7] "in which there was no human being," under a statute,[8] making the burning of a dwelling-house arson in the first degree whether there was any one in the house or not;[9] "the house of the sheriff"[10] in an indictment charging the burning of a jail;[11] "unlawfully, maliciously, and feloniously," under a statute[12] making wanton and wilful burning arson;[13] "with intent then and there to injure and destroy the property," is surplusage under a statute[14] making a wilful and malicious burning arson.[15]

Redundancy in alleging ownership of the house burned in a person named and its occupancy by the accused as the agent of a person holding under a lease from the owner, does not vitiate an indictment or information charging arson.[16]

Designation by wrong name of the offense charged, is immaterial where the specific acts constituting the arson are set forth.[17]

§ 414. —— JOINDER AND DUPLICITY. It is a general principle of criminal pleading that a single offense can not be split into separate parts and the accused prosecuted for each separate part, although each part may of

5 Com. v. Lamb, 67 Mass. (1 Gray) 493.

6 Childress v. State, 86 Ala. 77, 5 So. 775.

7 State v. Keen, 95 N. C. 646.

8 Ala. Code, 1886, § 3780.

9 Paine v. State, 89 Ala. 26, 8 So. 133.

10 Public buildings, as to allegation of ownership of, see, infra, § 427.

11 In re Stevens, 4 Leigh (Va.) 683.

12 N. C. Code, § 985.

13 State v. Battle, 126 N. C. 1036, 35 S. E. 624.

14 Sand. & H. Dig. (Ark.), § 1464.

15 State v. Snellgrove, 71 Ark. 101, 71 S. W. 266.

16 Rogers v. State, 26 Tex. App. 404, 9 S. W. 762.

17 People v. Morley, 8 Cal. App. 372, 97 Pac. 84.

itself constitute a separate offense.[1] Offenses arising out of the same transaction may be charged in the same indictment or information.[2] Thus where a grist-mill with all its contents, including books of account of the owner, were destroyed by one and the same fire, it constitutes but one offense.[3] The same is true in the case of the burning of a cotton-house belonging to A, and the burning of the cotton in the house belonging to A and B, and the charging of both in one indictment will not constitute duplicity;[4] the same is true of a charge of burning a "warehouse and tobacco-house" belonging to a designated person and occupied by the accused.[5] And an indictment for arson charging as a single act the burning of several houses, is not bad for duplicity,[6] even though the houses belong to different owners,[7] for the

1 State v. Colgate, 31 Kan. 511, 47 Am. St. Rep. 507, 5 Am. Cr. Rep. 71, 3 Pac. 346.

2 Such as procuring another to commit by burning a dwelling-house and an attempt to do so.—State v. Stephens, 170 N. C. 145, 87 S. E. 131.

An indictment charging arson in the first degree in three counts and in the second degree in two counts charges only one crime.—People v. Myer, 164 App. Div. (N. Y.) 296, 150 N. Y. Supp. 317.

Counts charging a defendant with attempting to burn another's house and with setting fire to his own property with intent to defraud the insurers may be joined in the same indictment.—Posey v. United States, 26 App. D. C. 302.

3 State v. Colgate, 31 Kan. 511, 47 Am. St. Rep. 507, 5 Am. Cr. Rep. 71, 3 Pac. 346.

4 Clue v. State, 78 Miss. 661, 84 Am. St. Rep. 643, 29 So. 516.

The defendant moved to require the state "to elect on which count" in the indictment it would proceed. The court held that in case the indictment were duplicitous, the objection should have been taken by demurrer.—Clue v. State, 78 Miss. 661, 84 Am. St. Rep. 643, 29 So. 516.

5 Wright v. Com., 155 Ky. 750, 160 S. W. 476.

Where the indictment charged that the defendant set fire to and burned a barn, it does not charge two crimes conjunctively. —State v. Jones, 106 Mo. 302, 17 S. W. 366.

6 Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; see Com. v. Squire, 42 Mass. (1 Metc.) 258; Reg. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986.

7 R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986.

A well recognized rule of criminal pleading, applicable to all crimes. See Ben v. State, 22 Ala. 9 (by one blow killing two men);

reason that matters however multifarious will not operate to make an indictment or information double, and open to the objection of duplicity, where taken together they constitute but one connected charge or transaction.[8] Thus, an indictment alleging that the parties agreed to burn an elevator and in pursuance of that agreement did burn the elevator, is not duplicitous in that it charged

State v. Benham, 7 Conn. 414 (having possession at one time of several forged bank-notes of different banks); Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528, and Copenhaven v. State, 15 Ga. 264 (burglary and robbery, where based on the same transaction); Jackson v. State, 14 Ind. 327 (larceny at one time of several articles, belonging to several owners); Clem v. State, 42 Ind. 420, 13 Am. Rep. 369 (by one blow killing two persons); State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612 (uttering several forged checks at a bank at one time); Hinkle v. Com., 34 Ky. (4 Dana) 518 (setting up a gaming table and keeping a gaming table and inducing others to bet thereon, committed by one person at the same time); Fisher v. Com., 64 Ky. (1 Bush) 211, 89 Am. Dec. 620 (larceny at one time of several articles, belonging to different owners); Larton v. State, 7 Mo. 55, 37 Am. Dec. 179 (larceny of several articles at the same time, belonging to several different owners); State v. Cooper, 13 N. J. L. (1 Gr.) 361, 25 Am. Dec. 490 (arson and homicide caused by the burning); People v. Allen, 1 Park. Cr. Rep. (N. Y.) 445 (forging and counterfeiting indorsements on promissory note, and uttering and publishing same as true); People v. McGowan, 17 Wend. (N. Y.) 386 (larceny at one time of several articles, belonging to different owners); State v. Lewis, 9 N. C. (2 Hawks.) 98, 11 Am. Dec. 741 (burglary and larceny and robbery, where latter is the same felonious taking); State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253 (larceny of several articles at the same time, though they belong to different owners); Fiddler v. State, 26 Tenn. (7 Humph.) 508 (running a horse-race and betting on the same); State v. Williams, 29 Tenn. (10 Humph.) 101 (larceny of several articles at the same time, belonging to several owners); Womack v. State, 47 Tenn. (7 Cold.) 509 (by one blow killing two persons); Wilson v. State, 45 Tex. 76, 23 Am. Rep. 602, and Hudson v. State, 9 Tex. App. 151, 35 Am. Rep. 732 (larceny of several articles at the same time and in the same act, belonging to different owners); State v. Damon, 2 Tyl. (Vt.) 387 (by one blow wounding two men); R. v. Jones, 4 Car. & P. 217, 19 Eng. C. L. 483 (larceny at one time of several articles, belonging to different owners).

8 Barnes v. State, 20 Conn. 232; Rowes v. Lusty, 4 Bing. 428, 13 Eng. C. L. 572.

the crime of conspiracy to burn and burning, for the reason that the conspiracy is merged in the burning.[9] Likewise an allegation in an indictment that the defendant "in the night-time" burned a warehouse does not charge two distinct offenses, where the statute makes it equally arson, and equally punishes, a burning in the daytime or night-time.[10]

Distinct counts may be used to set forth the various acts or steps in the consummation of the alleged offense, or the different ownership of the various buildings burned;[11] and there may be a count for burning a shed or barn under one section of the statute, and a count for doing the same act with intent to burn the dwelling-house under another section of the statute, without rendering the indictment or information open to the charge of duplicity.[12]

Objection that two offenses charged in an indictment or information, the defect can not be reached by demurrer.[13]

§ 415. —— Averment as to time. In the absence of any provision in the particular statute requiring it, an averment as to the time of the offense charged is unnecessary,[1] it is sufficient to allege that the crime was committed on or about a certain date;[2] and it has been said that in those cases where the statute[3] provides that arson in the daytime shall be punished with a shorter

9 "The conspiracy to burn is merged in the consummated act of burning, and so the offense charged is that of arson only, and not the independent offenses of a conspiracy to commit arson and arson."—Hoyt v. People, 140 Ill. 588, 16 L. R. A. 239, 30 N. E. 315.

10 Neither is it bad for uncertainty.—Com. v. Uhrig, 167 Mass. 420, 45 N. E. 1047.

11 Miller v. State, 45 Ala. 24.

12 State v. Ward, 61 Vt. 153, 17 Atl. 483.

13 Clue v. State, 78 Miss. 661, 84 Am. St. Rep. 643, 29 So. 516.

1 State v. Tenneborn, 92 Iowa 551, 61 N. W. 193; State v. Spiegel, 111 Iowa 701, 83 N. W. 722; Dick v. State, 53 Miss. 384.

2 State v. McDonald, 16 S. D. 78, 91 N. W. 447.

3 As Georgia Rev. Code (1871), § 4318.

term of imprisonment and labor than arson committed in the night-time, this provision is directory only, and does not require the indictment or information to allege whether the crime was committed in the daytime or the night-time.[4]

Where crime of higher grade, and punishment more severe, where the burning is in the night-time than where it occurs in the daytime, the time of the commission of the offense must be laid in the indictment or information,[5] or the lower grade of the offense, only, will be charged.[6]

§ 416. —— AVERMENT OF DEGREE. The general rule of criminal pleading being that an indictment or information drawn substantially in the language of the statute, setting out all the acts or facts used by the legislature in defining the particular offense charged, is sufficient,[1] except it be as to those cases where particular circumstances are necessary to constitute a complete offense, in

4 Brightwell v. State, 41 Ga. 482.

Alleging time where not required, as where the particular **arson** is equally punishable whether committed in the daytime or the night-time, the allegation as to time will be regarded as surplusage.—Com. v. Lamb, 67 Mass. (1 Gray) 493. See, supra, § 413.

5 Dick v. State, 53 Miss. 384; State v. England, 78 N. C. 552; In re Curran, 7 Gratt. (Va.) 619.

6 **Under Virginia statute** (Gen. Stats. 1850), it was held that to convict of a burning in the night-time the indictment must charge the burning in the night.—In re Curran, 7 Gratt. (Va.) 619.

Under Massachusetts statute, Pub. Stats., ch. 203, § 2, providing that whoever shall, in the night-time, burn a warehouse worth $1000 shall be punished in a specified degree, and § 4 providing that whoever burns a warehouse other than as mentioned in § 2 shall suffer a lesser degree of punishment, an indictment charging that accused "in the night-time" burned a warehouse, without designating its value, charged the lesser grade of the crime provided for in § 4.—Com. v. Uhrig, 167 Mass. 420, 45 N. E. 1047.

1 See, supra, §§ 269 et seq.

See: ALA.—Lodano v. State, 25 Ala. 64. ARK.—Shortwell v. State, 43 Ark. 349. CAL.—People v. Shaber, 32 Cal. 36; People v. Martin, 32 Cal. 91; People v. White, 34 Cal. 183; People v. Cronin, 34 Cal. 191; People v. Girr, 53 Cal. 629; People v. Lewis, 61 Cal. 366; People v. Soto, 63 Cal. 165; People v. Burns, 63 Cal. 615; People v. Turner, 65 Cal. 541, 4 Pac. 553;

which case those circumstances must be alleged;[2] hence an indictment or information charging arson in the language of the statute is sufficient;[3] it need not state the degree,[4] for that is a matter for the jury to determine from all the facts and circumstances developed in the evidence.[5]

Degrees of arson defined by the statute, and different punishment assigned according to the degree as thus defined, an indictment or information should set out the degree, or state the facts and circumstances necessary to bring the offense charged within the particular degree; but where the indictment or information is for a lesser degree of the offense it need not allege that the facts of the degree alleged are not embraced in the other degrees of the crime of arson, or within the other sections

People v. Murray, 67 Cal. 103, 7 Pac. 178; People v. Sheldon, 68 Cal. 434, 9 Pac. 457; People v. Russell, 81 Cal. 616, 23 Pac. 418; People v. Saverpool, 81 Cal. 650, 22 Pac. 856; People v. Miles, 9 Cal. App. 317, 101 Pac. 527. IDA.—People v. Butler, 1 Ida. 234. KAN.—State v. White, 44 Kan. 514, 25 Pac. 33. MINN.—State v. Golden, 86 Minn. 209, 90 N. W. 400. MONT.—State v. Williams, 9 Mont. 179, 23 Pac. 335. UTAH—People v. Colton, 2 Utah 457; United States v. Cannon, 4 Utah 122, 7 Pac. 369; State v. Fairbanks, 7 Utah 3, 24 Pac. 583; State v. McDonald, 14 Utah 173, 46 Pac. 872; State v. Williamson, 22 Utah 248, 255, 62 Pac. 1022. WASH.—State v. Halbert, 14 Wash. 306, 44 Pac. 538. FED.—United States v. Simmons, 96 U. S. 360, 24 **L. Ed.** 819; United States v. Cook, 84 U. S. (17 Wall.) 168, 21 **L. Ed.** 538.

2 Barfield v. State, 14 Ala. 603; People v. Purley, 2 Cal. 564; People v. Ward, 110 Cal. 369, 42 Pac. 894; Collins v. State, 25 Tex. Supp. 202; Newell v. Com., 2 Wash. (Va.) 88.

Compare: People v. Markham, 64 Cal. 157, 49 **Am. Rep.** 700.

3 See Cheatham v. State, 59 Ala. 40; Sands v. State, 80 Ala. 201; Leonard v. State, 96 Ala. 108, 11 So. 307; People v. Russell, 81 Cal. 616, 23 Pac. 418; People v. De Winton, 113 Cal. 403, 54 **Am. St. Rep.** 360, 33 **L. R. A.** 374, 45 Pac. 708; State v. Rathbone, 8 Ida. 167, 67 Pac. 187; State v. Keller, 8 Ida. 709, 70 Pac. 1054.

4 **Degree stated** where not required may be treated as surplusage.—People v. King, 27 Cal. 507, 87 **Am. Dec.** 95; State v. Noah, 20 N. D. 292, 124 N. W. 1126.

5 People v. King, 27 Cal. 507, 87 **Am. Dec.** 95; People v. Nichol, 34 Cal. 211; People v. Russell, 81 Cal. 616, 23 Pac. 418.

of the statute, where the higher degrees are provided for in separate sections.[6]

§ 417. —— Unnecessary averments. We have already seen that in an indictment or information charging arson it is not necessary to aver that the burning was not with the consent of the owner;[1] also that averment as to the time of the commission of the offense is unnecessary, in the absence of a statute requiring it;[2] and also that the degree of the arson need not be averred, where the statute divides the offense into degrees, the indictment or information being otherwise sufficient.[3] It need not be averred that the offense was committed vi et armis;[4] and where the ownership of the property burned is laid in a corporation, naming it, there need be no averment as to its incorporation;[5] neither is it necessary to aver or prove that the insurer was a corporation,[6] or that it was authorized to do business in the state.[7]

§ 418. Intent and malice. Whether there should be a distinct averment of intent to burn, and of malice, in an indictment or information charging arson, depends upon the wording of the particular statute under which drawn. Thus, it has been held that under the statute in Maine,[1]

6 GA.—Hester v. State, 17 Ga. 130. LA.—State v. Gregory, 33 La. Ann. 737. MASS.—Com. v. Squire, 42 Mass. (1 Met.) 258. MINN.—State v. Roth, 117 Minn. 404, 136 N. W. 12. N. Y.—People v. Haynes, 55 Barb. 450, 38 How. Pr. 369; People v. Pierce, 11 Hun 633; People v. Durkin, 5 Parker Cr. Rep. 243. VT.—State v. Ambler, 56 Vt. 672. WIS.—Lacy v. State, 15 Wis. 13; State v. Kroscher, 24 Wis. 64.

1 See, supra, § 411, footnote 5.

2 See, supra, § 415.

3 See, supra, § 416.

4 State v. Temple, 12 Me. 214.

5 Such fact will be presumed when the name imports a corporation.—State v. Donovan, (Del.) 95 Atl. 1041.

6 State v. Steinkraus, 244 Mo. 152, 148 S. W. 877.

7 Parb v. State, 143 Wis. 561, 128 N. W. 65.

1 State v. Hill, 55 Me. 365; State v. Watson, 63 Me. 135; State v. Bean, 77 Me. 487.

New York,[2] North Carolina[3] and Texas,[4] an intent to burn need not be alleged, because that fact will be presumed; on the other hand, it has been held that such averment is necessary in Arkansas,[5] California,[6] Maryland,[7] Mississippi[8] and Missouri,[9] and perhaps elsewhere.

§ 419. —— Sufficiency of averment. At common law the indictment must aver the offense to have been committed wilfully and maliciously as well as feloniously;[1] the word "unlawfully" can not be substituted for "maliciously";[2] and it has been held that unless the burning is alleged to have been maliciously done a motion to quash will lie,[3] though some of the cases are to the effect that an averment that the accused "wilfully and feloniously" set fire to, is equivalent to an averment that the act was done "wilfully, maliciously, and unlawfully."[4]

2 People v. Fanshowe, 137 N. Y. 68, 32 N. E. 1102, 10 N. Y. Cr. Rep. 291, affirming 65 Hun (N. Y.) 77, 8 N. Y. Cr. Rep. 326, 19 N. Y. Supp. 865.

3 State v. Thompson, 94 N. C. 496.

4 Thomas v. State, 41 Tex. 27; Tuller v. State, 8 Tex. App. 506.

5 Public building burned, there must be an averment of felonious intent.—Mott v. State, 29 Ark. 147.

6 "Intent to destroy" must be averred or no crime is charged under Kerr's Cyc. Pen. Code, § 447.—People v. Mooney, 127 Cal. 339, 59 Pac. 761, 132 Cal. 13, 63 Pac. 1070. See, People v. Jones, 123 Cal. 65, 55 Pac. 698.

People v. Mooney, supra, cited and principle applied in Newby v. State, 75 Neb. 36, 105 N. W. 1100.

7 Kellenbeck v. State, 10 Md. 413, 69 Am. Dec. 166.

8 Jesse v. State, 28 Miss. 100; Maxwell v. State, 68 Miss. 339, 8 So. 546.

9 State v. McCoy, 162 Mo. 383, 62 S. W. 991.

1 2 East's Crim. Law, ch. 21, § 11; 3 Chit. Crim. 1107; 1 Hale P. C. 567, ch. 49; State v. Gaffrey, 3 Pinn. (Wis.) 369, 4 Chand. 165.

In an information charging arson in the third degree, it need not be alleged the burning was maliciously done, where it is charged that it was wilfully, wrongfully, unlawfully, and feloniously done.—State v. Ross, 77 Kan. 341, 94 Pac. 270.

2 "Feloniously, wilfully, and unlawfully" done, held insufficient in Kellenbeck v. State, 10 Md. 431, 69 Am. Dec. 166.

3 Jesse v. State, 28 Miss. 100; Maxwell v. State, 68 Miss. 339, 8 So. 546.

4 See, Young v. Com., 75 Ky. (12 Bush) 243; State v. McCoy, 162 Mo. 383, 62 S. W. 991.

Every intent an element of arson under the statute, must be alleged,[5] and for that reason an allegation of intent to destroy the building is necessary under the statute of California[6] and statutes similarly worded.[7] It has been said that an allegation that a burning was "wilfully and maliciously" done is sufficient without an averment that the act was done with "malice aforethought";[8] and that a charge that the act was "unlawfully, maliciously, and feloniously" done, is sufficient, because this is equivalent to a charge that it was "wilfully" done.[9]

Statute in disjunctive, "wilfully *or* maliciously" burn, indictment or information in the conjunctive, "wilfully *and* maliciously" burn, is sufficient.[10]

§ 420. —— INTENT TO INJURE OR DEFRAUD. At common law, or under a statute making wilful burning arson, the indictment or information need not allege intent;[1] but under many of the state statutes it is held that there must be an allegation of intent to injure by the setting fire to and burning,[2] although some cases hold that there need not be an intent to injure a particular person.[3]

5 People v. Mooney, 127 Cal. 339, 59 Pac. 761, 132 Cal. 13, 63 Pac. 1070. See, People v. Jones, 123 Cal. 65, 55 Pac. 198.

6 Kerr's Cyc. Pen. Code, § 447.

7 See, supra, § 418, footnote 6.

Under Missouri statute, it is enough to allege that he set fire to the building, without averring that the acts were committed with the intent to burn and consume or that the building was burned or consumed.—State v. McCoy, 162 Mo. 383, 62 S. W. 991.

8 State v. Price, 37 La. Ann. 215, 6 Am. Cr. Rep. 33.

9 People v. Haynes, 55 Barb. (N. Y.) 450, 38 How. Pr. 369; Chapman v. Com., 5 Whart. (Pa.) 427.

10 State v. Price, 37 La. Ann. 215, 6 Am. Cr. Rep. 33.

Criminal to burn wilfully or maliciously, it intensifies the criminality to burn it wilfully and maliciously.—State v. Banton, 4 La. Ann. 31; State v. Price, 37 La. Ann. 215, 6 Am. Cr. Rep. 33.

1 Kerr's Whart. Crim. Law, § 1075. See State v. Thompson, 97 N. C. 496, 1 S. E. 921; State v. McCarter, 98 N. C. 637, 4 S. E. 553.

2 State v. England, 78 N. C. 552; State v. Porter, 90 N. C. 719; State v. Phifer, 90 N. C. 721.

3 State v. Rogers, 94 N. C. 860.

Burning insured property with intent to defraud the insurer being made punishable by statute, an indictment or information charging that offense must aver that the building was insured against loss by fire,[4] and that accused set the fire with intent to injure the insurer;[5] and where the insurer is a person or an unincorporated company, there must be an averment of an intent to injure the members of the company, naming them,[6] and if a corporation, the corporate name in full should be alleged[7] and the fact of incorporation averred;[8] but such indictment or information need not set forth the name of the owner,[9] or who was the beneficiary of the insurance,[10] and need not state the facts constituting the intended

4 **Statute not requiring building be insured against fire,** this averment is not necessary.—Renaker v. Com., 172 Ky. 714, 189 S. W. 928.

5 CAL.—People v. Hughes, 29 Cal. 258; People v. Schwartz, 32 Cal. 160. ILL.—Staaden v. People, 82 Ill. 432, 25 **Am. Rep.** 333; Mai v. People, 224 Ill. 414, 79 N. E. 633. MASS.—Com. v. Goldstein, 114 Mass. 272; Com. v. Asherowski, 196 Mass. 342, 82 N. E. 13. N. Y.—People v. Henderson, 1 Park. Cr. Rep. 560. OHIO—Evans v. State, 24 Ohio St. 458. CAN.—Queen v. Bryans, 12 U. C. C. P. 161.

6 People v. Schwartz, 32 Cal. 160. ILL.—Wallace v. People, 63 Ill. 451; Staaden v. People, 82 Ill. 432, 25 **Am. Rep.** 333.

7 White v. State, 24 Cal. App. 231, 5 **Am. St. Rep.** 789, 5 S. W. 857.

8 People v. Schwartz, 32 Cal. 160; Wallace v. People, 63 Ill. 451; Staaden v. People, 82 Ill. 432, 25 **Am. Dec.** 333; Burke v. State, 34 Ohio St. 81; Cohen v. People, 5 Park. Cr. Rep. 330; White v. State, 24 Tex. App. 231, 5 **Am. St. Rep.** 880, 5 S. W. 857; State v. Mead, 27 Vt. 722.

Compare: Supra, § 417, footnote 6.

Mere averment of company name amounts, in a legal sense, of entire absence of any averment of party intended to be injured.—People v. Schwartz, 32 Cal. 160.

Compare: People v. Mead, 200 N. Y. 16, 140 **Am. St. Rep.** 616, 25 N. Y. Cr. Rep. 179, 92 N. E. 1051.

De facto existence sufficient, and all that is required to be proved. See: People v. Frank, 28 Cal. 507; People v. Hughes, 29 Cal. 258; People v. Schwartz, 32 Cal. 160; Oakland Gas Light Co. v. Dameron, 67 Cal. 663, 8 Pac. 595; People v. Leonard, 106 Cal. 302, 39 Pac. 617; State v. Grant, 104 N. C. 908, 10 S. E. 554; State v. Savage, 36 Ore. 212, 60 Pac. 610, 61 Pac. 1128; State v. Stevens, 16 S. D. 313, 92 N. W. 421.

9 People v. Barbera, 29 Cal. App. 604, 157 Pac. 532.

10 Id.

fraud upon the insurer, the particular circumstances connecting the accused with the offense charged,[11] or by whom or by what authority the house was insured,[12] and the policy need not be set forth according to its terms.[13]

§ 421. Description of building. An indictment at common law was not required to aver that the house burned was a "dwelling-house,"[1] because the word "house," in an indictment charging arson, imports a dwelling-house.[2] Where, however, the statute uses the word "dwelling-house," the indictment or information must allege the house burned to have been a "dwelling-house";[3] but an

11 People v. Truax, 30 Cal. App. 471, 158 Pac. 510.

12 Arnold v. State, 74 Tex. Cr. Rep. 269, 168 S. W. 122.

13 Com. v. Goldstein, 114 Mass. 272.

1 1 Hale P. C. 567; 2 East P. C. 1033. KY.—Com. v. Elliston, 14 Ky. L. Rep. 216, 20 S. W. 214. MASS.—Com. v. Smith, 151 Mass. 491, 24 N. E. 677. N. C.—State v. Thorne, 81 N. C. 413. S. C.—State v. Sutcliffe, 4 Strobh. 372, 399. VA.—Com. v. Posey, 4 Call 109, 2 Am. Dec. 560. ENG.—Sarman v. Darley, 14 Mees. & W. 181.

A cottage, however mean and wretched, is a house within the meaning of the statute punishing arson, when used as a habitation.—R. v. England, 1 Car. & K. 533, 47 Eng. C. L. 532.

A building for workmen to take their meals and dry their clothes in, however, is not a "house" within the statute, even though a person may sleep therein with the knowledge of the owner, but without his consent.—Ibid.

2 Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

"House" not necessarily habitation for man or beast, under many of the statutes. See: Ford v. State, 112 Ind. 373, 14 N. E. 241; Daniel v. Coulsting, 7 Man. & G. 125, 49 Eng. C. L. 123.

3 Com. v. Smith, 151 Mass. 491, 24 N. E. 677; State v. Whitmore, 147 Mo. 78, 47 S. W. 1068; State v. Sutcliffe, 4 Strobh. (S. C.) 372.

"A billiard-saloon; said store or saloon being . . . within the curtilage of a dwelling-house bar," sufficiently describes the burning of a dwelling, and defendant could not be misled.—Morrill v. People, 7 Albany L. J. 171. See Shepherd v. People, 19 N. Y. 542.

English construction the same. See 1 Moak's Eng. Rep., 344, 394.

"A certain building, to-wit, a house," does not describe a dwelling-house.—Com. v. Smith, 151 Mass. 491, 24 N. E. 677.

Addition of the word "tenement" after "house" is immaterial, the words being synonymous, and even if it means more, the indictment will still be good for burning a house.—State v. Snellgrove, 71 Ark. 101, 71 S. W. 266.

"Building erected for a dwelling-house, and not completed or

allegation that the accused set fire to or burned a house "used as a dwelling-house," sufficiently describes the character of the house as a dwelling-house.[4]

Where by statute[5] *it is arson to wilfully burn "a building"* to destroy it, the indictment or information need not describe the building burned,[6] an allegation that it was in a designated city being a sufficient description;[7] and when the charge is of burning an "out-building," it seems that it need not be alleged whether the building was located in a city, town, or village.[8]

Designation by name of the building, if it has a specific name,[9] or charging its particular use,[10] is not required in an indictment charging arson; it is enough to charge the burning of "a certain building."[11]

Two tenements in same building, owned and occupied separately, with no interior communication, an indictment charging arson should describe the tenements as two

inhabited," sufficient description under Massachusetts statute.—Com. v. Squire, 42 Mass. (1 Metc.) 258.

Usually occupied by persons to lodge in at night, was held to be a sufficient description in People v. Orcutt, 1 Park. Cr. Rep. 252.

4 McLean v. State, 4 Ga. 335.

Charging burning of out-house and corn-crib equivalent to an averment that the building was not a dwelling-house.—Hester v. State, 17 Ga. 130.

5 As Kerr's Cyc. Pen. Code of California, § 447.

Abandoned dwelling-house, sufficiency of indictment for burning; under Mississippi Code 1906, § 1040.—Banks v. State, 93 Miss. 700, 47 So. 437.

6 People v. Gracamella, 71 Cal. 48, 12 Pac. 302; People v. Russell, 81 Cal. 616, 23 Pac. 418.

7 Ayres v. State, 115 Tenn. 772, 91 S. W. 195.

8 Carter v. State, 106 Ga. 372, 71 Am. St. Rep. 262, 32 S. E. 345.

Whether it be in a city, town, or village does not affect the legal character of the offense, but the punishment only.—Smith v. State, 64 Ga. 605.

A building is sufficiently described where alleged to be situate in a named city.—Ayres v. State, 115 Tenn. 722, 91 S. W. 195.

9 People v. Covitz, 262 Ill. 514, 104 N. E. 887.

"A business house used and occupied as a meat-market" is a sufficient description.—Goff v. State, 60 Fla. 17, 53 So. 327.

10 People v. Covitz, 262 Ill. 514, 104 N. E. 887.

11 People v. Covitz, 262 Ill. 514, 104 N. E. 887.

distinct houses;[12] and where the building burned is a "lodging-house" it is to be described as the house of the lodging-house keeper.[13]

Sufficiency of description under statute, in an averment of burning, to allege the building to be a "barn";[14] "a certain guard- and jail-house" of a named village, the property of that village;[15] a "corn-pen containing corn," where the statutory expression is "corn-crib containing corn";[16] "flouring, grist and corn mill-house," sufficiently alleges the burning of a building;[17] "fodder-house" is a sufficient description under a statute punishing wilful and malicious burning of a house, building or building material;[18] "house or building" is sufficient where those words are evidently used as synonyms;[19] "house used as a shop," is sufficient, as it charges the setting fire to a "shop" under the statute;[20] "large parts" of court house, sufficiently describes offense;[21] "meeting-house" is sufficient without averment that the same was then used as a place of public worship;[22] a "mill-house";[23] a "school-house," without alleging that it was erected for public use;[24] a "stable," sufficient to

12 State v. Toole, 29 Com. 342, 76 Am. Dec. 602.

13 See, infra, § 425, footnote 6.

14 State v. Emerson, 53 N. H. 619.

"A barn or stable," or "a barn, house, or stable," fatally defective.—Horton v. State, 60 Ala. 72.

Should be conjunctive, not disjunctive. See, supra, § 278.

15 Howard v. State, 109 Ga. 137, 34 S. E. 330.

16 Cook v. State, 83 Ala. 62, 3 Am. St. Rep. 688, 3 So. 849.

Allegation contained corn at time, not necessary.—Savage v. State, 8 Ala. App. 334, 63 So. 999, 1006.

17 Jordan v. State, 142 Ind. 422, 41 N. E. 817.

18 State v. Jeter, 47 S. C. 2, 24 S. E. 889.

19 State v. Moore, 61 Mo. 276.

20 State v. Morgan, 98 N. C. 641, 3 S. E. 927.

21 Lovelle v. State, 136 Ind. 233, 36 N. E. 135.

22 State v. Temple, 12 Me. 214.

As to indictment for burning house of public worship; see State v. Hunt, 190 Mo. 353, 88 S. W. 719.

23 Ford v. State, 42 Ind. 373, 14 N. E. 241.

24 State v. Bedell, 65 Vt. 541, 27 Atl. 208.

describe use of building;[25] a "sugar-house," is good without averment that the building is not a dwelling-house.[26]

On the other hand, it has been held to be an insufficient description of the building to allege the burning of "a building called a 'saloon,'" because of the fact that such allegation does not show the purpose for which the building was used;[27] the word "jail" is insufficient, without an averment that it is a dwelling-house, and fatally defective, under the Missouri statute in the case of a charge of first degree arson;[28] a "merry-go-round" charged to have been wilfully burned, the indictment will be insufficient to charge a crime under the Louisiana statute unless it contains averment that the outfit formed a part of a stock of goods, or that it was held as an article of trade;[29] and an allegation of the burning of "a saw-mill," has been held to be insufficient, for the reason that a saw-mill is not necessarily a building, and for that reason the indictment is not sufficient under a statute prohibiting the burning of "any building" other than a dwelling-house, in the absence of a distinct averment that the saw-mill was a building.[30]

§ 422. —— AVERMENTS TO SHOW VENUE. The crime of arson being one that is local in its nature, the indictment or information must contain an allegation as to the locality of the property burned, and must be reasonably certain,[1] and sufficient to show that the building was within the jurisdiction of the court.[2] An allegation in the indict-

25 Dugle v. State, 100 Ind. 259.

26 State v. Ambler, 56 Vt. 672.

27 State v. O'Connell, 26 Ind. 266.

28 State v. Whitmore, 147 Mo. 78, 47 S. W. 1068.

29 State v. Fontenot, 112 La. 628, 36 So. 630.

30 State v. Livermore, 44 N. H. 386.

1 State v. Gaffrey, 3 Pinn. (Wis.) 369, 4 Chand. 165.

A description that the building was "a certain barn of one J., there situate," is insufficient as being too indefinite.—Gibson v. State, 54 Md. 447.

2 Duncan v. State, 29 Fla. 439; Com. v. Barney, 64 Mass. (10 Cush.) 478; Com. v. Lamb, 67

ment or information that the defendant was within the county on a date named, and "then and there"[3] set fire to and burned a certain building, is a sufficient allegation that the situs of the building burned was within the county;[4] but it has been said that a description in the indictment or information of the building burned as "there situate,"[5] is insufficient, because of indefiniteness.[6]

§ 423. —— AVERMENTS AS TO LOCATION. An indictment or information charging arson, aside from the averments as to location within the county, as specified in the last section, need contain no averments or allegations as to

Mass. (1 Gray) 493; State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

An indictment which charges that the defendant at the time named, being in the county, then and there feloniously burned the dwelling-house of one T. J. K., sufficiently shows the offense was committed within the jurisdiction of the court.—People v. Wooley, 44 Cal. 494.

Where the building was described as being in the sixth ward of New York, whereas it was in the fifth, the accused could not be convicted thereunder.—People v. Slater, 5 Hill (N. Y.) 401.

[3] **"Then and there situate"** essential in an indictment in order to show that the building burned was in the county.—State v. Gaffrey, 3 Pinn. (Wis.) 369, 4 Chand. 163.

A description as "a certain dwelling-house situated in the city of St. Louis aforesaid" is insufficient as being too indefinite.—State v. Wacker, 16 Mo. App. 417.

An information stating that the prosecuting attorney for a certain county in the state informed the court that the accused did "then and there," etc., was sufficient without repeating the name of the state.—State v. Hunt, 190 Mo. 353, 88 S. W. 719.

Where it was alleged that the defendant in a certain county and state "then and there being, did then and there unlawfully, wilfully, and feloniously set fire to and burn a certain barn building," there is a sufficient allegation that the barn was in the named county. —State v. McLain, 43 Wash. 267, 10 **Ann. Cas.** 321, 86 Pac. 390.

The locus quo is sufficiently alleged as "a certain house then and there occupied, owned, and controlled by him, the said Baker."—Baker v. State, 25 Tex. App. 1, 8 **Am. St. Rep.** 427, 8 S. W. 23.

[4] People v. Wooley, 44 Cal. 494; Com. v. Lamb, 67 Mass. (1 Gray) 493; State v. Meyers, 9 Wash. 8, 36 Pac. 1051; State v. McLain, 43 Wash. 267, 10 **Ann. Cas.** 321, 86 Pac. 390.

[5] **The words "there situate"** are material.—State v. Gaffrey, 3 Pinn. (Wis.) 369, 4 Chand. 165.

[6] Gibson v. State, 54 Md. 447.

the location of the property; need not state whether within or without any city, town or village,[1] because such fact merely affects the punishment;[2] need not allege the building burned was or was not within the curtilage,[3] the fact of its being within the curtilage being of importance when the burning is in the night-time, only.[4] As to whether there must be an allegation that the burned building formed a part of the dwelling-house depends upon the wording of the statute.[5]

§ 424. —— Averments as to value. In the absence of any provision in the statute making such averment necessary, an indictment or information charging arson need not allege the value of the property or building burned,[1] and no averment is required as to the value of the property destroyed in the building burned;[2] where the punishment is regulated by the value of the property burned, the indictment must allege the value,[3] but may charge the value of the building and of the contents burned as a whole, and need not specify each separately.[4]

1 See, supra, § 421, footnote 8.

2 Smith v. State, 64 Ga. 605.

3 State v. Taylor, 45 Me. 322; Com. v. Hamilton, 81 Mass. (15 Gray) 480; People v. Pierce, 11 Hun (N. Y.) 633; State v. Gwinn, 24 S. C. 146; State v. Moore, 24 S. C. 150, 58 Am. Rep. 241.

Contra: State v. Jeter, 47 S. C. 2, 24 S. E. 889.

Within the curtilage of the dwelling-house being averred, it need not be averred that the dwelling-house was at that place. —Com. v. Barney, 64 Mass. (10 Cush.) 480.

4 State v. Taylor, 45 Me. 322.

5 See Gibson v. State, 54 Md. 447 (indictment not alleging building burned not parcel of any dwelling held bad); Staeger v. Com., 103 Pa. St. 469 (averment not parcel of dwelling-house not necessary).

1 State v. Temple, 12 Me. 214; Com. v. Hamilton, 81 Mass. (15 Gray) 833; Ayres v. State, 115 Tenn. 722, 91 S. W. 195; Wolf v. Com., 30 Gratt. (Va.) 833.

2 Wolf v. Com., 30 Gratt. (Va.) 833.

3 Brown v. State, 52 Ala. 345; Clark v. People, 2 Ill. (1 Scam.) 117; Ritchie v. State, 7 Blackf. (Ind.) 168; Com. v. Hamilton, 81 Mass. (15 Gray) 480.

4 State v. Huffman, 69 W. Va. 770, 73 S. E. 292.

§ 425. Ownership—Necessity of averment as to. At common law an indictment or information must allege the ownership of the property, and the same rule prevails under the codes and statutes of the various states,[1] inasmuch as the ownership is made part of the description of the offense,[2] arson being the malicious firing of

1 ALA.—Martha v. State, 26 Ala. 72; Martin v. State, 28 Ala. 71; Graham v. State, 40 Ala. 659; Davis v. State, 52 Ala. 357; Smoke v. State, 87 Ala. 143, 6 So. 376; Williams v. State, 177 Ala. 34, 58 So. 921. ARK.—Mott v. State, 29 Ark. 147. CAL.—People v. Myers, 20 Cal. 76; People v. Hodley, 100 Cal. 370, 34 Pac. 853; People v. DeWinton, 113 Cal. 403, 54 Am. St. Rep. 357, 33 L. R. A. 374, 45 Pac. 708. CONN.—State v. Lyon, 12 Conn. 487; State v. Keena, 63 Conn. 329, 28 Atl. 522. IND.—Garrett v. State, 109 Ind. 527, 10 N. E. 570; Kruger v. State, 135 Ind. 573, 35 N. E. 1019. MASS.—Com. v. Mahar, 33 Mass. (16 Pick.) 120; Com. v. Wade, 34 Mass. (17 Pick.) 395. MISS.—Morris v. State, (Miss.) 8 So. 295; Avant v. State, 71 Miss. 78, 13 So. 881. MO.—State v. Whitmore, 147 Mo. 78, 47 S. W. 1068. NEB.—Burger v. State, 34 Neb. 397, 51 N. W. 1027. N. Y.—People v. Gates, 15 Wend. 159; McGarry v. People, 45 N. Y. 153, reversing 2 Lans. 227. ORE.—State v. Moyer, 76 Ore. 396, 149 Pac. 84. TEX.—Fuller v. State, 8 Tex. App. 501. WIS.—Carter v. State, 20 Wis. 646. ENG.—Rex v. Rickman, 2 East P. C. 1034.

Averment that it was the property of a named person is sufficient.—Goff v. State, 60 Fla. 13, 17, 53 So. 327.

Ownership of the chicken-house as well as of the land was sufficiently set out in State v. Thurston, 77 Kan. 522, 94 Pac. 1011.

Ownership to be proved relates to the actual occupancy, and not to the nature of the estate or claim of the occupant.—Johnson v. State, 1 Ala. App. 148, 55 So. 268.

2 People v. Myers, 20 Cal. 76; People v. DeWinton, 113 Cal. 403, 54 Am. St. Rep. 357, 33 L. R. A. 374, 45 Pac. 708; State v. Bradley, 1 Houston C. C. (Del.) 164; People v. Gates, 15 Wend. (N. Y.) 159; McGarry v. People, 45 N. Y. 153, reversing 2 Lans. 237; State v. Moyer, 76 Ore. 396, 149 Pac. 84.

Offense to burn own house containing property of another being made an offense by statute, indictment or information must allege ownership of the house to be in accused, and that the house contained property belonging to another person.—Tuller v. State, 8 Tex. App. 501.

Tenancy must be alleged in an indictment under the Texas Criminal Code alleging the burning of leased premises by a tenant thereof.—Mulligan v. State, 25 Tex. App. 199, 8 Am. St. Rep. 435, 7 S. W. 664.

the house of another,[3] or own house in the possession and occupancy of another.[4]

Charging burning to defraud insurer it is not necessary to allege the ownership of the building, but the property must be so definitely described that it can be identified.[5]

Lodging-house averred as the subject of the burning the ownership should be laid in the lodging-house keeper.[6]

Under Missouri statute an indictment for arson in the second degree is not required to allege the ownership of the building, the manifest purpose of the statute being the protection of human life rather than the protection of the property.[7]

Effect of failure to allege ownership of building burned is to render the indictment or information fatally defective,[8] can not be amended,[9] and may be taken advantage of by motion in arrest of judgment.[10]

3 Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; People v. De Winton, 113 Cal. 403, 54 Am. St. Rep. 357, 33 L. R. A. 374, 45 Pac. 708; State v. Toole, 29 Com. 342, 76 Am. Dec. 602; Garrett v. State, 109 Ind. 527, 10 N. E. 570; People v. Gates, 15 Wend. (N. Y.) 159; People v. Henderson, 1 Park. Cr. Rep. (N. Y.) 560; State v. Sarvis, 45 S. C. 668, 55 Am. St. Rep. 846, 32 L. R. A. 647, 24 S. E. 53; Roberts v. State, 47 Tenn. (7 Coldw.) 359; Mulligan v. State, 25 Tex. App. 199, 8 Am. St. Rep. 435, 7 S. W. 664.

Under statute the rule may be different. See State v. Rohfrischt, 12 La. Ann. 382; State v. Elder, 21 La. Ann. 157; State v. Cohn, 9 Nev. 179; State v. Hurd, 51 N. H. 176; Shepherd v. People, 19 N. Y. 537; Hennessey v. People, 21 How. Pr. (N. Y.) 239.

4 People v. Fong Hong, 120 Cal. 686, 53 Pac. 265; Tuller v. State, 8 Tex. App. 501; Com. v. Erskine, 8 Gratt. (Va.) 627.

5 United States v. McBride, 7 Mack. (D. C.) 371.

6 State v. Toole, 29 Conn. 342, 76 Am. Dec. 602.

7 State v. Myer, 259 Mo. 306, 168 S. W. 717.

8 Martin v. State, 28 Ala. 71; People v. Myers, 20 Cal. 76.

An indictment which leaves the question of ownership to rest upon conjecture or argument is demurrable.—People v. Myers, 20 Cal. 76.

9 State v. Moyer, 76 Ore. 396, 149 Pac. 84.

10 Martin v. State, 28 Ala. 71; State v. Keena, 63 Conn. 329, 28 Atl. 522.

§ 426. —— Sufficiency of averment as to. Ownership of the building burned may be laid in one to whom a deed has been executed to indemnify him as surety on grantor's appearance bond;[1] in one holding the property in trust,[2] even though the accused had a contingent interest therein and was in the actual occupancy of the building;[3] in the owner of the fee[4] or, under statute,[5] in the

1 Kinsey v. State, 12 Ga. App. 422, 77 S. E. 369.

2 **Ownership may be laid in the holder of the legal title,** although he may not be in possession.—Hutchinson v. State, 28 Ohio Cir. Ct. Rep. 595.

Trustee of property held in trust may be laid as the owner, although accused had contingent interest therein.—Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111.

3 Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111.

4 Harvey v. State, 67 Ga. 639; Overstreet v. Com., 147 Ky. 471, 144 S. W. 751; Avant v. State, 71 Miss. 78, 13 So. 881; State v. Carter, 49 S. C. 265, 27 S. E. 106.

"Barn of one Laura Wolf," charged to have been burned, sufficiently alleges possession by her in her own right.—Wolf v. State, 53 Ind. 30.

Belonging to A & B, a partnership composed of A and B, sufficiently describes the ownership where A purchased the house burned and deeded an undivided half interest therein to B, his partner.—People v. Greening, 102 Cal. 381, 36 Pac. 665.

House "of" a named person charged to have been burned is sufficient allegation that it was the property of that person.—Jordan v. State, 142 Ind. 422, 41 N. E. 817.

Occupancy in accused ownership may be alleged in the owner of the fee.—Gutgesell v. State, (Tex. Cr.) 43 S. W. 1016.

"Owned by A" sufficient allegation of ownership of house burned by setting fire to rags in the cellar of the house, location particularly described; it does not allege ownership of the rags.—State v. Tenneborn, 92 Iowa 551, 61 N. W. 193.

Tenant on shares using barn on farm merely for purpose of storing crops raised, on charge of arson for burning the barn, property is properly described as belonging to the owner.—People v. Smith, 3 How. Pr. (N. Y.) 226.

Title in A subject to dower-right of B, the indictment properly describes the property as belonging to A and B.—People v. Eaton, 59 Mich. 559, 26 N. W. 702.

Where indictment charges ownership in defendant and fails to aver its occupancy in possession by any one, the presumption is that the defendant was in possession.—People v. De Winton, 113 Cal. 403, 54 **Am. St. Rep.** 357, 33 **L. R. A.** 374, 45 Pac. 708.

Validity of title is not an element entering into the sufficiency of description of the property as to the ownership thereof. See Tuller v. State, 8 Tex. App. 501; Wyley v. State, 34 Tex. Cr. Rep. 514, 31 S. W. 393.

5 As under Rev. Code of Del., § 1, p. 933.

occupant;[6] and it seems that the ownership may be al-

[6] ALA.—Davis v. State, 52 Ala. 357. CAL.—People v. Wooley, 44 Cal. 494; People v. Simpson, 50 Cal. 304; People v. Fisher, 51 Cal. 319; People v. De Winton, 113 Cal. 403, 54 **Am. St. Rep.** 357, 33 **L. R. A.** 374, 45 Pac. 708. CONN.—State v. Toole, 29 Conn. 342, 76 **Am. Dec.** 602. DEL. — State v. Bradley, 1 Houston C. C. 164; State v. Barrett, 2 Penn. 297, 47 Atl. 381. ILL.—People v. Spira, 264 Ill. 243, 106 N. E. 241. IND.—Ritchie v. State, 7 Blackf. 168; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322. KY.—Young v. Com., 75 Ky. (12 Bush) 243. MICH.—People v. Fairchild, 48 Mich. 31, 11 N. W. 773. MO.—State v. Whitmore, 147 Mo. 78, 47 N. W. 1068; State v. Wacker, 16 Mo. App. 417. NEB. — Burger v. State, 34 Neb. 397, 51 N. W. 1027. N. J.—State v. Fish, 27 N. J. L. (3 Dutch.) 323. N. Y.—People v. Gates, 15 Wend. 159; Woodford v. People, 62 N. Y. 117, 20 **Am. Rep.** 464. N. C.—State v. Graham, 121 N. C. 623, 28 S. E. 409. S. C.—State v. Carter, 49 S. C. 265, 27 S. E. 106. TEX.—Tuller v. State, 8 Tex. App. 501. VT.—State v. Roe, 12 Vt. 93; State v. Hannett, 54 Vt. 83. WIS.—Kopcyznski v. State, 137 Wis. 358, 16 **Ann. Cas.** 864, 118 N. W. 863. ENG. — Reg. v. Kimbrey, 6 Cox C. C. 464.

An allegation that the building was the property of a certain person and occupied by another as tenant is sufficient.—State v. Barrett, 2 Penn. (Del.) 297, 47 Atl. 381.

Ownership may be laid in occupying tenant having actual possession and exclusive control, under contract with co-tenant, though fee in the two jointly. — Adams v. State, 62 Ala. 177.

Ownership laid in servant properly where actual possession and exclusive occupancy in of premises on which situate, is in such servant under contract of hiring. —Davis v. State, 52 Ala. 537.

Ownership may be laid in wife of owner where she has possession in his absence, occupies and cultivates the land during her husband's absence, and had constructed the corn-pen, arson of which is charged.—May v. State, 85 Ala. 14, 5 So. 14.

Ownership may be laid in the widow of the deceased owner, occupying and using it since his death, even though there were heirs and dower had not been assigned.—State v. Gailor, 71 N. C. 88, 17 **Am. Rep.** 3. See State v. Moore, 61 Mo. 276.

Part of building occupied by tenant, who slept there at night, and balance of building by the landlord, indictment charging arson was held to properly describe the building as the property of the tenant. — Shepherd v. People, 19 N. Y. 537.

Particular facts which make an accused tenant entitled to occupancy and possession amenable to prosecution must be alleged.—Mulligan v. State, 25 Tex. App. 199, 8 **Am. St. Rep.** 435, 7 S. W. 664.

An averment that the building was "in the possession of and occupied by" accused alleges his tenancy sufficiently.—Kelley v. State, 44 Tex. Cr. Rep. 187, 62 S. W. 991.

Room leased as store in a building, balance of which is occupied

leged in the alternative.[7] It has been said that the property may properly be described as that of the defendant, although not actually used or occupied by him.[8]

"*No. 139 Dolores street,* in the City of San Francisco, the property of one Ellen Bolton, and occupied by" the accused, has been said to be a sufficient description of the ownership, as the property is sufficiently identified regardless of the name of the owner, because the ownership of the house becomes immaterial as being a necessary part of the description of the crime charged.[9]

"*Then and there the property of one A,*[10] and was then and there the dwelling-house of one B," has been held to be a defective allegation, because of the uncertainty as to whether the building burned was the dwelling-house of A or B, and because the indictment could not be made good by the rejection of surplusage.[11]

by landlord, the store-room having no connection with the balance of the building, indictment for arson properly describes the store-room as the property of the lessee.—State v. Sandy, 25 N. C. (3 Ired. L.) 570.

Where there are separate occupations of different portions of the same building the indictment need not allege that the building was the dwelling of two persons.—State v. Toole, 29 Conn. 342, 76 Am. Dec. 702.

7 Brown v. State, 79 Ala. 51; Sampson v. Com., 5 Watts & S. (Pa.) 385.

Where ownership was laid in A or B and the proof showed ownership in A, B, and C jointly the variance is immaterial.—Brown v. State, 79 Ala. 51.

8 People v. Mix, 149 Mich. 260, 112 N. W. 907, 14 Det. Leg. News 397.

9 People v. Handley, 100 Cal. 370, 34 Pac. 853. See People v. Davis, 135 Cal. 162, 67 Pac. 59; People v. Laverty, 9 Cal. App. 759, 100 Pac. 901.

Erroneous or insufficient allegation as to ownership of property is immaterial if the offense be described in other respects with sufficient certainty, under Kentucky statute. See Com. v. Napier, 27 Ky. L. Rep. 131, 84 S. W. 536.

10 **"Then and there belonging to one C G,"** held to be a sufficient allegation of the ownership of a barn alleged to have been burned.—Com. v. Hamilton, 81 Mass. (15 Gray) 480.

11 People v. Myers, 20 Cal. 76.

"Belonging to one A B and in possession of one C D," sufficiently describes the house and its ownership.—State v. McCarter, 98 N. C. 637, 4 S. E. 553.

§ 427. —— Of public building. In an indictment or information charging arson of a public building, the ownership of the building is not required to be alleged,[1] such as a public meeting house,[2] a county jail,[3] and the like; the court takes judicial notice that county jails and other public buildings are the property of the county where located.[4]

Jail a dwelling-house, under the statute, of any person having charge of it or of any person lodged therein, an indictment or information for burning it must allege ownership,[5] but such ownership is properly laid in the jailer or sheriff who occupies it.[6]

§ 428. Occupancy or possession—Necessity of averment as to. No uniform rule obtains in the various states as to the necessity of averment in the indictment or information as to the occupancy or possession of the building, in some of the states such an averment being necessary,[1] while in others it is not[2] when the charge is that of burning a dwelling-house. The general rule may be

1 ALA.—Lockett v. State, 63 Ala. 5; Sands v. State, 80 Ala. 201. ARK.—Mott v. State, 29 Ark. 147. MO.—State v. Johnson, 93 Mo. 73, 5 S. W. 699; State v. Wacker, 16 Mo. App. 417. N. Y.—State v. Van Blarcum, 2 John. 105. VT.—State v. Roe, 12 Vt. 93. VA.—Stevens v. Com., 4 Leigh 683.

2 State v. Temple, 12 Me. 214.

3 "The jail of Talladega County, which said jail or building was erected for public use," is a sufficient averment as to ownership.—Lockett v. State, 63 Ala. 5.

"The jail of Wilcox County" sufficiently avers ownership.—Sands v. State, 80 Ala. 201.

"The common jail and county prison of the County of H." is sufficient.—Stevens v. Com., 4 Leigh (Va.) 683.

4 Sands v. State, 80 Ala. 201.

5 State v. Whitmore, 147 Mo. 78, 47 S. W. 1068.

6 State v. Whitmore, 147 Mo. 78, 47 S. W. 1068; People v. Van Blarcum, 2 John. (N. Y.) 105; Stevens v. Com., 4 Leigh (Va.) 683.

1 Dick v. State, 53 Miss. 384.

Fact of occupancy, and that it was lawful, must be distinctly averred.—Lacy v. State, 15 Wis. 13.

Failure to state name of occupant, or any other facts showing its occupancy by another than the accused, indictment fatally defective and not cured by verdict.—State v. Keena, 63 Conn. 329, 28 Atl. 522.

2 McClaine v. Territory, 1 Wash. St. 345, 25 Pac. 453.

Need not state who dwelt in

said to be that where the presence of a human being in the house is not made an ingredient of the offense an averment as to occupancy is not essential,[3] and the name of the person in the house need not be stated.[4]

Public building alleged to have been burned it is not essential that the indictment or information shall set out who, if anybody, occupied it at the time.[5]

Human beings in burned building being by statute an aggravation of the offense, there must be an allegation in the indictment or information that there was a human being in the building at the time of the burning, and the words of the statute should be set out in full.[6]

Joint occupancy is, in law, the possession of all who so occupy, and an indictment or information charging arson must so describe the occupancy.[7]

§ 429. Burning. The indictment need not allege in terms that the defendant "set fire" to the house,[1] al-

house at time of burning, where ownership alleged in another.—Garrett v. State, 109 Ind. 527, 10 N. E. 570.

3 Garrett v. State, 109 Ind. 527, 10 N. E. 570; McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Meyers, 9 Wash. 8, 36 Pac. 1051.

4 State v. Aguila, 14 Mo. 130; State v. Hayes, 78 Mo. 307; State v. Jones, 171 Mo. 401, 194 Am. St. Rep. 786, 71 S. W. 680.

5 State v. Roe, 12 Vt. 93.

6 People v. Freeman, 160 App. Div. (N. Y.) 640, 145 N. Y. Supp. 1061.

ALA.—Childress v. State, 86 Ala. 77, 5 So. 775. MINN.—State v. Grimes, 50 Minn. 123, 52 N. W. 275. MISS.—Lewis v. State, 49 Miss. 354; Dick v. State, 53 Miss. 384. MO.—State v. Aguila, 14 Mo. 130. N. Y.—Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464. TEX.—Beaumont v. State, 1 Tex. App. 533. VA.—Page v. Com., 26 Gratt. 943. WIS.—Lacy v. State, 15 Wis. 13.

Indictment alleging "a certain dwelling-house, then and there being the property of H, and then and there being occupied as such by human beings, to-wit S, and members of his family," sufficiently alleges that there were human beings therein at the time it was burned.—State v. Stringer, 105 Miss. 851, 63 So. 270.

7 Maynard's Case, 2 East P. C. 501. See State v. Toole, 29 Conn. 342, 76 Am. Dec. 602.

1 People v. Myers, 20 Cal. 76; State v. Jones, 106 Mo. 302, 17 S. W. 366; State v. Gaffrey, 3 Pinn. (Wis.) 369, 4 Chand. 163.

"Burned and caused to be

though this was the rule at common law.[2] But where the statute uses the word "burn" it is not enough to allege that the building was "set fire to,"[3] it must be alleged that the property was "burned."[4]

§ 430. ATTEMPT TO COMMIT ARSON. An indictment or information alleging an attempt to unlawfully burn is sufficient where it employs the language of the statute.[1] It is unnecessary to describe in the indictment the materials used in the attempt,[2] or the manner in which the attempt was made;[3] but an overt act proximately leading to the consummation of the crime must be alleged,[4] although there seems to be authority to the contrary.[5]

burned" is sufficient. — State v. Price, 11 N. J. L. (3 Stockt.) 203.

An averment that he feloniously, etc., "did burn and cause to be burned," is sufficient.—People v. Myers, 20 Cal. 76.

2 2 East's P. C. 1033, § 11.

3 Mary v. State, 20 Ark. 44, 81 Am. Dec. 60; People v. Myers, 20 Cal. 76; Cochrane v. State, 6 Md. 400; State v. Hall, 93 N. C. 571; Howell v. Com., 5 Gratt. (Va.) 664.

Contra: State v. Taylor, 45 Me. 322; Rex v. Salmon, R. &. R. 26.

4 For a sufficient allegation that a fire actually occurred, see State v. Brand, 76 N. J. L. 267, 72 Atl. 131.

Burning to defraud insurer.— An indictment or information charging the burning of insured property under § 548 of the Penal Code, with intend to defraud the insurer, will not be held bad on demurrer for uncertainty for not stating the facts constituting the fraud, nor the particular circumstances connecting defendant with that element of the offense.—People v. Truax, 30 Cal. App. 471, 158 Pac. 510.

1 People v. Giacamella, 71 Cal. 48, 12 Pac. 302.

The indictment must charge that the attempt was felonious.—Com. v. Weiderhold, 112 Pa. 584, 4 Atl. 345.

2 Com. v. Flynn, 57 Mass. (3 Cush.) 529.

3 Mackesey v. People, 6 Park. Cr. Rep. (N. Y.) 114; People v. Bush, 4 Hill (N. Y.) 433.

Compare: People v. Waldhorn, 82 Misc. (N. Y.) 238, 143 N. Y. Supp. 484.

4 Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55.

An indictment in general terms which alleges that he "did unlawfully, feloniously, and wilfully attempt to set fire to and burn and destroy a certain frame building commonly called a 'barn,'" etc., is defective in that it charges no act.—Kinningham v. State, 119 Ind. 332, 21 N. E. 911.

5 State v. Stephens, 170 N. C. 745, 87 S. E. 131, where the indictment was held sufficient under Revisal 1905, §§ 3244, 3254 to uphold a conviction although no overt act was charged.

CHAPTER XXIII.

INDICTMENT—SPECIFIC CRIMES.

Assault and Battery.

§ 431. FORM, REQUISITES AND SUFFICIENCY IN GENERAL.[1] An indictment or information charging assault, or assault and battery, which follows the language of the statute is sufficient;[2] the means by which the assault was committed need not be alleged.[3] It need not be alleged that the assault, or the assault and battery, was committed unlawfully,[4] although a different rule prevails in

1 For forms of indictment for assault, and for assault and battery, in the various forms and degrees and heinousness of the offense, see Forms Nos. 338-419.

2 Smith v. State, 58 Neb. 531, 11 Am. Cr. Rep. 145, 78 N. W. 1059.

Language of statute being "in a rude, insolent, and angry manner," an allegation that defendant "feloniously, purposely, and with premeditated malice did beat, strike, kick, tramp, trample upon, and wound," while sufficient under the statute, such departure from the statutory language is not approved.—Sloan v. State, 42 Ind. 2.

3 Smith v. State, 58 Neb. 531, 11 Am. Cr. Rep. 145, 78 N. W. 1059.

4 GA.—Badger v. State, 5 Ga. App. 477, 63 S. E. 532. ILL.—People v. Cantwell, 160 Ill. App. 652, affirmed in 253 Ill. 57, 97 N. E. 287. ME.—State v. Creighton, 98 Me. 424, 57 Atl. 592. MO.—State v. Bray, 1 Mo. 180. TEX.—State v. Lutterloh, 22 Tex. 210; State v. Hays, 41 Tex. 526; State v. Hartman, 41 Tex. 562.

Committed in unlawful manner should be alleged.—State v. Mur-

Indiana;[5] neither need it be alleged that the offense was committed publicly or to the terror of citizens,[6] as in the case of an affray;[7] nor that the act was feloniously[8] or wilfully done.[9]

A simple assault charged, the indictment or information may be good without averments as to striking, beating or wounding.[10]

Battery charged, the material facts of the battery must be set forth in the indictment or information;[11] but an allegation that the defendant did intentionally and wrong-

phy, 21 Ind. 441; Cranor v. State, 39 Ind. 64.

"Made in a rude, insolent, and angry manner," should be alleged, under statute.—Cranor v. State, 39 Ind. 64.

"Shoot towards, at, and against the body of" person named held not sufficient because not necessarily importing that act was done in a rude, insolent, or angry manner.—McCulley v. State, 62 Ind. 428.

5 State v. Murphy, 21 Ind. 441; Howard v. State, 67 Ind. 401; Chandler v. State, 141 Ind. 106, 39 N. E. 444.

A charge that defendant "did unlawfully commit an assault and battery on the person of M., by then and there in a rude, insolent, and angry manner, touching, striking, beating," etc., is insufficient for failure to allege that the touching, etc., was unlawful.—State v. Smith, 74 Ind. 557.

An unlawful touching, etc., is sufficiently charged in the words that the defendant "did in a rude, violent, insolent, angry, and unlawful manner, touch, beat, and strike him the said W."—Parker v. State, 118 Ind. 328, 20 N. E. 833.

6 Com. v. Simmons, 29 Ky. (6 J. J. Marsh) 614.

7 See, supra, § 408.

8 Wagner v. State, 43 Neb. 1, 61 N. W. 85.

An averment that the act was feloniously done is equivalent to an averment that it was unlawfully done.—Hays v. State, 77 Ind. 450.

Where the information charged that defendants "unlawfully, wilfully, and purposely, and with premeditated knowledge, in a rude, insolent, and angry manner, touch" him with intent to "feloniously, wilfully, purposely, and with premeditated malice to kill and murder," there was a sufficient charge of assault and battery, the words attempting to charge a felonious intent being mere surplusage.—Barnett v. State, 22 Ind. App. 599, 54 N. E. 414.

9 State v. Boyer, 70 Mo. App. 156.

10 State v. Schomers, 176 Mo. App. 271, 161 S. W. 1177.

11 Bryant v. State, 41 Ark. 359; Jones v. State, 100 Ark. 195, 139 S. W. 1126.

fully assault, beat, cut, and wound a party named, sufficiently alleges the battery.[12]

Serious damage done to victim, such damage must be described as to character and extent so that the court may see from the face of the indictment or information the particular facts and that the offense designated in the statute is charged.[13]

Conclusion of indictment or information should be in the words "against the form of the statute," etc.,[14] otherwise it will be fatally defective in some jurisdictions,[15] though the contrary has been held in other jurisdictions.[16]

§ 432. ALLEGATION AS TO INTENT AND MALICE. The necessity of pleading intent and malice in an indictment or information charging an assault, or an assault and battery, depends entirely upon the wording and provisions of the statute under which drawn, and what is herein set forth must be taken in connection with the wording of the particular statute under which the decision is made. An assault being an intentional attempt to do injury by violence[1] to the person of another,[2] it has been held that an indictment or information charging an assault must

12 Moore v. State, 4 Okla. Cr. App. 212, 111 Pac. 822.

13 State v. Battle, 130 N. C. 651, 13 Am. Cr. Rep. 186, 41 S. E. 66.

Averment that party was seriously injured or sustained serious damage is too general and indefinite.—State v. Battle, 130 N. C. 651, 13 Am. Cr. Rep. 186, 41 S. E. 66.

14 State v. McKettrick, 14 S. C. 346.

15 State v. McKettrick, 14 S. C. 346.

16 Snodgrass v. State, 13 Ind. 292.

Indictment not quashed for failure to conclude "contrary to the form of the statute," etc.—State v. Berry, 9 N. J. L. (4 Halst.) 374.

1 Lane v. State, 85 Ala. 11, 4 So. 730.

2 Sweeden v. State, 19 Ark. 205; State v. Harrigan, 4 Penn. (Del.) 129, 55 Atl. 5; Johnson v. State, 14 Ga. 55; Goodrum v. State, 60 Ga. 509; Grove v. State, 116 Ga. 516, 59 L. R. A. 598, 42 S. E. 755; State v. Wyatt, 76 Iowa 328, 41 N. W. 31; Hays v. People, 1 Hill (N. Y.) 351; State v. Godfrey, 17 Ore. 300, 11 Am. St. Rep. 330, 20 Pac. 625.

allege intent,[3] and some of the cases require an allegation of malice as well.[4]

Assault being made a statutory offense, the word "assault" in the statute is to be given its established meaning in the criminal law, unless limited or qualified by the words and provisions of the statute;[5] and as intent is implied in "assault,"[6] the intent with which the act is done not being made an ingredient of the offense,[7] the intent need not be charged,[8] even in the case of an aggravated assault.[9]

Unlawful assault being charged, an averment of intent

3 State v. Wright, 52 Ind. 307; State v. Child, 42 Kan. 611, 22 Pac. 721; State v. Harris, 34 Mo. 347.

Assault and battery being charged, indictment must allege intent to injure.—Hill v. State, 34 Tex. 623.

4 State v. Owen, 5 N. C. (1 Murph.) 452, 4 **Am. Dec.** 571.

Compare: State v. Ostman, (Mo. App.) 126 S. W. 961.

"Assault with intent to wound, maim, and disfigure" being charged, it must be alleged to have been done on purpose and with malice aforethought.—State v. Harris, 34 Mo. 347.

5 Smith v. State, 58 Neb. 531, 78 N. W. 1059.

6 State v. Creighton, 98 Me. 424, 5 Atl. 592.

7 State v. Broadbent, 19 Mont. 467, 48 Pac. 775.

8 State v. Godfrey, 17 Ore. 300, 11 **Am. St. Rep.** 830, 20 Pac. 625; State v. Erickson, 57 Ore. 262, 110 Pac. 785, 111 Pac. 17; Evans v. State, 25 Tex. 303.

Common assault charged if the count would be good with the addition of battery, it is equally good for the assault without the battery.—State v. Burt, 25 Vt. 373.

Intent to injure must be alleged because the fact that the law will presume intent to injure from fact of injury does not dispense with necessity of averring intent.—Grayson v. State, 37 Tex. 228.

Quo animo which may be shown by way of avoidance, where pleaded in defense, need not be averred.—State v. Stafford, 113 N. C. 635, 18 S. E. 256.

9 Saye v. State, 54 Tex. Cr. Rep. 430, 114 S. W. 804.

Assault with intent to kill need not be alleged.—State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

"On purpose and with malice aforethought" need not be averred in an indictment charging an assault to kill or to do great bodily harm. — State v. Ostman, (Mo. App.) 126 S. W. 961.

is not required,[10] because the intent with which the act is done will be inferred by the court from the unlawful act.[11]

Assault with dangerous weapon being charged, the indictment or information need not allege the intent with which the assault was made,[12] because the intent and malice are presumed from the use of such a weapon.[13]

§ 433. ALLEGATION OF PRESENT ABILITY. An indictment or information charging assault must allege all the elements necessary to constitute the offense charged, and if the charge is of an aggravated assault or an assault to commit a felony, there must be an averment of an attempt to do personal injury to the person assaulted,[1] coupled

10 State v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

Assault and battery being charged need not be alleged act unlawfully done.—State v. Boyer, 70 Mo. App. 156.

Assault charged in violation of law, intent need not be averred, as wrongful intent will be inferred from the illegal act.—State v. Allen, 30 Tex. 59; State v. Hays, 41 Tex. 526; State v. Hartman, 41 Tex. 562.

"Feloniously" done is equivalent to "unlawfully done," within the statute.—Hays v. State, 77 Ind. 450.

"Wilfully and knowingly" assaulting an officer, sufficiently charges that accused knew person assaulted was an officer.—People v. Tompkins, 121 Mich. 131, 80 N. W. 126.

"Wilfully and unlawfully assault . . . with a revolver," sufficiently charges attempt to do bodily harm by violence. — State v. Bell, 26 Minn. 521, 4 N. W. 621.

11 State v. Allen, 30 Tex. 59.

12 State v. Godfrey, 17 Ore. 300, 11 Am. St. Rep. 830, 20 Pac. 625; State v. Erickson, 57 Ore. 262, 110 Pac. 785, 111 Pac. 17.

13 Williams v. State, 77 Ala. 53; Monday v. State, 32 Ga. 672, 79 Am. Dec. 314.

Assault armed with a dangerous weapon being charged, there must be an averment that the assault was made with such dangerous weapon, or the indictment will not be sufficient to charge the higher grade of the offense where "made with a dangerous weapon."—State v. Mead, 27 S. D. 381, 131 N. W. 305.

Question for jury to determine, the intent with which assault was made.—State v. Daly, 16 Ore. 240, 18 Pac. 357.

1 See, ante, § 432; Pratt v. State, 49 Ark. 179; People v. Dodel, 77 Cal. 293, 19 Pac. 484.

with a present ability to do the injury attempted,[2] which latter may be alleged in the words of the statute.[3]

§ 434. Allegation of acts constituting the assault. The indictment or information should set out the specific acts[1] constituting the alleged assault, and the acts set out should show an actual assault within the statute.[2] An allegation that the accused did intentionally and wrongfully beat, cut, stab and wound a named person sufficiently sets forth the acts constituting the battery;[3] and an allegation that the accused made an assault on a named per-

2 See: ARK.—Pratt v. State, 49 Ark. 179. CAL.—People v. Dodel, 77 Cal. 293, 19 Pac. 484; People v. Charlie Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800. COLO.—McNamara v. People, 24 Colo. 66, 48 Pac. 451. IND.—State v. Swails, 8 Ind. 524, 65 Am. Dec. 772; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Hubbs, 58 Ind. 416; Howard v. State, 67 Ind. 404. ORE.—State v. Godfrey, 17 Ore. 300, 11 Am. St. Rep. 830, 20 Pac. 625.

Contra: Russell v. State, 52 Ark. 276; Knucker v. State, 32 Ind. 229; Burton v. State, 3 Tex. App. 408, 30 Am. Rep. 146.

Averring assault committed with intent and in a manner necessary to constitute the offense charged, sufficient without charging present ability.—Russell v. State, 52 Ark. 276.

As to attempt to commit an impossible crime, see Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; also, supra, § 203.

3 State v. Turlock, 46 Ind. 289; Marshall v. State, 123 Ind. 128, 23 N. E. 114.

See, also, supra, § 431, footnote 2.

1 Jones v. State, 100 Ark. 195, 139 S. W. 1126.

"Stab," used to denote the manner in which a wound was inflicted, is not a technical word, but used in its ordinary acceptation.—Ruby v. State, 7 Mo. 206.

Unlawful striking or beating being an essential element under the statute, the indictment or information must show the material fact of battery.—Jones v. State, 100 Ark. 195, 139 S. W. 1126.

—Common assault charged, indictment good without averring striking, beating, or wounding.—State v. Schomers, 176 Mo. App. 271, 161 S. W. 1177.

See, also, supra, § 431, footnote 10.

2 See, supra, § 431, footnote 11. See Sims v. State, 118 Ga. 761, 45 S. E. 621; Gober v. State, 7 Ga. App. 206, 66 S. E. 395; Howard v. State, 67 Ind. 401; Hays v. State, 77 Ind. 450; State v. Spigener, 69 Miss. 597, 50 So. 977; State v. Mead, 27 S. D. 381, 131 N. W. 305.

3 See, supra, § 431, footnote 12.

son and beat him unlawfully is a sufficient allegation of the offense without alleging the specific acts constituting the assault or the manner of the beating.[4]

§ 435. ALLEGATION OF MATTER IN AGGRAVATION. An indictment or information charging an assault to commit a felony should designate the felony attempted to be committed.[1] Aggravating circumstances alleged do not change the character of the assault made; the assault is the original offense and the intent with which made and the means made use of simply aggravate the original offense and affect the punishment to be inflicted, where the statute establishes different grades of the offense and attaches more severe punishment to some of the grades thus established than is affixed to other grades;[2] for this reason it is proper to insert various matters which tend to aggravate the original offense,[3] although such allegation is not essential to the validity of the indictment under perhaps a majority of the statutes;[4] e. g., it need not be alleged that the assault was with a deadly weapon,[5] or that it was done under such circumstances that, had death ensued, it would have been manslaughter,[6] or that the person assaulted was an officer of the law in the discharge of his duties as such;[7] but where there is an allegation that the person assaulted was an officer, there

4 Sims v. State, 118 Ga. 761, 45 S. E. 621.

1 Davis v. State, 35 Fla. 614, 17 So. 565; State v. Hailstock, 2 Blackf. (Ind.) 257.

Assault and battery a felony by statute, indictment need not charge intent to commit any other felonious offense. — State v. Goddard, 69 Me. 181. See Com. v. Sanborn, 80 Mass. (14 Gray) 393.

Particularity in indictment for offense itself not required in an indictment charging an assault to commit a named offense.—State v. Montgomery, 66 Tenn. (7 Baxt.) 160.

2 State v. Cokely, 4 Iowa 477.

3 State v. Dearborn, 54 Me. 442.

4 Com. v. Sanborn, 80 Mass. (14 Gray) 393; State v. Moore, 65 Mo. 606; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86; People v. Cooper, 13 Wend. (N. Y.) 379; State v. Davis, 1 Hill (S. C.) 46.

5 State v. Moore, 65 Mo. 606.

6 Ibid.

7 State v. Dearborn, 54 Me. 442; People v. Cooper, 13 Wend. (N. Y.) 379.

must be a further allegation that accused knew him to be such.[8]

Assault by force being charged, however, the indictment or information should set out the particular means used, under the statutory provisions in some states.[9]

§ 436. Description of person accused. An indictment or information charging an assault must describe the accused by naming him, and where he is known by two names he may be charged by either name,[1] but the name of the accused need not be repeated in the clause of the indictment reciting that "the said . . . then and there having," etc;[2] and where accused is indicted as "John B. Doe," the charge that the assault was committed by "John Doe," will not render the instrument bad,[3] it not being necessary to allege more than one Christian name, since the law knows one only, and where an initial of a second Christian name is given it may be rejected as surplusage.[4]

8 State v. Smith, 11 Ore. 205, 8 Pac. 343. See Com. v. Kirby, 56 Mass. (2 Cush.) 581; Horan v. State, 7 Tex. App. 183; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

9 As under Cal. Pen. Code, §§ 950-952. See People v. Perales, 141 Cal. 581, 75 Pac. 170.

1 State v. Bundy, 64 Me. 507. See, also, supra, § 145.

2 State v. Brown, 50 Tenn. (3 Heisk.) 1.

3 O'Connor v. State, 97 Ind. 104; Com. v. Robinson, 165 Mass. 426, 43 N. E. 121.

As to name of defendant, see, supra, §§ 138 et seq.

4 Cohen v. State, 52 Ind. 347, 21 Am. Rep. 179; Mergentheim v. State, 107 Ind. 567, 7 N. E. 568; Ratcliff v. State, 23 Ind. App. 64, 54 N. E. 814.

Initial of middle name surplusage and may be rejected, is the general rule of law supported by the great weight of decision, though there are some strong cases among the minority. Some of the cases pro and con are given, drawn from both civil and criminal sides of the adjudications. See: ALA.—Edmundson v. State, 17 Ala. 179, 53 Am. Dec. 169. CAL.—People v. Lockwood, 6 Cal. 205; Allison v. Thompson, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309. ILL.—Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Beattie v. National Bank, 174 Ill. 571, 66 Am. St. Rep. 318, 43 L. R. A. 654, 51 N. E. 602. IND.—Schofield v. Jennings, 68 Ind. 232; Miller v. State, 69 Ind.

§ 437. DESCRIPTION OF PERSON ASSAULTED. An indictment or information charging assault must describe the person assaulted[1] by giving his name,[2] which, however,

284; Hess v. State, 73 Ind. 537; Ross v. State, 116 Ind. 495, 19 N. E. 451. MO.—State v. Martin, 10 Mo. 391. N. H.—Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597. N. J.—Dills v. Kinney, 15 N. J. L. (3 Gr.) 130. N. Y.—People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146; Franklin v. Talmadge, 5 John. 84; Roosevelt v. Gardinier, 2 Cow. 463; Milk v. Christie, 1 Hill 102; In re Gotobed, 6 City Hall Rec. 25; People v. Cook, 14 Barb. 259, 307; Van Voorhis v. Budd, 39 Barb. 479. PA.—Bratton v. Seymour, 4 Watts 329. TEX.—McKay v. Spick, 1 Tex. 376; State v. Manning, 14 Tex. 402. VT.—Isaacs v. Wiley, 12 Vt. 674; Allen v. Taylor, 26 Vt. 599. W. VA.—Lang v. Campbell, 37 W. Va. 665, 17 S. E. 197. FED.—Keene v. Meade, 28 U. S. (3 Pet.) 1, 7 L. Ed. 581.

Contra: McLaughlin v. State, 52 Ind. 279; State v. Higgins, 60 Minn. 1, 51 Am. St. Rep. 490, 27 L. R. A. 74, 61 N. W. 816 (second initial becomes material where first Christian name is given by initial only); Proctor v. Nance, 220 Mo. 104, 132 Am. St. Rep. 255, 119 S. W. 409; State v. Vittum, 9 N. H. 519; Price v. State, 19 Ohio 423; State v. Hughes, 31 Tenn. (1 Swan) 261; R. v. Owen, 1 Moo. 118; R. v. Deeley, 1 Moo. 303; R. v. Craven, R. & R. 14.

1 See Black v. State, 68 Tex. Cr. Rep. 2, 150 S. W. 774.

Allegation as to character of person assaulted, regarded as merely descriptive of the person.—State v. Burt, 25 Vt. 373.

Forcibly feeling one's private parts, etc., being charged, information designating accused as "him" and "his" and the person assaulted as "her" is a sufficient decription of the accused as a male and the assaulted as a female.—Slawson v. State, 39 Tex. Cr. Rep. 176, 73 Am. St. Rep. 914, 45 S. W. 575.

2 State v. Bitman, 13 Iowa 485; State v. Shinner, 76 Iowa 147, 40 N. W. 144.

Assault charged without naming victim in that connection, but adds that "then and there the said John Doe was beaten, wounded," etc., sufficiently avers the person assaulted.—Harne v. State, 39 Md. 552.

Clerical error as to name of person assaulted, that name having been previously correctly given, not fatal, under statute, where in no way tending to prejudice substantial right of accused.—State v. Craighead, 32 Miss. 561.

As to clerical errors, see, supra, §§ 322 et seq.

—Misspelling of name, Christian or surname, after once properly given in the indictment, does not vitiate.—Hall v. State, 32 Tex. Cr. Rep. 594, 25 S. W. 292 (Christian name); Henry v. State, 7 Tex. App. 388 (surname).

As to omission of letters or misspelling of words, see, supra, § 322.

Person since deceased, assaulted while alive, sufficiency of indictment to show person assaulted was a living being. See Com. v. Ford, 71 Mass. (5 Gray) 475.

Surplusage in description of

need not be in the body of the instrument;[3] may be sufficiently given by the initials merely of the Christian name,[4] and where Christian name first given by initial subsequent spelling out of Christian name will not vitiate.[5] Assaulted person being once correctly named in indictment, a subsequent misstatement of the name will not furnish ground for quashing.[6] Name by which person assaulted is certainly known to acquaintances and friends in the community may be used in the indictment, whether such is his true name or not.[7]

Name unknown to grand jury, indictment should allege that the name of the assaulted is to the grand jury unknown, and if the indictment is otherwise sufficient it will be good without the name of the person assaulted.[8]

§ 438. ALLEGATION AS TO TIME. It has been said that the general rule of criminal pleading which requires that the indictment or information must set out distinctly the time of the offense charged or the instrument will be fatally defective[1] applies to an indictment or information charging an assault or an assault and battery;[2] that allegation

offense may be rejected without injuring complaint, where name of victim properly given in another part of complaint.—Com. v. Randall, 70 Mass. (4 Gray) 36.

Victim of assault sufficiently described as "Mary R., wife of complainant."—Com. v. Gray, 56 Mass. (2 Cush.) 535.

3 Information signed and verified, which in body charges assault and battery "upon the person of this informant," in action before justice of peace, is sufficient. —State v. McKinley, 82 Iowa 445, 48 N. W. 804.

4 State v. Seely, 30 Ark. 162. See, supra, § 144.

5 State v. Wall, 39 Mo. 532.

6 Catlett v. State, (Tex. Cr. App.) 61 S. W. 485.

7 Bell v. State, 25 Tex. 574.

8 See Brooster v. State, 15 Ind. 190; Grogan v. State, 63 Miss. 147; White v. People, 32 N. Y. 465; State v. Snow, 41 Tex. 596; State v. Elmore, 44 Tex. 102; Ranch v. State, 5 Tex. App. 363; Rutherford v. State, 13 Tex. App. 92; United States v. Davis, 4 Cr. C. C. 333, Fed. Cas. No. 14924.

1 Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168; State v. Roach, 3 N. C. (2 Hayw.) 352, 2 Am. Dec. 626; Barnes v. State, 42 Tex. Cr. Rep. 297, 96 Am. St. Rep. 801, 59 S. W. 882; Man-zan-man-ne-kah v. United States, 1 Pinn. (Wis.) 134, 39 Am. Dec. 279.

2 State v. Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; State v. Eubanks, 41 Tex. 291.

of a day within the period of limitation is material where the offense is subject to a limitation as to the time within which it may be prosecuted,[3] for it is an elementary rule of criminal pleading that when the time for prosecuting the offense is limited the indictment or information must lay the time of the act within the period limited or it will be fatally defective, even after verdict.[4] However, there is a line of cases holding—and this will apply with especial force to assault, it is thought—that the time at which an offense is committed is not material, unless time is of the essence or gist of the offense,[5] but that it will be sufficient if the evidence shows it to have been committed within the time limit fixed by statute for the prosecution of such offenses.[6]

Under statute the necessity of averring the time of an assault may be dispensed with.[7]

§ 439. Allegation as to place. The place or venue of an assault is a necessary averment in an indictment or information charging an assault in any of its phases,[1] but an averment that the offense was committed within the county sufficiently lays the venue.[2]

3 People v. Miller, 12 Cal. 291. See Lechter v. State, 159 Ala. 68, 48 So. 806; Vaughn v. Congdon, 56 Vt. 115, 48 Am. Rep. 758.

4 See People v. Miller, 12 Cal. 291; State v. Rust, 8 Blackf. (Ind.) 195; People v. Gregory, 30 Mich. 371; State v. G. S., 1 Tyl. (Vt.) 295, 4 Am. Dec. 724; Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758.

5 Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; see Com. v. Monahan, 75 Mass. (9 Gray) 119.

6 State v. Magarth, 19 Mo. 678.

7 See State v. Ball, 30 W. Va. 386, 4 S. E. 645.

Indiana statute modifies the rule by provision that no indictment shall be quashed or judgment arrested, for omitting to state the time or date of the offense charged, unless time is of the essence of the offense. — State v. Sampson, 95 Ind. 22; Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722; Myers v. State, 121 Ind. 15, 22 N. E. 781.

1 See Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168; Kennedy v. Com., 6 Ky. (3 Bibb) 490.

2 State v. Foye, 53 Mo. 336.

"Late of the county" need not be alleged of the person assaulted. — State v. Whimple, 8 Blackf. (Ind.) 214.

"Then and there being, unlaw-

§ 440. JOINDER OF PERSONS. Two or more persons committing an assault and battery upon each other may be joined in an indictment or information charging the offense.[1] An indictment or information in one count against two or more persons charging an assault and battery upon three other persons, does not embrace distinct offenses and is permissible.[2] Where two or more are thus jointly accused of a joint assault and battery, one may be convicted of assault and battery and the others of simple assault,[3] or acquitted;[4] but where the assault and battery is charged to have been jointly made on two or more different persons there can be no separate conviction for an individual and separate assault upon one of the persons named.[5] In case of separate and distinct assaults by two or more persons upon another person or persons, the assailants can, by separate counts, be united in the same indictment.[6] Where several persons are concerned in an assault, some as participants and others merely present, aiding and abetting, to render the latter liable it is not necessary that they be indicted jointly or with a simul cum aliis.[7]

fully did make an assault" upon a named person, sufficiently alleges that the offense was committed in the county laid in the venue of the indictment.—Hampton v. United States, 1 Morr. (Iowa) 489.

Contra: Kennedy v. Com., 6 Ky. (3 Bibb) 490.

Wounding being charged, no venue to such wounding need be laid where venue has properly been laid to the assault and stroke which caused the wound.—State v. Freeman, 21 Mo. 481.

1 Each guilty of a several offense in such a case, and where charged severally, the court may quash the indictment. — State v. Lonon, 19 Ark. 577.

2 Fowler v. State, 50 Tenn. (3 Heisk.) 154.

3 Lewis v. State, 33 Ga. 131; White v. People, 32 N. Y. 465; Shouse v. Com., 5 Pa. St. 83.

4 Shouse v. Com., 5 Pa. St. 83.

5 Conviction for separate assault of any of defendants on all the individuals named may be had.—State v. McClintock, 8 Iowa 203.

6 Com. v. Malone, 114 Mass. 295.

7 United States v. Hunter, 1 Cr. C. C. 446, Fed. Cas. No. 15425.

CHAPTER XXIV.

INDICTMENT—SPECIFIC CRIMES.

Barratry.

§ 441. REQUISITES AND SUFFICIENCY OF INDICTMENT.[1] An indictment or information charging barratry is an exception to the general rule requiring that a certain description of the offense charged be set out together with the facts constituting the same,[2] and an indictment is good which merely charges the accused generally as a common[3] barrator.[4]

Conclusion of the indictment or information should be "against the peace," and need not be "contrary to the form of the statute," etc., because the offense existed at common law, but if the indictment does so conclude it will not be vitiated thereby, it has been said, for the reason that the mode of trial is regulated by statute.[5]

§ 442. ALLEGATION AS TO PLACE. In an indictment for barratry it is not necessary to allege any particular place of the commission of the offense, because the crime con-

1 As to form of indictment for barratry, see Form No. 420.

2 Lambert v. People, 9 Cow. (N. Y.) 578; J'Anson v. Stuart, 1 T. R. 748, 99 Eng. Repr. 1357.

3 "Common mover and exciter, or maintainer of suits, quarrels, or pacts, either in courts or elsewhere."—Co. Litt. 368a, b. Hence, a single act does not constitute an offense.—Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

4 Com. v. Davis, 28 Mass. (11 Pick.) 432; Com. v. Snelling, 32 Mass. (15 Pick.) 321, 330; Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153.

Justice of peace may be indicted as a common barrator.—State v. Chitty, 1 Bail. L. (S. C.) 379.

5 Burton's Case, Cro. Eliz. 148.

sists in repetitions of the act[1] and must be intended to have happened, or at least may have happened, in several places.[2]

§ 443. BILL OR NOTE OF PARTICULARS.[1] A bill of particulars, or note of the particulars, as to the acts constituting the offense charged must be furnished by the prosecution when demand is made therefor by the accused, which bill must be a note of the particular acts upon which the prosecution will rely,[2] and such acts of barratry, only, as are contained in the bill of particulars or notice can be given in evidence at the trial.[3]

Technical nicety is not essential to the sufficiency of the bill of particulars or notice; if it identifies the several legal proceedings intended to be relied upon so that the defendant, by perusing the bill or notice, can readily find the records of the several proceedings, it is sufficient.[4]

The bill of particulars no part of record in the case, and for that reason can furnish no ground for motion in arrest of judgment.[5]

1 Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

2 Parcell's Case, Cro. Eliz. 195; R. v. Clayton, 2 Keb. 410; Man's Case, Latch 194.

1 As to form of bill of particulars, see Forms Nos. 421, 422.

2 Com. v. Davis, 28 Mass. (11 Pick.) 432; Com. v. Snelling, 32 Mass. (15 Pick.) 321; Lambert v. People, 9 Cow. (N. Y.) 578; State v. Chitty, 1 Bail. L. (S. C.) 380; United States v. Porter, 2 Cr. C. C. 60; Fed. Cas. No. 16072; Clark v. Periam, 2 Atk. 339; Rex v. Wylie, 2 Bos. & P. 95, 1 New. R. 95; Rex v. Grove, 5 Mod. 18; Rex v. Urlyn, 2 Saund. 308, note 1; J'Anson v. Stuart, 1 T. R. 754, 99 Eng. Repr. 1357; King v. Mason, 2 T. R. 586.

3 Goddard v. Smith, 6 Mod. 262.

4 Com. v. Davis, 28 Mass. (11 Pick.) 432.

5 State v. Chitty, 1 Bail. L. (S. C.) 379.

CHAPTER XXV.

INDICTMENT—SPECIFIC CRIMES.

Bastardy.

§ 444. Requisites and sufficiency of indictment.

§ 444. REQUISITES AND SUFFICIENCY OF INDICTMENT.[1] The offense of begetting bastard children being purely of statutory regulation, an indictment charging accused with being the father of a bastard child in the general terms of the statute, setting out all of the facts essential to constitute the offense and to enable the defendant to make his defense, stating the nature of the offense so plainly that it can be easily understood by the jury, is sufficient.[2] The indictment or information must distinctly allege that accused is the actual father,[3] not the putative father of the bastard child,[4] but it need not be averred that the accused has, in a bastardy proceeding, been adjudged to be the father of the child.[5]

1 **As to forms of indictment** against parents in bastardy, see Forms Nos. 423-429.

2 McColman v. State, 121 Ga. 491, 49 S. E. 609.

Failure to provide maintenance and education being the charge, sufficient to allege accused the father, and that he refused to give security when required to do so "in terms of the law" by the magistrate, held to be sufficient.—Walker v. State, 5 Ga. 491. See Ogg v. State, 73 Ohio St. 59, 75 N. E. 943.

In South Carolina, it seems that it is necessary to charge mother a white woman.—State v. Clark, 2 Brev. (S. C.) 386; State v. Clements, 1 Speers (S. C.) 48.

Recital in caption that relator a single woman held to be sufficient in Austin v. Pickett, 9 Ala. 102.

3 Locke v. State, 3 Ga. 534; Huff v. State, 29 Ga. 424; Hudson v. State, 104 Ga. 723, 30 S. E. 947; Taylor v. Smith, 133 Ga. 638, 66 S. E. 792.

Charging with being father of one bastard child is good although defendant father of two bastard children.—Davis v. State, 58 Ga. 170.

"Farther" of a bastard child, held bad.—State v. Caspsary, 11 Lich. (S. C.) L. 356.

4 Taylor v. Smith, 133 Ga. 638, 66 S. E. 792.

5 Norwood v. State, 45 Md. 68;

Birth of child alive[6] or within the county,[7] need not be alleged, it being sufficient that the child was begotten within the county.[8] Under some statutes,[9] however, the offense is not complete until the birth of the child, yet under these statutes the time of birth need not be alleged, or may be alleged on a future date.[10]

Twins delivered at same time, the father may be charged with both in one indictment,[11] or may be separately indicted for each child, but where prosecuted on two separate indictments each indictment must contain a description of the sex,[12] complexion, etc., of each child sufficient for a separate identification.[13]

Child likely to become public charge need not be alleged,[14] it seems, unless the information by a person other than the mother.[15]

Residence of child and mother should be set out in the indictment so that accused, if convicted, may be compelled to give recognizance to the proper county,[16] although it has been said that an allegation as to the county in which the child is at the time of the indictment is sufficient without averring the residence of the mother.[17]

Ogg v. State, 73 Ohio St. 59, 75 N. E. 943.

Need not set out preliminary proceedings before magistrate because they are no part of the record.—Norwood v. State, 45 Md. 68.

6 Com. v. Menefee, 2 Del. Co. Rep. 55, 14 W. N. C. 170.

7 Com. v. Wentz, 1 Ashm. (Pa.) 269; Com. v. Menefee, 2 Del. Co. Rep. 55, 14 W. N. C. 170.

"Did beget a bastard child on the body of her," naming the woman, is sufficient without alleging birth of the child.—Gorman v. Com., 124 Pa. St. 536, 17 Atl. 26.

8 Com. v. Wentz, 1 Ashm. (Pa.) 269; Gorman v. Com., 124 Pa. St. 536, 17 Atl. 26; Com. v. Menefee, 2 Del. Co. Rep. 55, 14 W. N. C. 170.

9 As Maryland Code Pub. Civ. Laws, Art. 12.

10 Allen v. State, 128 Md. 265, 97 Atl. 362.

11 Davis v. State, 58 Ga. 170.

12 **In Pennsylvania,** it seems, the sex of child must always be stated.—Com. v. Pintard, 1 Browne (Pa.) 59.

13 State v. Derrick, 1 McM. (S. C.) 338.

14 State v. McDonald, 2 McC. (S. C.) 299.

15 State v. Crawford, 10 Rich. (S. C.) 361.

16 Root v. State, 10 Gill & J. (Md.) 374.

17 Robinson v. State, 68 Md. 617, 13 Atl. 378.

Mother may be indicted, under statutes of various states, for concealing the birth,[18] or the death,[19] of a bastard child.

[18] State v. White, 76 Mo. 97; Forms Nos. 427, 428.

[19] See Form No. 429.

CHAPTER XXVI.

INDICTMENT—SPECIFIC CRIMES.

Bigamy.

§ 445. REQUISITES AND SUFFICIENCY OF INDICTMENT.[1] To constitute the crime of bigamy, it being necessary to allege and prove that there were two distinct marriages to different persons, and that at the time of the second marriage the first spouse was living and undivorced,[2] an indictment or information charging the offense of bigamy should follow substantially the language of the statute under which drawn,[3] and must contain an averment of a

1 As to forms of indictment for bigamy, see Forms Nos. 430-450.

2 Ferrell v. State, 45 Fla. 26, 34 So. 220; Prichard v. People, 149 Ill. 50, 36 N. E. 103; People v. Price, 250 Ill. 109, 95 N. E. 68; State v. Stewart, 194 Mo. 345, 112 Am. St. Rep. 529, 5 Ann. Cas. 963, 92 S. W. 878; Richardson v. State, 71 Tex. Cr. Rep. 111, 158 S. W. 517.

Under Illinois statute, it is sufficient where the indictment refers to the first wife as "being then living" and to the defendant as "well knowing" that she was then alive.—Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181.

Under North Carolina statute, where the indictment alleges that at the time of the second marriage the accused knew that his first wife was living, that was a sufficient allegation.—State v. Davis, 109 N. C. 780, 14 S. E. 55.

Under Oklahoma statutes, 1893, § 2181, this averment is necessary, but under § 4551 it is unnecessary.—Niece v. Territory, 9 Okla. 535, 60 Pac. 300.

Under Texas Penal Code, an indictment alleging that defendant unlawfully married a named person, "he then and there having a lawful former wife then living," is fatally defective.—McAfee v. State, 38 Tex. Cr. Rep. 124, 41 S. W. 627; Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

3 Davis v. Com., 76 Ky. (13 Bush) 318; State v. Armington, 25 Minn. 29; State v. Gonce, 79 Mo.

first marriage,[4] that the first spouse was living,[5] giving the name of such first spouse is required under some

600, 4 Am. Cr. Rep. 68; State v. Jenkins, 139 Mo. 535, 41 S. W. 220; State v. Long, 143 N. C. 670, 57 N. E. 349; Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

In Kentucky it is held that is not in itself completely descriptive of the offense and it is insufficient to follow the words of the statute.—Davis v. Com., 76 Ky. (13 Bush) 318, 2 Am. Cr. Rep. 163.

Substantial compliance with form prescribed in code or statute sufficient.—Esser v. State (Tex. Cr.), 66 S. W. 776.

Polygamous marriage charged in the language of the statute, not bad because it charges in the same count polygamous cohabitation following such marriage.—United States v. Tenney, 2 Ariz. 29, 8 Pac. 295.

[4] Sauser v. People, 8 Hun (N. Y.) 302 (insufficient averment of); State v. Davis, 109 N. C. 780, 14 S. E. 55 (sufficiently stated); May v. State, 4 Tex. App. 424; McAfee v. State, 38 Tex. Cr. Rep. 124, 4 S. W. 627; Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

Felonious and unlawful marriage to another, "then and there being married," and the first spouse living and undivorced, sufficiently charges bigamy.—Com. v. McGrath, 140 Mass. 296, 6 N. E. 515.

First marriage is a mere matter of inducement.—Cathron v. State, 40 Fla. 468, 24 So. 496.

"Having a former wife living," held a sufficient allegation.—Parker v. State, 77 Ala. 47, 54 Am. Rep. 43.

Particulars of first marriage need not be stated.—Cathron v. State, 40 Fla. 468, 24 So. 496.

Enough as to the former marriage should be stated to apprise the defendant in general terms of the proof to be adduced by the state to establish it.—Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

Two women as and for wives at one and the same time being charged, the indictment was held sufficient in State v. Sherwood, 68 Vt. 414, 35 Atl. 352.

"Unlawfully" married a named woman "having another wife living," sufficiently charges the offense.—Com. v. Whaley, 69 Ky. (6 Bush) 266.

[5] Com. v. McGrath, 140 Mass. 296, 6 N. E. 515; State v. Norman, 13 N. C. (2 Dev. L.) 222; McAfee v. State, 38 Tex. Cr. Rep. 124, 4 S. W. 627.

Contra: State v. Hughes, 58 Iowa 165, 11 N. W. 706.

As to sufficiency of allegation of wife living, see State v. Jenkins, 139 Mo. 535, 41 S. W. 220.

Allegation that at time of second marriage, defendant had a lawful wife, held sufficient.—Ferrell v. State, 45 Fla. 25, 34 So. 220.

Divorcee not permitted to marry within six months, indictment charging bigamy against person divorced within six months need not allege accused had former spouse living at time of second marriage.—Niece v. Territory, 9 Okla. 535, 60 Pac. 300.

statutes,[6] and must aver that the accused knew such first spouse was living at the time of the second marriage;[7] but the indictment need not aver that such former marriage was a lawful one,[8] that the parties had a legal right to marry,[9] or the date on which[10] or the place where[11] the first marriage took place. The indictment or information must also contain an allegation of a second marriage[12] and that it was unlawful,[13] stating the place of such second marriage[14] at a time prior to the finding of the indict-

6 Davis v. Com., 7 Ky. (13 Bush) 318, 2 Am. Cr. Rep. 163; Vinsant v. State, 42 Tex. Cr. Rep. 413, 60 S. W. 550.

7 King v. State, 40 Ga. 244; Prichard v. People, 149 Ill. 50, 36 N. E. 103 (insufficient allegation as to knowledge first wife living); Hiler v. People, 156 Ill. 511, 41 N. E. 181 (sufficient allegation as to knowledge first wife living); State v. Damon, 97 Me. 323, 54 Atl. 845.

8 Ferrell v. State, 45 Fla. 25, 34 So. 220; State v. Hughes, 58 Iowa 165, 11 N. W. 706; Kopke v. People, 43 Mich. 42, 4 N. W. 551; Hills v. State, 61 Neb. 589, 57 L. R. A. 155, 85 N. W. 386; State v. Kniffen, 44 Wash. 585, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113, 87 Pac. 837.

Contra: King v. State, 40 Ga. 244.

9 Baker v. State, 86 Neb. 775, 276 L. R. A. (N. S.) 1097, 126 N. W. 300.

10 Ferrell v. State, 45 Fla. 25, 34 So. 220; Murphy v. State, 122 Ga. 149, 50 S. E. 48; State v. Hughes, 58 Iowa 165, 11 N. W. 706.

Time and place of first marriage, while there are some reasons why it should be given, is not the important factor, which is the second marriage.—People v. Perriman, 72 Mich. 184, 40 N. W. 425.

11 Id.

As to effect of failure to allege place, see State v. Meyer, 13 Mo. App. 596.

12 In re Watson, 19 R. I. 342, 33 Atl. 873; May v. State, 4 Tex. App. 424.

Existence of two marriages is the important factor.—People v. Perriman, 72 Mich. 184, 40 N. W. 425.

13 Parker v. State, 77 Ala. 47, 54 Am. Rep. 43; Teston v. State, 66 Fla. 244, 63 So. 433.

Compare: Ferrell v. State, 45 Fla. 25, 34 So. 220.

An allegation that the defendant was lawfully married to the second wife simply means that the second marriage was performed lawfully according to the usual forms and ceremonies required by law.—Rice v. Com., 31 Ky. L. Rep. 1354, 105 S. W. 123.

"Felonious," allegation that second marriage was, sufficient without averment that it was "unlawful."—Kopke v. People, 43 Mich. 41, 4 N. W. 551.

14 Cathron v. State, 40 Fla. 468, 24 So. 496.

Date and place of second marriage need not be stated under

ment or filing the information,[15] and must set out the name of the person with whom the second and bigamous marriage was contracted.[16]

Bigamy a misdemeanor under the statute, an indictment charging that the accused acted "feloniously," will be bad.[17]

Polygamy by statute where party having a spouse living and undivorced cohabits as husband and wife with another, indictment charging the offense must bring the accused clearly within the statute;[18] and where the statute prohibits the guilty spouse divorced by the injured spouse from remarrying, making remarriage polygamy, an indictment charging the offense must allege the divorce, that the accused was the guilty cause thereof, and all the other facts necessary to bring the accused within the statute.[19] As the offense, under the statute, may be committed in divers ways, the indictment must state the particular manner of commission of the offense charged.[20]

Unlawful cohabitation continued within the state, or an unlawful marriage contracted out of the state, by statute, constituting the offense of bigamy, the indictment or information alleging the unlawful marriage[21] in another state, must also allege cohabitation continued

North Carolina statute, where the indictment follows the language of the statute.—State v. Long, 143 N. C. 670, 57 S. E. 349.

15 Scoggins v. State, 32 Ark. 205.

16 Nickelson v. State, 53 Tex. Cr. Rep. 631, 111 S. W. 414.

17 State v. Darrah, 1 Houst. C. C. (Del.) 112.

18 Allegation defendant married in Massachusetts a named woman "and while she was still his wife" feloniously married another woman in Illinois and subsequently cohabited with her as man and wife in Oregon, is not sufficient to charge the crime under the statute, because the phrase "while she was his wife" relates to the second marriage in Illinois and not to the cohabitation in Oregon.—State v. Durphy, 43 Ore. 79, 71 Pac. 63.

19 Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647, 2 Am. Cr. Rep. 612.

20 Id.

21 Unlawful marriage in another state, being merely inducement, particulars need not be stated.—Cathron v. State, 40 Fla. 468, 24 So. 496.

within the state,[22] because that fact constitutes the gist of the offense charged, and without such allegation there will be no offense charged under the statute.[23]

§ 446. Unnecessary allegations. As to what are and what are not unnecessary allegations in an indictment or information charging bigamy, is a matter depending almost entirely upon the wording of the statute under which the indictment or information is drawn. Because of the diverse and conflicting provisions of the statutes of the different states there is a want of harmony in the decisions on this question, and no general rule can be laid down which will be applicable to, and govern in, all jurisdictions. However, it is trusted that what is here collected and set forth may be of material assistance to pleaders in the various jurisdictions.

It has been held to be unnecessary in an indictment or information charging the offense of bigamy to allege that it was committed with force and arms;[1] to set out the name of the first spouse;[2] that the person thus married

22 Cathron v. State, 40 Fla. 468, 24 So. 496.

As to sufficiency of allegation of continuous cohabitation after unlawful marriage in another state, while having lawful spouse living, see State v. Stuart, 194 Mo. 345, 112 **Am. St. Rep.** 529, 92 S. W. 878.

Continuous cohabitation not alleged where charge was unlawfully marrying in another state while first spouse still living, indictment held not to be bad for failure to allege same.—State v. Steupper, 117 Iowa 519, 91 N. W. 912.

Under Alabama Criminal Code, 1896, § 4902, it is unnecessary to aver in the indictment that the bigamous cohabitation occurred in the state or within the county.—Caldwell v. State, 146 Ala. 141, 41 So. 473.

23 People v. Devine, 185 Mich. 50, 151 N. W. 646.

1 State v. Kean, 10 N. H. 347, 34 **Am. Dec.** 162.

2 Johnson v. State, 60 Ark. 308, 30 S. W. 31; Hutchins v. State, 28 Ind. 34; State v. Armington, 25 Minn. 29; State v. Kean, 10 N. H. 347, 34 **Am. Dec.** 162; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. Melton, 120 N. C. 591, 26 S. E. 933; Keneval v. State, 107 Tenn. 581, 64 S. W. 897.

Contra: Davis v. Com., 76 Ky. (13 Bush) 318, 2 **Am. Cr. Rep.** 163; McAfee v. State, 38 Tex. Cr. Rep. 124, 41 S. W. 627 (over-

was of the opposite sex;[3] the time when or the place where the first marriage occurred,[4] although there are

ruling Watson v. State, 13 Tex. App. 76).

Vinsant v. State, 42 Tex. Cr. Rep. 413, 60 S. W. 550; Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

Accused has right to be informed of name of person with whom prosecution claims he had formerly intermarried, as well as the state or country in which such marriage took place.—Davis v. Com., 76 Ky. (13 Bush) 318.

Averment name unknown to grand jury name need not be given.—Nelms v. State, 84 Ga. 466, 20 Am. St. Rep. 377, 10 S. E. 1087.

Idem sonans: Where the indictment named the first wife as "Staunton" instead of "Stanton" the variance was immaterial, as the words are idem sonans.—People v. Spoor, 235 Ill. 230, 126 Am. St. Rep. 197, 14 Ann. Cas. 638, 85 N. E. 207.

Where the name of the lawful wife in the indictment was Deadema but the proof showed it Diadema there was no fatal variance, the names being idem sonans.—State v. Patterson, 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699.

Maiden name need not be given where her name required to be stated.—Richardson v. State, 71 Tex. Cr. Rep. 111, 158 S. W. 517.

Where Christian name of the first spouse is omitted it is enough if it be alleged that her name is unknown to the grand jurors, and after verdict the judgment will not be arrested for the omission.—Nelms v. State, 84 Ga. 466, 20 Am. St. Rep. 377, 10 S. E. 1087.

[3] Witt v. State, 5 Ala. App. 137, 59 So. 715.

[4] People v. Giesea, 61 Cal. 53; People v. Priestley, 17 Cal. App. 171, 118 Pac. 965; Cathron v. State, 40 Fla. 468, 24 So. 496; Ferrell v. State, 45 Fla. 26, 34 So. 220; Murphy v. State, 122 Ga. 149, 50 S. E. 48; Oliver v. State, 7 Ga. App. 695, 67 S. E. 886; Hutchins v. State, 28 Ind. 34; State v. Hughes, 58 Iowa 165, 11 N. W. 706; State v. Nadal, 69 Iowa 478, 29 N. W. 451; State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; Com. v. McGrath, 140 Mass. 296, 6 N. E. 515; People v. Perriman, 72 Mich. 184, 40 N. W. 425; State v. Armington, 25 Minn. 34; State v. Bray, 35 N. C. (13 Ired. L.) 289; State v. Long, 143 N. C. 670, 57 S. E. 349; Bryan v. State, 54 Tex. Cr. Rep. 18, 16 Ann. Cas. 515, 111 S. W. 744.

Contra: Williams v. State, 44 Ala. 24; Tucker v. People, 117 Ill. 88, 7 N. E. 51; Davis v. Com., 76 Ky. (13 Bush) 318; State v. La Bore, 26 Vt. 768.

County in which it occurred need not be alleged.—Apkins v. Com., 148 Ky. 662, 147 S. W. 376.

Second marriage, alleged to have taken place "on —— day of September, 1891," "he then and there having a wife living to whom he was married on September 19, 1891," held to be good and sufficient, the allegation as to date of first marriage being manifestly a clerical error.—Faustre v. Com., 92 Ky. 34, 13 Ky. L. Rep. 347, 17 S. W. 189

authorities to the contrary, as pointed out in the preceding section;[5] by whom the first marriage was solemnized,[6] or that defendant knew that the first spouse was his or her lawful spouse;[7] or state the color[8] or sex[9] of the accused, or that he had not been divorced.[10]

"Bigamy," eo nomine, need not appear in the indictment or information. The prudent pleader, however, will not omit that word, even though it has been frequently held that an indictment or information will be sufficient where the offense is charged therein in words of equivalent import with those used in the statute denouncing the offense sought to be charged;[11] and particularly is this true in those cases in which the words employed more particularly describe the offense than the word or words used in the statute.[12] Where the statute makes a common-law offense indictable, describing it by its technical term merely, e. g., "arson," "burglary," "murder," etc., we have already seen that it is not sufficient to charge the offense by its technical name merely;[13] and this rule applies in the case of bigamy.

5 See, supra, § 445, footnotes 10, 11; Williams v. State, 44 Ala. 24; Tucker v. People, 117 Ill. 88, 7 N. E. 51; Davis v. Com., 76 Ky. (13 Bush) 318, 2 **Am. Cr. Rep.** 163; State v. La Bore, 26 Vt. 765; see State v. Sherwood, 68 Vt. 414, 35 Atl. 352.

6 Hutchins v. State, 28 Ind. 34.

7 People v. Priestley, 17 Cal. App. 171, 118 Pac. 965; see, also, supra, § 445, footnote 8.

8 Kirk v. State, 65 Ga. 159.

9 United States v. Musser, 4 Utah 153, 7 Pac. 389; United States v. Eldredge, 5 Utah 161, 13 Pac. 673, 5 Utah 189, 14 Pac. 42; Cannon v. United States, 116 U. S. 55, 29 **L. Ed.** 561, 6 Sup. Ct. Rep. 278, affirming 4 Utah 122, 7 Pac. 369.

10 State v. Melton, 120 N. C. 591, 26 S. E. 933.

11 See, supra, § 286; United States v. Tenney, 2 Ariz. 29, 8 Pac. 295; State v. Hayes, 105 La. 352, 29 So. 937; State v. Stewart, 194 Mo. 345, 112 **Am. St. Rep.** 529, 5 **Ann. Cas.** 963, 92 S. W. 878.

12 State v. Hayes, 105 La. 352, 29 So. 937.

13 See, supra, §§ 270, 281.

Where terms used ultra technical, and their meaning not generally known, the rule is otherwise. Thus, in the case of the California crimes of "Fellatio" and "Cunnilingus" (Kerr's Cal. Pen. Code, 1915, § 288a), only the privileged few know what the statute defines and prohibits, consequently an indictment in the language of the

§ 447. NEGATIVING EXCEPTIONS IN STATUTE. The general rules governing the necessity and sufficiency of negativing exceptions in the statute under which the indictment or information drawn[1] applies to an indictment or information charging the crime of bigamy.[2] That is to say, where the exceptions are embodied in the clause defining the offense or in the clause under which the prosecution is laid, the exceptions must be negatived, but when not in the enacting clause and in a different or subsequent section to the one on which the prosecution is based, the exceptions need not be negatived.[3]

§ 448. VENUE. An indictment or information charging the bigamous marriage to have occurred in some city or county unknown to the grand jury, does not, on its face, show that the court into which the indictment is returned

statute is unintelligible to the accused, and for that reason insufficient; it must set out the acts complained of as constituting the offense.—People v. Carrell, 31 Cal. App. 793, 161 Pac. 995.

1 See, supra, §§ 290, 291.

2 As to exceptions in bigamy, rule seems to be otherwise in some states. See Barber v. State, 50 Md. 161; Kopke v. People, 43 Mich. 41, 4 N. W. 551.

Exceptions matter of defense, according to doctrine in some states, and need not be negatived in indictment or information.—Fleming v. People, 27 N. Y. 329, affirming 5 Park. Cr. Rep. 353; Stanglein v. State, 17 Ohio St. 453.

3 CAL.—People v. Priestley, 17 Cal. App. 171, 118 Pac. 965. FLA.—Ferrell v. State, 45 Fla. 26, 34 So. 220. ILL.—Sokel v. People, 212 Ill. 238, 72 N. E. 382. IOWA—State v. Williams, 20 Iowa 98. KY.—Com. v. Whaley, 69 Ky. (6 Bush) 266, overruled on another point in 76 Ky. (13 Bush) 318; Rogers v. Com., 24 Ky. L. Rep. 119, 68 S. W. 14. LA.—State v. Barrow, 31 La. Ann. 691. MASS.—Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249. MINN.—State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241. MO.—State v. Jenkins, 139 Mo. 535, 41 S. W. 220. N. Y.—Fleming v. People, 27 N. Y. 329, affirming 5 Park. Cr. Rep. 353. N. C.—State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. Melton, 120 N. C. 591, 26 S. E. 933; State v. Long, 143 N. C. 670, 57 N. E. 349. OHIO—Stanglein v. State, 17 Ohio St. 453. R. I.—State v. Gallagher, 20 R. I. 266, 38 Atl. 655. VT.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

An indictment alleging that defendant, being lawfully married to one woman, who was then and there alive, afterward married another, was sufficient without nega-

is without jurisdiction in the case.[1] It is sufficient to confer jurisdiction to allege that the crime was committed within the county,[2] that the defendant resided in the county at the time of the finding and return of the indictment, or that he was apprehended within the county,[3] under statute in Maine[4] and New York.[5]

Apprehension within jurisdiction of the court being the sole authority by virtue of which indictment found, such apprehension, being matter of substance and not merely matter of form, must be distinctly averred to have occurred within the county prior to the finding and return of the indictment.[6]

tiving that the first marriage had been dissolved by divorce.—Oliver v. State, 7 Ga. App. 695, 67 S. E. 886.

1 State v. Hausbrough, 181 Mo. 348, 80 S. W. 900.

2 Objection committed in another county, must be raised by plea in abatement and not by motion to quash.—State v. Long, 143 N. C. 670, 57 N. E. 349.

Objection offense was committed without the state that is a matter of proof under a plea of not guilty.—State v. Long, 143 N. C. 670, 57 N. E. 349.

Proof showing offense was committed in another county than that alleged in the indictment, an order of the trial court that the venue be corrected operated as a proper amendment to the indictment.—Welty v. Ward, 164 Ind. 457, 72 N. E. 596, 73 N. E. 889.

3 State v. Griswold, 53 Mo. 181.

4 Rev. St., ch. 124, § 4; State v. Damon, 97 Me. 323, 54 Atl. 845.

5 3 Rev. Stats. (5th ed.), p. 968, § 10.

6 State v. Griswold, 53 Mo. 181; Houser v. People, 46 Barb. (N. Y.) 33.

CHAPTER XXVII.

INDICTMENT—SPECIFIC CRIMES.

Blasphemy.

§ 449. Form and sufficiency of indictment.

§ 449. FORM AND SUFFICIENCY OF INDICTMENT.[1] Where the statutory offense of blasphemy may be committed in two or more ways—e. g., by profane swearing and also by denying or contumeliously reproaching the Deity—an averment of the commission of the offense in either of these ways is sufficient.[2] An indictment or information charging the offense of blasphemy in the language of the statute is sufficient;[3] the locality of the offense need not be averred,[4] except where swearing in a public place is charged, as pointed out in last paragraph of this section.

Averment of facts sufficient on the face of the indictment or information to make out, under the statute, the offense sought to be charged, is necessary,[5] and an indictment or information which fails to allege that the profane language was used or uttered in the presence and within the hearing of other persons,[6] and that it was heard by

1 As to form of indictment, see Forms Nos. 454-458.

2 Com. v. Kneeland, 37 Mass. (20 Pick.) 206; Reg. v. Bradlaugh, 15 Cox C. C. 217.

Complaint before justice need not aver oaths used "profanely."—Johnson v. Barclay, 16 N. J. L. (1 Harr.) 1.

General averment charging both ways but the specifications set out amount to the commission in but one way it is sufficient.—Com. v. Kneeland, 37 Mass. (20 Pick.) 206.

"Profanely swearing three several oaths, by taking the name of God in vain," held sufficient under Indiana statute.—Odell v. Garnett, 4 Blackf. 549.

3 Bodenhamer v. State, 60 Ark. 10, 28 S. W. 507.

"Did profanely curse," without setting forth the words, held sufficient in State v. Freeman, 63 Vt. 496, 22 Atl. 621.

4 Johnson v. Barclay, 16 N. J. L. (1 Harr.) 1.

5 State v. Brewington, 84 N. C. 783; Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

6 State v. Jones, 31 N. C. (9

divers persons,[7] is insufficient. It must be alleged that the words were spoken and the language used "profanely,"[8] and there must be an averment of common or public nuisance, in order to render the indictment or information sufficient.[9]

Profane and obscene language being charged, it is sufficient for the indictment or information to follow the language of the statute without setting out the language or

Ired.) 38; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

7 State v. Jones, 31 N. C. (9 Ired.) 38; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; State v. Barham, 79 N. C. 646; State v. Brewington, 84 N. C. 783.

"Publicly" made, is not a sufficient allegation.—Goree v. State, 71 Ala. 7.

If the indictment be in other respects good, it is not a fatal defect to omit the allegation that the words were uttered in the presence of divers persons, the omission being supplied by the other averments.—Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

See Com. v. Cin., N. O. & T. P. Ry. Co., 33 Ky. L. Rep. 1056, 18 L. R. A. (N. S.) 699, 112 S. W. 613, where the failure to allege that the acts were committed in the presence or hearing of persons was overcome by the allegation that the acts disturbed "the peace, happiness, comfort, and pleasure of persons residing in said village, and at, on, and near said highway."

8 Updegraph v. State, 11 Serg. & R. (Pa.) 394; Com. v. Spratt, 14 Phila. (Pa.) 365.

Complaint before Justice of the Peace for use of profane oaths need not aver that they were used profanely where the words were set out.—Johnson v. Barclay, 16 N. J. L. (1 Harr.) 1.

"Profanely curse, swear, aver, and imprecate by and in the name of God . . . by unlawfully saying 'God damn,'" held not to be bad by reason of not averring the words were "profanely" used.—Taney v. State, 9 Ind. App. 46, 36 N. E. 295.

9 State v. Jones, 31 N. C. (9 Ired.) 38; State v. Crisp, 85 N. C. 528, 39 Am. Rep. 713; Gaines v. State, 75 Tenn. (7 Lea) 410, 4 Am. Rep. 64.

Publicly committed and so long continued as to annoy citizens at large, must be alleged and proved.—State v. Crisp, 85 N. C. 528, 39 Am. Rep. 713.

Words must be set forth with an allegation that they were repeated to the annoyance of the public.—State v. Barham, 79 N. C. 646.

words used,[10] although in Mississippi,[11] Vermont,[12] and perhaps elsewhere, the language used is required to be set out. Where the prosecution is for criminal nuisance by profane swearing, the language used and the words made use of must be set out, in order that the court may decide as to the quality of the words used.[13]

Public swearing being charged, it is sufficient to allege that the words were spoken or language used publicly;[14] but where the offense is alleged to have been committed by profanely swearing in a public place, the indictment or information must allege the particular public place.[15]

10 Bodenhamer v. State, 60 Ark. 10, 28 S. W. 507; Ex parte Foley, 62 Cal. 508; Taney v. State, 9 Ind. App. 46, 36 N. E. 295; State v. Cainan, 94 N. C. 880.

11 Walton v. State, 64 Miss. 207, 8 So. 171.

12 **Indictment not setting out the words verbatim** is cured by verdict.—State v. Freeman, 63 Vt. 496, 22 Atl. 621.

13 Walton v. State, 64 Mich. 207; Johnson v. Barclay, 16 N. J. L. (1 Harr.) 1; State v. Jones, 31 N. C. (9 Ired. L.) 38; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; State v. Barham, 79 N. C. 646; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; State v. Steele, 50 Tenn. (3 Heisk.) 135; R. v. Sparling, 1 Stra. 497, 93 Eng. Repr. 658.

Using the same profane oath thirty-three times on the same day being charged in the information, the words of the oath need be set forth but once.—Johnson v. Barclay, 16 N. J. L. (1 Harr.) 1.

Whole of the words or conversation need not be set out.—State v. Steele, 50 Tenn. (3 Heisk.) 135.

14 Goree v. State, 71 Ala. 7; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; State v. Barham, 79 N. C. 646.

15 State v. Shanks, 88 Miss. 410, 40 So. 1005; Files v. State, 96 Miss. 257, 50 So. 979.

CHAPTER XXVIII.

INDICTMENT—SPECIFIC CRIMES.

Bribery.

§ 450. REQUISITES AND SUFFICIENCY OF INDICTMENT.[1] The crime of bribery being a purely statutory offense in probably all of the states, an indictment or information charging the offense, which must not be argumentative,[2] must state the facts with such certainty and precision as to conform to the provisions of the statute under which drawn, and bring accused clearly within same,[3] and at the same time sufficiently inform the accused of the exact charge he is called upon to meet, under the constitutional guarantee that a person accused of crime shall be advised

1 As to form of indictment charging bribery in its various forms, see Forms Nos. 459-489.

2 See People v. Hammond, 132 Mich. 422, 93 N. W. 1084, in which indictment was held not to be argumentative.

3 See Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433, 15 Am. Cr. Rep. 454, 59 N. E. 494; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096; State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510.

To charge that the money received was "the pretended and ostensible price, consideration, and value of certain worthless and unmarketable shares of stock" was a mere matter of evidence.—State v. Meysenburg, 171 Mo. 1, 71 S. W. 229.

As to proper form of indictment against justice of peace for accepting bribe not to prosecute person he knows to be unlawfully carrying concealed weapons, see Morawietz v. State, 46 Tex. Cr. Rep. 436, 80 S. W. 997.

of "the nature and cause of action against him";[4] and to accomplish this constitutional requirement the indictment or information must set out the name of the person or corporation by or to whom the bribe was offered or received.[5]

Corrupt intent must be alleged,[6] but an averment that the money, or other thing of value, was wilfully, unlawfully, and feloniously given, or offered, sufficiently charges the corrupt intent of the accused.[7]

Indictment following language of statute,[8] or substantially in the language of the statute,[9] is sufficient in those

[4] State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; State v. Lucero, 20 N. M. 55, 146 Pac. 407; State v. Marion, 68 Wash. 675, 124 Pac. 125.

Accused, a member of the board of surgeons, is charged with asking "a gratuity, the nature of which is unknown," with intent to have his official action influenced, he is not sufficiently informed of what evidence he must meet.—United States v. Kessel, 62 Fed. 57.

Member of board of surgeons indicted under Federal Rev. Stats., § 5501, 1 Fed. Stats. Ann., 1st ed., p. 715, charging he did unlawfully ask a "gratuity, the nature of which is to the grand jury unknown," with intent to have his official action influenced thereby, held to be insufficient for the reason that it did not inform accused of what he was to meet in evidence.—United States v. Kessel, 62 Fed. 57.

Uncertainty as to whether charge under city ordinance or state statute can not be raised by demurrer under Kerr's Cal. Pen. Code, 1915, § 1004. See People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620.

[5] State v. Meysenburg, 171 Mo. 1, 71 S. W. 229.

[6] State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Collins v. State, 25 Tex. Supp. 202.

[7] State v. La Flame, 30 N. D. 489, 152 N. W. 810.

[8] People v. Seeley, 137 Cal. 13, 69 Pac. 693; People v. Glass, 158 Cal. 650, 112 Pac. 281; Higgins v. State, 157 Ind. 57, 60 N. E. 685; State v. McCrystol, 43 La. Ann. 907, 9 So. 922; State v. Glandi, 43 La. Ann. 914, 9 So. 925; Dickhaut v. State, 85 Md. 451, 60 Am. St. Rep. 332, 37 Atl. 21; Com. v. Milliken, 174 Mass. 79, 11 Am. Cr. Rep. 177, 54 N. E. 357.

Where the language of the statute is followed it is unnecessary to allege the agreement under which the money was received.—Com. v. Milliken, 174 Mass. 79, 11 Am. Cr. Rep. 177, 54 N. E. 357.

[9] People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; People v. Edson, 68 Cal. 549, 10 Pac. 192; People v. Seeley, 137 Cal. 13, 69 Pac. 693; Tillman v. State, 58 Fla. 113, 138 Am. St. Rep. 100, 19 Ann. Cas. 91, 5 So. 675; State v. Walls, 54 Ind. 561, 2 Am. Cr. Rep. 23; Glover v. State, 109

cases in which the statute contains all the essential elements of the bribery sought to be charged;[10] but is insufficient in those cases in which all the elements are not set out in the statute.[11] Where the statute sets forth with clearness and precision all the things which constitute the offense of bribery, nothing further need be averred;[12] the subject-matter concerning which the accused attempted to corrupt, or consented to be corrupted, being mere matter of inducement, need not be described with certainty in the indictment or information.[13] To this general rule, however, there are some well-recognized exceptions, noted below:

—— *Bribing juror*[14] being charged in the language of the statute, the indictment or information must allege, in addition, that the accused knew the person to whom the bribe was offered was a juror;[15] and must further set

Ind. 391, 7 Am. Cr. Rep. 113, 10 N. E. 282; Sharp v. United States, 13 Okla. 522, 76 Pac. 177, reversed on another point in 71 C. C. A. 258, 138 Fed. 878.

Sufficient on motion in arrest of judgment.—State v. Johnson, 17 N. D. 558, 118 N. W. 230.

10 People v. Ward, 110 Cal. 368, 42 Pac. 894; Ex parte Bunkers, 1 Cal. App. 61, 81 Pac. 748; State v. Dankwardt, 107 Iowa 704, 77 N. W. 495; State v. Comfort, 22 Minn. 271; State v. Abrisch, 41 Minn. 41, 42 N. W. 543; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096; State v. Paisley, 36 Mont. 245, 92 Pac. 566.

11 State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096; State v. Gager, 99 Minn. 57, 108 N. W. 812; State v. Swanson, 106 Minn. 289, 119 N. W. 45; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; Pettiti v. State, 7 Okla. Cr. 12, 121 Pac. 278; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251.

12 Com. v. Milliken, 174 Mass. 79, 11 Am. Cr. Rep. 177, 54 N. E. 357.

13 Sharp v. United States, 71 C. C. A. 258, 138 Fed. 878.

14 **Charging attempt to bribe juror** in the language of the statute, naming the juror, setting out the nature of the bribe offered, and averring unlawful intent, held good in State v. McCrystol, 43 La. Ann. 907, 9 So. 922, and State v. Glandi, 43 La. Ann. 914, 9 So. 925.

15 Colson v. State, 71 Fla. 267, 71 So. 277; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096.

Contra: Diegel v. State, 86 Ohio St. 310, 99 N. E. 1125, affirming 33 Ohio Cir. Ct. Rep. 82, where an indictment was held sufficient under Gen. Code, § 12380, without averment of knowledge of the official character.

out the particular thing offered, alleging that it had a certain specific value.[16]

—— *Bribing officer* being charged by the indictment or information in the language of the statute, it must further be averred that the accused knew that the person to whom the bribe was given, or was offered, held a designated public official position;[17] but this express allegation is unnecessary when that fact is necessarily implied.[18] An indictment under the California Penal Code,[19] and statutes with like provisions, charging accused with having offered a bribe, or to whom a bribe was given, was "a member of the board of trustees of a corporation," naming it, which fails to allege that such corporation is either a public or a quasi-public corporation, is fatally defective.[20]

—— *Bribing witness,* or attempting to bribe a witness, being charged in the language of the statute, it is necessary[21] that the indictment or information shall further allege that the accused knew that such person was a witness in the cause,[22] unless that knowledge is necessarily implied from the indictment.[23]

16 State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096.

17 Pettiti v. State, 7 Okla. Cr. 12, 121 Pac. 278.

18 **Indictment for bribing a supervisor** to vote on a certain bill, charging an intent to corruptly influence his action on a matter before the body of which he is a member, necessarily carries with it the knowledge on the part of the defendant that the person bribed was a member of the board of supervisors.—People v. Glass, 158 Cal. 650, 112 Pac. 281.

Inspector of milk being required to make analyses and preserve record of results, and such record made evidence, indictment alleging that analysis of milk of person accused of bribing inspector showed it was not of the required standard quality, held to be sufficient.—Com. v. Lapham, 156 Mass. 480, 31 N. E. 638.

19 Kerr's Cal. Pen. Code, 1915, § 165.

20 People v. Turnbull, 93 Cal. 630, 29 Pac. 224.

21 **As to unnecessary averments in indictment for bribing witness,** or attempting to bribe, see, infra, § 451, footnotes 13-17.

22 Com. v. Bailey, 26 Ky. L. Rep. 583, 82 S. W. 299.

23 **Indictment for murder** pending against accused and A being a witness for the state, an indictment charging accused offered to A

Framed under common law, charging accused with having corruptly offered money to a member of the state legislature to vote for a certain person who was a candidate for election to be United States senator, an indictment or information will be good, notwithstanding the fact that such specific offense is not defined or denounced by the state statute.[24]

§ 451. UNNECESSARY ALLEGATIONS. Time, not being of the essence of the offense in bribery, need not be alleged,[1] and if alleged, need not be proved as laid.[2] Completion of the bribery not being an essential element of the offense charged, it need not be alleged that accused carried out his promise.[3] It is also unnecessary to set forth a particular description of the money or thing of value offered or received;[4] but in the case of a public or quasi-

certain property to leave the state and remain absent from the trial, without alleging that accused knew A was a witness against him was held good, because such knowledge was necessarily implied from the indictment.—Com. v. Bailey, 26 Ky. L. Rep. 583, 82 S. W. 299.

24 State v. Davis, 2 Penn. (Del.) 139, 45 Atl. 394.

Membership in Congress being designated in the federal constitution (Art. 1, § 2) as the office of "representative," an indictment or information charging bribery at a primary election to secure the nomination of a designated person to the "office of Congress" is fatally defective.—Allison v. State, 45 Tex. Cr. Rep. 596, 78 S. W. 1065.

1 State v. McDonald, 106 Ind. 233, 6 N. E. 607.

2 **Variance immaterial** where date of bribery is given as August 2 and the proof shows it to have been committed on July 20, there being but a single offense charged, and both dates being within the statute of limitations.—People v. Vincilione, 17 Cal. App. 513, 120 Pac. 438. Same principle applied in People v. Rice, 73 Cal. 220, 14 Pac. 851.

3 Com. v. Jackson, 248 Pa. 530, 94 Atl. 233.

An indictment charging attempted bribery and setting forth facts that if the offer alleged was a corrupt offer, to induce a deputy sheriff to violate his oath and duty, the defendant would be guilty, but in setting forth the facts it was alleged that the offer was made to induce the deputy sheriff to allow liquors to be shipped into L— and not seize or libel the liquors without mentioning the fact that they were intoxicating liquors, held bad.—State v. Beliveau, 114 Me. 477, 96 Atl. 779.

4 Value v. State, 84 Ark. 285, 13 Ann. Cas. 308, 105 S. W. 361; People v. Seeley, 137 Cal. 13, 69 Pac.

public officer, the inducement for the official conduct must be set forth.[5]

Bribery at election at which a representative in congress was voted for, together with candidates for local offices, being charged, an indictment under the federal statute[6] need not allege that the ballot cast contained the name of one voted for to be representative in congress, nor charge an intention to influence the voter in the congressional election.[7] And where a bribe at an election is charged to have been offered and received "with the understanding and agreement" that the accused would vote for certain persons or in a certain way, the indictment or information need not allege with whom the understanding was had and agreement made.[8]

Offering bribe being charged, where the person sought to be corrupted or influenced was a public officer, the Christian name of such officer need not be alleged, neither need there be an averment that such name is to the grand jurors unknown;[9] offering bribe to arbitrator being charged, there need be no allegation that the arbitrators

693; Watson v. State, 39 Ohio St. 123; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411.

But when alleged it must be proved as laid.—Value v. State, 84 Ark. 285, 13 **Ann. Cas.** 308, 105 S. W. 361.

5 Value v. State, 84 Ark. 285, 13 **Ann. Cas.** 308, 105 S. W. 361; People v. Ward, 110 Cal. 369, 42 Pac. 894; People v. Seeley, 137 Cal. 13, 69 Pac. 693; State v. Walls, 54 Ind. 561, 2 **Am. Cr. Rep.** 23; State v. Stephenson, 83 Ind. 246; Com. v. Donovan, 170 Mass. 228, 49 N. E. 104; State v. Howard, 66 Minn. 309, 61 **Am. St. Rep.** 403, 34 **L. R. A.** 178, 68 N. W. 1096; Com. v. Chapman, 1 Va. Cas. 138; United States v. Kessell, 62 Fed. 57.

6 U. S. Rev. Stats., § 5511, 2 Fed. Stats. Ann., 1st ed., p. 870.

7 United States v. McBosley, 29 Fed. 897.

Misleading refinement to say that there are two elections, a national and a state, at the same time. It is one election for the conduct of which two sovereignties have a common concern, though a several interest in the results.—United States v. McBosley, 29 Fed. 897. Ex parte Siebold, 100 U. S. 371, 25 **L. Ed.** 717; Ex parte Yarbrough, 110 U. S. 662, 28 **L. Ed.** 277, 4 Sup. Ct. Rep. 157.

8 State v. Durnam, 73 Minn. 150, 11 **Am. Cr. Rep.** 179, 75 N. W. 1127.

9 Roden v. State, 5 Ala. App. 247, 59 So. 751.

were appointed by the court, or that the court had jurisdiction of the cause being considered by the arbitrators;[10] offering bribe to attorney being charged, the particular acts which the latter was required to do to receive the offered bribe need not be set out;[11] corruptly giving to municipal officer designated notes of specified value each, being charged, indictment need not allege by whom the notes were signed;[12] the bribing of policeman not to arrest him being charged, it need not be alleged that accused had committed any offense, or what were the duties of the policeman;[13] attempt to bribe a witness in a criminal cause being charged, indictment or information need not allege that the testimony of such witness was material,[14] that he had been summoned[15] or had been sworn,[16] that the offense was committed with the intent to impede justice,[17] or state the kind or amount of money or other thing of value offered.[18]

Receiving bribe, or agreeing to receive bribe, by public officer being charged, indictment need not specify name of person who gave or was to give the money or other thing of value.[19] Accused being alleged to have received

10 State v. Lusk, 16 W. Va. 767.

11 Reed v. State, 43 Tex. 319.

12 Com. v. Donovan, 170 Mass. 228, 49 N. E. 104.

13 Minter v. State, 70 Tex. Cr. Rep. 634, 159 S. W. 286.

Where accused was charged with giving money to a policeman to influence him to disregard his power to prevent accused from running a bawdy house, the powers and duties of the policeman need not be alleged where the city charter empowers him to make arrests in such cases.—State v. Nick, 66 Wash. 134, 119 Pac. 15.

14 State v. Biebusch, 32 Mo. 276.

15 Id.

16 Chrisman v. State, 18 Neb. 107, 24 N. W. 434.

17 State v. Biebusick, 32 Mo. 276.

18 Id.

19 An information is sufficient when it alleges that the defendant offered a bribe to the judge of a named court with the purpose and intent to influence him "to modify and reduce the sentence" imposed on a certain named person on a prior day of the same term, although it does not allege that the prosecution of such convicted person was pending in the court when the bribe was offered.—Tillman v. State, 58 Fla. 113, 138 Am. St. Rep. 100, 19 Ann. Cas. 91, 50 So. 675.

New York Penal Laws, § 372

a bribe for his appointment of a designated person to a public official position, it need not be alleged that there was an incumbent in the office to which the appointment was made.[20] A juror charged with having received money or other thing of value to give a verdict in a specified case, it is not necessary to allege that the money or thing of value was received from one of the parties to the action.[21] And where a police officer is charged with having received a bribe to desist from arresting, or for failing to arrest, a certain class of offenders, the indictment or information need not allege, and the evidence need not show, that the crime had been or was subsequently committed and that the policeman failed to arrest therefor;[22] neither need it be averred that the policeman did or intended to keep his promise, or that he knew the persons intended to commit any offense.[23]

§ 452. Solicitation of bribe. The general rule is that solicitation of a bribe by a public officer is an offense, at common law a misdemeanor;[1] under statute, in most if not all the states, a felony.[2] An indictment or informa-

(Consol. Laws, ch. 40) provides punishment for judicial officers who ask, receive, or agree to receive a bribe.—People v. Furlong, 127 N. Y. Supp. 422.

20 Ruffin v. State, 36 Tex. Cr. Rep. 565, 38 S. W. 169.

21 Com. v. Milliken, 174 Mass. 79, 11 Am. Cr. Rep. 177, 54 N. E. 357.

22 People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620.

Where the indictment charges a police officer with omitting to prevent the maintenance of bawdy houses and omission to arrest inmates thereof, it charges but one offense, the allegation of failure to arrest being merely an amplification of the offense charged.—State v. Boyd, 108 Mo. App. 518, 84 S. W. 191, affirmed 196 Mo. 52, 94 S. W. 536.

23 State v. Gardiner, 88 Minn. 130, 92 N. W. 529.

1 Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; People v. Hammond, 132 Mich. 472, 93 N. W. 1084; R. v. Bunting, 7 Ont. 524.

Misdemeanor in Missouri for legislative officer to solicit a bribe, but a felony to bribe such officer.—State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105.

2 People v. Squires, 99 Cal. 327, 33 Pac. 1092; People v. Bunkers, 2 Cal. App. 197, 84 Pac. 364; People v. Hammond, 132 Mich. 422, 98 N. W. 1084; State v. Durnam, 73 Minn. 150, 75 N. W. 1127; People v. Jackson, 47 Misc. (N. Y.) 60, 95 N. Y. Supp. 286; Rudolph v. State,

tion charging accused with soliciting a bribe must state the facts constituting the alleged offense;[3] these facts can not be inferred from the allegation of a conclusion of law;[4] but the means of solicitation need not be set out.[5] Thus, under a statute[6] defining bribery as any reward to a person, or to another "at his instance," an indictment or information charging accused, as a voter, with soliciting a bribe for his vote, need not allege that the reward was offered to another at the instance of the accused, where it is alleged that the offer was made to influence, and did influence, the accused as councilman in his vote at the election.[7] An allegation that a public officer wilfully, unlawfully and feloniously asked and agreed to receive a specified bribe, on an understanding that his action on a public matter pending before or coming before him should be influenced thereby, sufficiently charges the offense of soliciting a bribe.[8] A member of the legislature being charged with soliciting a bribe, the indictment or information need not allege that the matter to be voted or acted on was at the time pending in the legislature;[9] but an indictment against a town assessor charging an offer to receive a bribe to reduce the assessment of certain real estate, must aver that the real estate was situated in the town where the accused was acting as

128 Wis. 222, 116 Am. St. Rep. 32, 107 N. W. 466.

3 See People v. Willis, 24 Misc. (N. Y.) 549, 13 N. Y. Cr. Rep. 343, 54 N. Y. Supp. 52.

4 Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433, 15 Am. Cr. Rep. 454, 59 N. E. 494.

5 State v. Bauer, 1 Ohio N. P. 103.

6 As Ky. Stats. (1895), ch. 41, § 1586.

7 Com. v. Root, 96 Ky. 533, 29 S. W. 351.

8 People v. Seeley, 137 Cal. 13, 69 Pac. 693; Ex parte Bunkers, 1 Cal. App. 61, 81 Pac. 748.

9 State v. Lucero, 20 N. M. 55, 146 Pac. 407.

Charging member of Legislature with soliciting bribe to vote for special person to be United States Senator, alleging he asked a specified sum for his vote, and agreed to vote as directed, is sufficient.—State v. Lucero, 20 N. M. 55, 146 Pac. 407.

assessor.[10] A juror being charged with asking and agreeing to receive a bribe to vote for a particular verdict or for a specified party, is sufficient without charging that he asked for or agreed to receive it upon any agreement or understanding with the person approached that he would cast his vote in consideration thereof; it being sufficient to aver that the accused offered to or was ready to make such an agreement or understanding.[11] Where the accused is charged with soliciting a bribe to absent himself as a witness from the trial of the cause, the indictment need not directly aver that accused was a witness or about to be called at the time of the offense, where this must necessarily be inferred from the facts alleged.[12]

§ 453. Nature and value of bribe. An indictment or information charging the bribing, or an attempt to bribe, a public officer must set forth the means used to bribe, or in the attempt to bribe;[1] must allege that something of value[2] was given, promised, or received, although it is not

10 Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433, 15 Am. Cr. Rep. 454, 59 N. E. 494.

The facts necessary to be alleged can not be inferred from allegations of mere conclusions of law.—Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433, 15 Am. Cr. Rep. 454, 59 N. E. 494.

11 People v. Squires, 99 Cal. 327, 33 Pac. 1092; State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

12 People v. McGee, 24 Cal. App. 563, 141 Pac. 1055.

Soliciting or attempting to bribe witness being charged, indictment or information must allege that accused knew the person to be a witness, or must state facts showing that he had such knowledge.—Gandy v. State, 77 Neb. 783, 110 N. W. 862.

1 Armstrong v. Van de Vauter, 21 Wash. 682, 59 Pac. 510; United States v. Kessel, 62 Fed. 57.

2 See People v. Vincilione, 17 Cal. App. 513, 120 Pac. 438; Brunson v. State, 70 Fla. 387, 70 So. 390; Colson v. State, — Fla. —, 71 So. 277; State v. Walls, 54 Ind. 561, 2 Am. Cr. Rep. 23.

Allegation of attempt to bribe by means of a "certain gift or gratuity, to wit, money," held to be insufficient for failure to allege the money was of value.—Brunson v. State, 70 Fla. 387, 70 So. 390.

It is not sufficient to charge that something of value was promised for such promise could not be enforced.—State v. Walls, 54 Ind. 561, 2 Am. Cr. Rep. 23.

Offer to give Justice of Peace portion of fee accused would receive as attorney in the case if the former would dismiss the

necessary to incorporate a description of the thing offered,[3] and should set forth the name of the thing offered, where known.[4] All that seems to be requisite in this respect is that the indictment or information shall describe in general terms[5] the thing of value given or offered, it not being necessary to allege any definite sum of money or a specific thing of a designated value;[6] is not necessary to allege the kind and value of money received or offered,[7] that it was "lawful money of the United States,"[8] "coin of the United States of America,"[9] or that the money has a specified value, because the court will take judicial notice or draw the conclusion that it was of value.[10] While it is not necessary to allege that the money offered or paid by or to the accused was "lawful money of the United States, paper money and silver money," yet having been so alleged, the proof must establish the fact as laid.[11]

cause, is not open to objection of insufficiency because of failure to charge the offering of anything of value, present or prospective.—People v. Vincilione, 17 Cal. App. 513, 120 Pac. 438.

3 Value v. State, 84 Ark. 285, 13 Ann. Cas. 308, 105 S. W. 361; People v. Ward, 110 Cal. 369, 42 Pac. 894; Brunson v. State, 70 Fla. 387, 70 So. 390; State v. Stephenson, 83 Ind. 246; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096; Watson v. State, 39 Ohio St. 123; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411.

4 Brunson v. State, 70 Fla. 387, 70 So. 390; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096.

Variance between sum named and amount proved on the trial not material.—State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096.

5 Value v. State, 84 Ark. 285, 13 Ann. Cas. 308, 105 S. W. 361.

6 Watson v. State, 39 Ohio St. 123, 4 Am. Cr. Rep. 71; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411; Com. v. Chapman, 1 Va. Cas. 138.

7 State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411.

8 Value v. State, 84 Ark. 285, 13 Ann. Cas. 308, 105 S. W. 361.

9 People v. Seeley, 137 Cal. 13, 69 Pac. 693.

10 4 Ruling Case Law, p. 187.

11 Value v. State, 84 Ark. 285, 13 Ann. Cas. 308, 105 S. W. 361.

Variance not fatal where allegation of receipt of $9000 as bribe, and proof showed receipt of cashier's check for that amount.—State v. Meysenburg, 171 Mo. 29, 71 S. W. 229.

§ 454. ACT TO BE DONE AND AUTHORITY TO ACT. We have already seen[1] that it is not material to the completion of the offense, and need not be alleged in the indictment or information or proved on the trial, whether or not the officer carried out the contract or understanding; but it is necessary to the completion of the offense that there should be (1) a public or a quasi-public officer empowered to act[2] and (2) that the thing sought to be accomplished or done shall be within the scope of the authority and power of the officer,[3] and for this reason when one is

1 See, supra, § 451, footnote 3.

2 An indictment which accuses one of offering a bribe to the "assistant city attorney of El Paso," there being no such officer, is defective, and a motion to quash should be granted.—Naill v. State, 59 Tex. Cr. Rep. 484, Ann. Cas. 1912A, 1268, 129 S. W. 630.

Coroner accepting money to discharge from arrest a person whom he had caused to be arrested in an investigation of a death, is bribery, regardless of the jurisdiction and authority of the coroner to order the arrest.—People v. Jackson, 191 N. Y. 300, 14 Ann. Cas. 243, 15 L. R. A. (N. S.) 1177, 84 N. E. 65.

Indictment for aiding and abetting need not allege accused knew official character of person bribed or to be bribed.—Diegel v. State, 86 Ohio St. 310, 99 N. E. 1125, affirming 33 Ohio Cir. Ct. Rep. 82.

Indictment for offering bribe to assistant county attorney need not allege whether he was a county or state official, under Texas Pen. Code, 1911, art. 174.—Davis v. State, 70 Tex. Cr. Rep. 524, 158 S. W. 288.

Misdescription of office of officer is immaterial where indictment fully sets out his official position.—People v. Salsbury, 134 Mich. 537, 96 N. W. 936; Davis v. State, 70 Tex. Cr. Rep. 524, 158 S. W. 288.

3 **Application for leave to lay railway track** pending before council, an offer of money to a member of the council to vote in favor of the application is bribery, whether the council had authority to make the grant or not.—State v. Ellis, 33 N. J. L. (4 Vr.) 102, 97 Am. Dec. 707.

Charge of attempted bribery of judge to modify sentence imposed on a third person earlier in the term is not bad for failure to allege that the cause was still pending in the court.—Tillman v. State, 58 Fla. 113, 50 So. 675.

Jurisdiction of judicial officer to do act held not to affect right to prosecute him for agreeing to accept bribe to do same.—People v. Jackson, 191 N. Y. 300, 14 Ann. Cas. 243, 15 L. R. A. (N. S.) 1177, 84 N. E. 65.

Morgue and poor-buildings charged as being maintained by the county, that the question of selling the real estate on which they stood was pending, and that accused offered a bribe to a mem-

charged with attempting to bribe a public official the indictment or information must allege his official capacity, so as to show whether the offer was to bribe him with respect to his official duties.[4] And it has been held that where an indictment or information charges an attempt to bribe a deputy sheriff by offering him money to permit the shipment of liquors to the accused to reach him without seizure, it will be insufficient unless it is further alleged (1) that the liquors were intoxicating and (2) that they were designed to be sold by the accused in violation of law.[5] It has been held that where the caption of an indictment charges an attempt to bribe a public officer but the charging part shows an attempt on a person holding a position of trust, it is not misleading.[6]

Public officer charged with receiving a bribe, the indictment or information will be sufficient if it is alleged that he was a de facto officer; it not being necessary to allege or to prove that he was a de jure officer.[7]

§ 455. JOINT INDICTMENT. The general rules governing in criminal pleading as to the joinder of parties in an indictment or information applies with equal force on an

ber of the board to secure his vote favorable to the sale, is sufficient without the further allegation that the county owned the real estate.—Schultz v. State, 133 Wis. 215, 113 N. W. 428.

4 Collins v. State, 25 Tex. Supp. 202.

Policeman bribed not to arrest accused in violation of former's duty, indictment need not set out the duties of the policeman.—Davis v. State, 70 Tex. Cr. Rep. 524, 158 S. W. 288.

5 State v. Beliveau, 114 Me. 477, 96 Atl. 779. See Brunson v. State, 70 Fla. 387, 70 So. 390.

6 State v. Bunch, 119 Ark. 219, 177 S W. 932.

7 People v. McCann, 247 Ill. 130, 20 Ann. Cas. 496, 93 N. E. 100.

Criminal liability of de facto officers is sustained and established in a number of well-considered cases. See, among others, Diggs v. State, 49 Ala. 311; Pentecost v. State, 107 Ala. 81, 18 So. 146; State v. Stone, 40 Iowa 547; State v. Goss, 69 Me. 22; Fortenberry v. State, 56 Miss. 286; People v. Church, 1 How. Pr. N. S. (N. Y.) 366, 3 N. Y. Cr. Rep. 57; State v. McEntyre, 25 N. C. (3 Ired. L.) 171; State v. Causler, 75 N. C. 442; State v. Long, 76 N. C. 254; State v. Maberry, 3 Strobh. L. (S. C.) 144; State v. Sellers, 7 Rich. L. (S. C.) 368.

accusation of the offense of bribery. We have already seen[1] that where several persons are jointly interested in the commission of a crime, and the evidence as to the acts constituting the crime applies equally to two or more persons, they may be joined in the same indictment;[2] the innocence or guilt of one is not affected by that of one or more of the others.[3] Thus, where the House of Delegates, one of the branches of the municipal assembly of St. Louis, jointly made and entered into a corrupt agreement to vote for a measure to come before them in their official capacity, and for the commission of this act were charged with bribery and jointly indicted, the indictment was upheld, the court saying that "it was but one transaction, the same subject-matter, the same purposes were designed to be accomplished, the performance of the same functions rested upon all alike, and we are of the opinion that it is in harmony with the objects and purposes of good pleading, as well as with the spirit of the statute, to present the issue made by the charge to all who are interested by joining them in one indictment."[4]

1 See, supra, § 351.

2 **Well-established rule of criminal pleading** supported by a long line of precedents, among which are: ALA.—Elliot v. State, 26 Ala. 78. ARK.—Volmer v. State, 34 Ark. 487. IND.—State v. Winstandley, 151 Ind. 316, 51 N. E. 92. IOWA—State v. Comstock, 46 Iowa 265. MASS.—Com. v. Elwell, 43 Mass. (3 Metc.) 191, 35 **Am. Dec.** 398. MO.—State v. Lehman, 182 Mo. 424, 103 **Am. St. Rep.** 670, 66 **L. R. A.** 490, 81 S. W. 1118. N. H.—State v. Forcier, 65 N. H. 42, 17 Atl. 577. OHIO—Hess v. State, 5 Ohio 5, 22 **Am. Dec.** 767. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 **Am. Dec.** 475. R. I.—State v. O'Brien, 18 R. I. 795, 25 Atl. 910. TENN.—Fowler v. State, 50 Tenn. (3 Heisk.) 154. TEX.—Bell v. State, 1 Tex. App. 598. VA.—Com. v. Harris, 7 Gratt. 600. ENG.—R. v. Trafford, 1 Barn. & Ad. 876, 887, 20 Eng. C. L. 726, 731.

Indictment of eight counts, seven alleged the offer of money by the accused to the same person in the same official relation to induce the same violation of official duty, and the eighth count alleges the giving of money to another official under like conditions, such may be properly joined.—Benson v. U. S., 27 App. D. C. 331.

3 State v. Lehman, 182 Mo. 424, 103 **Am. St. Rep.** 670, 66 **L. R. A.** 490, 81 S. W. 1118; State v. Hartman, 182 Mo. 461, 81 S. W. 1272.

4 State v Lehman, 182 Mo. 424, 103 **Am. St. Rep.** 670, 66 **L. R. A.** 490, 81 S. W. 1118.

§ 456. Duplicity. The general rules of criminal pleading respecting duplicity are applicable in charges of bribery. The fact that an indictment or information alleges that the accused corruptly accepted a gift and gratuity and a promise to make a gift, does not render it duplicitous;[1] and where the accusing part of an indictment or information names the offense charged as bribery, and the descriptive part sets out an attempt to bribe, it will not be bad for duplicity.[2] In those jurisdictions in which, under the statute, the offense of bribery may be committed in one of many ways the indictment or information may charge, in one count, its commission in any or all of the ways mentioned in the statute.[3] An indictment charging that accused corruptly offered money to influence the official action of A, a member of the legislature and also a member of the house committee on public works, to vote for a certain bill, is not duplicitous;[4] and it has been held that an indictment is not duplicitous where the receiving of a bribe and the conspiracy to do an unlawful act are alleged in two counts, but it is stated in the second count that there is no intention to charge two crimes, the object being merely to so vary the charge as to meet the proof.[5]

1 State v. Smalls, 11 S. C. 262.

2 Com. v. Bailey, 26 Ky. L. Rep. 583, 82 S. W. 299.

3 State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

An indictment alleging in one count that the accused asked for, accepted, and received a bribe is not duplicitous. — State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

4 Watson v. State, 39 Ohio St. 123, 4 Am. Cr. Rep. 71.

5 State v. Potts, 78 Iowa 656, 5 L. R. A. 814, 43 N. W. 534.

CHAPTER XXIX.

INDICTMENT—SPECIFIC CRIMES.

Burglary.

§ 457. Requisites and sufficiency in general.[1] Both at common law[2] and under statute, an indictment or information charging burglary must allege every essential element necessary to constitute the offense, including every fact and modification of a fact essential to a prima facie case,[3] including intent,[4] time,[5] place,[6] description of crime intended[7] and of property to be stolen,[8] description of the building burglarized[9] and its ownership,[10] and the like,[11] to the end that the accused may be properly and fully apprised of what he must prepare to meet and defend against.[12]

Form prescribed by code or statute followed, the indictment or information will be sufficient.[13]

1 As to forms of indictment for burglary in its various phases, see Forms Nos. 490-578.

2 Common-law information charging burglary has been held not to be bad because it alleges that one of the accused was armed and the other was not.—Harris v. People, 44 Mich. 305, 6 N. W. 677.

3 State v. Dale, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722.

4 See, infra, § 466.

5 See, infra, § 462.

6 See, infra, § 461.

7 See, infra, §§ 467-470.

8 See, infra, § 471.

9 See, infra, §§ 473 et seq.

10 See, infra, §§ 478 et seq.

11 Simpson v. State, 5 Okla. Cr. 57, 113 Pac. 549. See Pairo v. State, 49 Ala. 25; Hays v. Com., 17 Ky. L. Rep. 1147, 33 S. W. 1104; State v. Dale, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722; Winslow v. State, 26 Neb. 308, 41 N. W. 1116; St. Louis v. State (Tex. Cr.), 59 S. W. 889.

12 Pairo v. State, 49 Ala. 25; Smith v. State, 68 Neb. 204, 14 Am. Cr. Rep. 146, 94 N. W. 106.

13 Harris v. State, 11 Ala. App. 314, 66 So. 876; Boyd v. State, 12 Ala. App. 152, 67 So. 806; Norman v. State, 13 Ala. App. 337, 69 So. 362; Shetters v. State, 66 Tex. Cr Rep. 478, 147 S. W. 582.

§ 458. —— Charging in the language of the statute. An indictment or information charging burglary in the language of the statute is generally sufficient,[1] all the

1 People v. Shaber, 32 Cal. 36; People v. Lewis, 61 Cal. 366; People v. Murray, 67 Cal. 103, 6 Am. Cr. Rep. 54, 7 Pac. 178; Lee v. Com., 3 Ky. Law Rep. 250; State v. Golden, 86 Minn. 209, 90 N. W. 400; State v. Moss, 216 Mo. 436, 115 S. W. 1007; Leisenberg v. State, 60 Neb. 628, 14 Am. Cr. Rep. 193, 84 N. W. 6; State v. Goffney, 157 N. C. 624, 73 S. E. 162; Simpson v. State, 5 Okla. Cr. Rep. 57, 113 Pac. 549; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; Scott v. State, 91 Wis. 552, 10 Am. Cr. Rep. 150, 65 N. W. 61.

The general rule of criminal pleading applicable alike to all crimes. See, supra, §§ 269, 400. See, also: ALA.—Crawford v. State, 44 Ala. 382; White v. State, 44 Ala. 409. ARK.—Lemon v. State, 19 Ark. 171; State v. Witt, 39 Ark. 216; Fortenbury v. State, 47 Ark. 189. CAL.—People v. Martin, 32 Cal. 91; People v. White, 34 Cal. 183; People v. Cronin, 34 Cal. 191; People v. Burke, 34 Cal. 661; People v. Girr, 53 Cal. 629; People v. Lewis, 61 Cal. 366; People v. Marseiler, 67 Cal. 103, 2 Am. Cr. Rep. 54, 7 Pac. 178; People v. Sheldon, 68 Cal. 434, 9 Pac. 457; People v. Donaldson, 70 Cal. 116, 11 Pac. 681; People v. Russell, 81 Cal. 616, 23 Pac. 418; People v. Saverpool, 81 Cal. 650, 22 Pac. 856. COLO.—Cohen v. People, 7 Colo. 274, 3 Pac. 385; Schneider v. People, 30 Colo. 493, 71 Pac. 369. CONN.—Whiting v. State, 14 Conn. 491, 36 Am. Dec. 500; State v. Bierce, 27 Conn. 319; State v. Jackson, 39 Conn. 229. IDAHO—People v. Butler, 1 Idaho 234. ILL.—Cole v. People, 84 Ill. 216; Loehr v. People, 132 Ill. 504, 24 N. E. 68; Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425. IND.—Howard v. State, 87 Ind. 68; Toops v. State, 92 Ind. 13; Miller v. State, 98 Ind. 70. IOWA—State v. Smith, 46 Iowa 662. KAN.—State v. Foster, 30 Kan. 365, 2 Pac. 628; State v. Beverlin, 30 Kan. 611, 2 Pac. 630. LA.—State v. Bartley, 34 La. Ann. 149. MASS.—Com. v. Brown, 141 Mass. 78. MINN.—State v. Comfort, 22 Minn. 271. MISS.—Riley v. State, 43 Miss. 397. N. H.—State v. Kennison, 55 N. H. 242; State v. Beckman, 57 N. H. 174. N. J.—State v. Thatcher, 35 N. J. L. (6 Vr.) 445. N. Y.—People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 1 L. R. A. 293, 18 N. E. 245; People v. Dorthy, 20 App. Div. 308, 13 N. Y. Cr. Rep. 173, 46 N. Y. Supp. 970; People v. Seldner, 62 App. Div. 357, 71 N. Y. Supp. 35; People v. Lochner, 73 App. Div. 120, 16 N. Y. Cr. Rep. 520, 76 N. Y. Supp. 396; People v. Adams, 85 App. Div. 390, 17 N. Y. Cr. Rep. 443, 83 N. Y. Supp. 481; People v. Corbalis, 86 App. Div. 531, 17 N. Y. Cr. Rep. 469, 83 N. Y. Supp. 782; People v. Myers, 109 App. Div. 143, 19 N. Y. Cr. Rep. 546, 95 N. Y. Supp. 993; Frazer v. People, 54 Barb. 306; People v. Burns, 53 Hun 274, 7 N. Y. Cr. Rep. 92, 6 N. Y. Supp. 611; People v. Web-

facts and circumstances which constitute the offense as given in the particular statute being set out;[2] and it is not necessary that the exact words of the statute shall be used; words of like import may be employed.[3] But an indictment or information in the language of the statute, or substantially in the language of the statute, is insufficient in those cases where the statute does not contain

ster, 17 Misc. 410, 11 N. Y. Cr. Rep. 340, 40 N. Y. Supp. 1135. N. C.—State v. Sloan, 67 N. C. 357. OHIO—Ellars v. State, 25 Ohio St. 385. TEX.—State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251. UTAH—United States v. Cannon, 4 Utah 146, 7 Pac. 384; State v. Williams, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022. VT.—State v. Cocke, 38 Vt. 437. VA.—Helfrick v. Com., 29 Gratt. 844. W. VA.—State v. Riffe, 10 W. Va. 794. FED.—United States v. Mills, 32 U. S. (7 Pet.) 138, 8 L. Ed. 636; United States v. Simmons, 96 U. S. 363, 24 L. Ed. 820; United States v. Britton, 107 U. S. 661, 27 L. Ed. 522, 2 Sup. Ct. Rep. 517; Cannon v. United States, 116 U. S. 78, 29 L. Ed. 569, 6 Sup. Ct. Rep. 290; United States v. Pond, 2 Curt. 268, Fed. Cas. No. 16067; United States v. O'Sullivan, 9 N. Y. Leg. Obs. 193, Fed. Cas. No. 15937; United States v. Hearing, 11 Sawy. 514, 26 Fed. 744.

2 **No others required** generally to make indictment sufficient. See State v. Graham, 38 Ark. 519; Wood v. State, 47 Ark. 488; Sloan v. State, 42 Ind. 570; State v. Casey, 45 Me. 435; Wood v. People, 53 N. Y. 511; Phelps v. People, 72 N. Y. 334; State v. Rose, 90 N. C. 712; State v. Shuler, 19 S. C. 140; United States v. Mills, 32 U. S. (7 Pet.) 138, 8 L. Ed. 636; United States v. Northway, 120 U. S. 334, 30 L. Ed. 666, 7 Sup. Ct. Rep. 584; Evans v. United States, 153 U. S. 587, 38 L. Ed. 831, 14 Sup. Ct. Rep. 936; United States v. Henry, 3 Ben. 31, Fed. Cas. No. 15350; United States v. Quinn, 8 Blatchf. 66, Fed. Cas. No. 16110; United States v. Lancaster, 2 McL. 433, Fed. Cas. No. 15556.

3 ALA.—State v. Bullock, 13 Ala. 413. ARK.—Wood v. State, 47 Ark. 488. IND.—State v. Anderson, 103 Ind. 170, 2 N. E. 332; Henning v. State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4; Franklin v. State, 108 Ind. 47, 8 N. E. 695. KAN.—State v. Beverlin, 30 Kan. 611, 2 Pac. 630. KY.—Com. v. Turner, 71 Ky. (8 Bush) 1. ME.—State v. Robbins, 66 Me. 324. MASS.—Com. v. Parker, 117 Mass. 112. MISS.—Jones v. State, 51 Miss. 718, 24 Am. Rep. 658. MO.—State v. Ware, 62 Mo. 597. N. Y.—Tully v. People, 67 N. Y. 15. N. C.—State v. Drake, 64 N. C. 589. OHIO—Poage v. State, 3 Ohio St. 229. PA.—Com. v. Monat, 14 Phila. 366. TEX.—Jones v. State, 12 Tex. App. 424.

"It is always best, however, to avoid cavil or dispute, to conform to the very words of the statute on which the accusation is based."—Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238.

all the elements of the offense, and does not set forth with clearness and reasonable certainty the particular offense sought to be charged so as to (1) apprise the accused of the nature and circumstances of the accusation against him so that he may prepare his defense, and (2) may plead any judgment that may be rendered as a bar to a subsequent prosecution for the same offense;[4] in such cases a more particular statement of the facts and circumstances must be averred.[5] Thus, where the statute specifies particular acts and things as constituting burglary, and then declares, in alternative words, that the offense may be committed otherwise by acts and things which are not specifically designated, but are described or classified generally as having something in common with those, or with some of those, which are specified, an indictment in the language of the statute will not be sufficient to cover the offense in a manner or by a means other than those particularized in the statute as sufficient to constitute the offense;[6] in such a case the indictment

4 Danner v. State, 54 Ala. 127, 25 Am. Rep. 662; Rain v. State, 15 Ariz. 125, 137 Pac. 550; Schneider v. People, 30 Colo. 493, 71 Pac. 369; State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440; State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096. See Mason v. State, 42 Ala. 543; State v. Witt, 39 Ark. 216; Glass v. State, 45 Ark. 173; Scales v. State, 47 Ark. 476, 58 Am. Rep. 768; Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 447, 35 L. R. A. 176, 45 N. E. 991.

5 Bryan v. State, 45 Ala. 86; State v. Graham, 38 Ark. 519; Schmidt v. State, 78 Ind. 41; Com. v. Cook, 52 Ky. (13 B. Mon.) 149; Territory v. Casland, 6 Mont. 18, 9 Pac. 580; People v. Taylor, 3 Den. (N. Y.) 93; Daniel v. State, 50 Tenn. (3 Heisk.) 257; Williams v. State, 12 Tex. App. 400; Bonneville v. State, 53 Wis. 680, 11 N. W. 427; United States v. Mills, 32 U. S. (7 Pet.) 138, 8 L. Ed. 636; United States v. Cruikshank, 92 U. S. 558, 23 L. Ed. 593; United States v. Kaltmeyer, 5 McC. 263, 16 Fed. 762; United States v. Bettilini, 1 Woods 656, Fed. Cas. No. 14587; United States v. Lehman, 39 Fed. 771; United States v. Kelsey, 42 Fed. 887.

6 Johnson v. State, 32 Ala. 581; Danner v. State, 54 Ala. 127, 25 Am. Rep. 662.

Under Alabama statute making it burglary to enter with specified intent, buildings named "in which goods, merchandise, or other valu-

or information must particularize the things or means other than those specifically mentioned in the statute which are relied upon;[7] in other words, must in addition to the language of the statute contain an averment setting forth the facts and circumstances constituting the offense charged.[8]

§ 459. —— Negativing exceptions. The general rules already discussed[1] relative to the necessity and sufficiency of negativing exceptions, applies to an indictment or information charging burglary, and such exceptions and provisos, only, as are descriptive of the offense need be negatived.[2] Thus, under the California statute[3] exempting children under fourteen years of age from the class capable of committing crime, an indictment or information charging burglary need not allege that accused is not under fourteen years of age;[4] and under the Wisconsin statute[5] establishing a lower grade of burglary and providing a less punishment where the building burglarized is "not adjacent to or occupied with a dwelling," and other like provisions as to entering in

able thing," etc., where the thing taken from the building or intended to be taken consists of "other things of value," an indictment in the language of the statute is bad, unless it particularizes the particular thing taken or to be taken, and alleges that it was a thing of value, or a valuable thing, to wit, cotton, or whatever it was.—Danner v. State, 54 Ala. 127, 25 Am. Rep. 662. See Webb v. State, 52 Ala. 442; Robinson v. State, 52 Ala. 587.

7 Danner v. State, 54 Ala. 127, 25 Am. Rep. 662.

8 Anthony v. State, 29 Ala. 27; People v. Carrell, 31 Cal. App. 793, 161 Pac. 995; State v. Foster, 30 Kan. 365, 2 Pac. 628; State v. Pugh, 15 Mo. 509; State v. Perham, 4 Ore. 188; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; White v. State, 3 Tex. App. 607; Hoskey v. State, 9 Tex. App. 203; Rodriguez v. State, 12 Tex. App. 552.

1 See general discussion, supra, §§ 290, 291; also, supra, §§ 411, 447.

2 State v. Bouknight, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451; State v. Kane, 63 Wis. 260, 6 Am. Cr. Rep. 99, 23 N. W. 488. See State v. Price, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81.

3 Kerr's Cyc. Pen. Code, § 26.

4 People v. Bartley, 12 Cal. App. 773, 108 Pac. 868.

5 Rev. Stats. of 1878, § 4409.

daytime, it is held not to be incumbent upon the state to negative the exception reducing the grade or degree of the offense.[6]

§ 460. —— Degree of crime. An indictment or information charging burglary need not charge the degree under a statute defining different degrees and providing a lesser punishment for the inferior degrees;[1] but in those cases where the offense is thus divided into degrees with varying punishment, the manner in which the burglary was committed should be alleged with such clearness and certainty that the degree may readily be determined from the facts and circumstances alleged.[2]

§ 461. —— Venue or place of commission. The venue or place of the commission of the offense charged must be laid in every indictment or information charging burglary;[1] but an averment that the entry was made in a named county, this will be sufficient without alleging

6 State v. Kane, 63 Wis. 261, 6 Am. Cr. Rep. 99, 23 N. W. 488; Gundy v. State, 72 Wis. 1, 7 Am. Cr. Rep. 262, 38 N. W. 328.

1 People v. Jefferson, 52 Cal. 452; People v. Barnhart, 59 Cal. 381; People v. Shaver, 107 Mich. 562, 65 N. W. 538; People v. Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. Supp. 114; State v. La Croix, 8 S. D. 369, 66 N. W. 944.

Degree to be determined by jury on trial, by court on plea of guilty.—People v. Jefferson, 52 Cal. 452.

Jury may find guilty of either degree.—People v. Barnhart, 59 Cal. 381.

Burglary in third degree, under New York Penal Code, § 498, providing breaking and entering a building with intent to commit a crime shall be burglary in that degree, is sufficiently charged by an indictment alleging accused "feloniously, wilfully and burglariously did break and enter" a designated building, "with intent to commit a crime therein, and with an intent feloniously, wilfully, and unlawfully to steal, take, and carry away therefrom goods, chattels, and personal property in said building then and there being," sufficient without averring the degree.—People v. Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. Supp. 114.

2 People v. Van Gasbeck, 9 Abb. Pr. N. S. (N. Y.) 328.

1 Simpson v. State, 5 Okla. Cr. 57, 113 Pac. 549; Com. v. Richards, 1 Va. Cas. 1.

that the house burglarized was within the body of the county.[2] Where the burglary was committed in another county than the one in which the indictment is returned, into which latter county the goods and property stolen were taken, the facts as to the place where the crime was committed must be specifically set out, under the New York statute[3] in order to bring the offense within the provision of the statute and confer jurisdiction on the court to which the indictment is returned.[4]

Railroad car charged to have been burglarized, and there being uncertainty as to what county the offense was committed in, the indictment or information may charge the offense to have been committed in any county through which the car passed.[5]

§ 462. —— Time of offense. An indictment or information charging burglary must allege the time of commission,[1] although no particular hour need be designated,[2] and it must be averred that the offense was committed in the night-time or the indictment or informa-

2 State v. Reid, 20 Iowa 413; State v. Johnson, 4 Wash. 592, 9 Am. Cr. Rep. 145, 30 Pac. 672.

3 2 Rev. Stats. (1857), p. 727, § 50.

4 Haskens v. People, 16 N. Y. 344.

5 People v. Goodwin, 263 Ill. 99, 104 N. E. 1018.

1 Simpson v. State, 5 Okla. Cr. 57, 113 Pac. 549. See, also, supra, § 162.

2 People v. Burgess, 35 Cal. 115; State v. Ruby, 61 Iowa 86, 15 N. W. 848; State v. Woods, 31 La. Ann. 267; Com. v. Williams, 56 Mass. (2 Cush.) 582; Leisenberg v. State, 60 Neb. 628, 14 Am. Cr. Rep. 193, 84 N. W. 6; State v. Robinson, 35 N. J. L. (6 Vr.) 71.

Contra: State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724.

See, also, supra, § 172.

"About the hour of twelve in the night of the same day," sufficient.—State v. Seymour, 36 Me. 225; Shelton v. Com., 89 Va. 450, 16 S. E. 355.

"By night" is sufficient allegation as to the time of day.—People v. Burgess, 35 Cal. 115; Com. v. Williams, 56 Mass. (2 Cush.) 582; State v. Robinson, 35 N. J. L. (6 Vr.) 71.

"On the second day of February, 1886, and in the night-time of the said day," held to be sufficient in State v. Ruby, 61 Iowa 86, 15 N. W. 848.

tion will be fatally defective,[3] except in those states where, by statute, there is no distinction drawn between breaking and entering in the night-time and breaking and entering in the daytime, in which states there need be no averment as to the hour of the day on which the offense occurred;[4] under such statutes, where no time of day is charged, the offense will be presumed to have been committed in the daytime,[5] and, where alleged, may be treated as surplusage in Iowa,[6] but must be proved as laid in California,[7] and perhaps elsewhere. Under such a statute, where it is alleged in one count that the offense was committed in the night-time and in another it is charged as occurring in the daytime, the court may require the prosecutor to elect upon which he will proceed to trial.[8]

3 Lewis v. State, 16 Conn. 32; Com. v. Kaas, 3 Brewst. (Pa.) 422; Davis v. State, 43 Tenn. (3 Cold.) 77; Com. v. Weldon, 4 Leigh (Va.) 652; Com. v. Mark, 4 Leigh (Va.) 658.

Compare: Lassiter v. State, 67 Ga. 739; Buchanan v. State, 24 Tex. App. 195, 5 S. W. 847; Sampson v. State, (Tex. Cr.) 20 S. W. 708.

4 People v. Smith, 136 Cal. 207, 13 Am. Cr. Rep. 719, 68 Pac. 702; Lassiter v. State, 67 Ga. 739; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809; State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459; Schultz v. State, 88 Neb. 613, 34 L. R. A. (N. S.) 243, 130 N. W. 105; Carr v. State, 19 Tex. App. 635, 53 Am. Rep. 395; Buchanan v. State, 24 Tex. App. 195, 5 S. W. 847; Sampson v. State (Tex. Cr.), 20 S. W. 708; Combs v. State (Tex. Cr.), 49 S. W. 585; Wilks v. State (Tex. Cr.), 51 S. W. 902; Shaffer v. State (Tex. Cr.), 65 S. W. 1072; Newman v. State, 55 Tex. Cr. Rep. 273, 116 S. W. 577; Snodgrass v. State, 67 Tex. Cr. Rep. 451, 148 S. W. 1095; Stephens v. State, 69 Tex. Cr. Rep. 379, 154 S. W. 1001; Howard v. State, — Tex. Cr. Rep. —, 178 S. W. 506.

Under Montana Penal Code, § 2145, on conviction, jury must find the degree.—State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459.

Where committed with force it is unnecessary to state whether committed in the day or night time.—Vargas v. State, 60 Tex. Cr. Rep. 196, 131 S. W. 594.

5 Nicholls v. State, 68 Wis. 416, 60 Am. Rep. 870, 7 Am. Cr. Rep. 106, 32 N. W. 543.

6 State v. Neitzel, 155 Iowa 485, 136 N. W. 532.

7 People v. Smith, 136 Cal. 207, 13 Am. Cr. Rep. 719, 68 Pac. 707.

8 State v. Bouknight, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451.

Specific day on which the offense was committed must be averred,[9] but need not be proved as laid.[10] And it must appear from the face of the indictment that the offense was committed within the period of the statute of limitations.[11]

§ 463. —— MANNER OF COMMISSION, "BURGLARIOUSLY," "FELONIOUSLY," ETC. The necessity for the pleader to make use of certain technical averments in charging burglary has been already discussed;[1] it is sufficient to state here that at common law an indictment or information charging burglary must allege the breaking and entering to have been "burglariously" done with "felonious" intent,[2] but under statute neither word need be used, particularly when the indictment or information is

9 State v. Brown, 24 S. C. 224; Cool v. Com., 94 Va. 799, 26 S. E. 411.

10 Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724.

Allegation as to time is immaterial, and therefore it is sufficient if proven to have been committed within the time limited by the statute for the prosecution of the offense.—Palin v. State, 38 Neb. 862; Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590.

11 See, supra, § 179.

Where the crime was alleged to have been committed on April 19, "one thousand nine hundred and ——," and before the presentment of the indictment on August 30, 1910, it was bad.—Bradford v. State, 62 Tex. Cr. 424, 138 S. W. 119.

As to blank date being fatal, see, supra, § 165.

1 See, supra, § 314.

2 State v. Curtis, 30 La. Ann. 814; State v. McDonald, 9 W. Va. 456; State v. Meadows, 22 W. Va. 766; State v. McClung, 35 W. Va. 280, 13 S. E. 654; State v. Cottrell, 45 W. Va. 837, 32 S. E. 162.

"Burglariously" is a term of art at common law without which burglary can not be charged; no other word or circumlocution can serve the purpose.—1 Hale P. C. 550; 2 East P. C. 512; 2 Bennett & H. Lead. Cr. Cas. 48; Brock's Case, 4 Co. Rep. 39, 76 Eng. Repr. 982; Long's Case, 5 Co. Rep. 120, 77 Eng. Repr. 243.

"Feloniously, burglariously, and with force and arms" did enter in the night-time, is substantially to charge the breaking and entry felonice et burglariter fregit.—People v. Long, 43 Cal. 444.

duly framed in the language of the statute;[3] but in all

[3] People v. Rogers, 81 Cal. 209, 22 Pac. 592; Lyons v. People, 68 Ill. 271; State v. Short, 54 Iowa 392, 6 N. W. 584; State v. Curtis, 30 La. Ann. 814; State v. Jordan, 39 La. Ann. 340, 1 So. 655; Tully v. Com., 45 Mass. (4 Metc.) 357; Com. v. Carson, 166 Pa. St. 179, 30 Atl. 985; State v. Lewis, 13 S. D. 166, 82 N. W. 406; Reed v. State, 14 Tex. App. 662; Jones v. State, (Tex. Cr.) 55 S. W. 491.

Tully v. Com., supra, deciding that the Massachusetts definition of burglary does away with the common law requisites of an indictment charging that offense, so that the word "burglariously" is no longer essential to validity, was declared by George Bemis (in Law Reporter, Jan., 1847, p. 387) to be "an important one, because in connection with a class of cases which have begun to form a line of precedents in the Massachusetts courts (that is, Com. v. Squires, 42 Mass. (1 Metc.) 258; Devoe v. Com., 44 Mass. (3 Metc.) 316; Josslyn v. Com., 47 Mass. (7 Metc.) 236). The old landmarks are fast vanishing in the jurisprudence of that respectable commonwealth before the supposed efficacy of statute phraseology—phraseology, too, which has hardly changed a whit for the last half century, and under which common law technicalities have been deemed hitherto indispensable."

"Feloniously" qualifying word "steal" in the statute, its omission in an indictment charging conspiracy to break and enter the storehouse of another with intent to steal, is fatal.—Scudder v. State, 62 Ind. 13.

—In Louisiana the common law crime of burglary is unknown by name, while the statutory offense is what would be burglary at common law, and it is sufficient in the indictment to charge that the offense was done "feloniously" without the use of the term "burglariously."—State v. Curtis, 30 La. Ann. 413; State v. Newton, 30 La. Ann. 1253; State v. Jordan, 39 La. Ann. 340.

"Property of another" omitted in an indictment charging accused did "unlawfully, feloniously and burglariously break and enter" with intent to steal certain meat therein, held fatal. — Barnhart v. State, 154 Ind. 117, 56 N. E. 212.

"Wilfully and maliciously, and with force" being the language of the statute, an indictment charging the accused "feloniously, wilfully, and burglariously did break and enter" is sufficient, those words being the equivalent of the statutory language. — Shotwell v. State, 43 Ark. 345.

An allegation that accused maliciously, feloniously, and burglariously broke and entered is equivalent to saying that the breaking was with force.—Parnell v. State, 86 Ark. 241, 110 S. W. 1036.

—"Forcibly" omitted does not vitiate where the charge is that accused "wilfully, feloniously, and maliciously broke and entered."—Cunningham v. Com., 11 Ky. L., Rep. 783, 13 S. W. 104.

—"Maliciously" omitted will not vitiate where it is charged accused "wilfully, forcibly and feloniously" did the act, as these words import and in effect charge malice. — Johns v. State, 88 Neb. 145, 129 N. W. 247.

such cases the act should be charged to have been unlawfully done.[4]

Entering without breaking, either in the daytime or night-time, with intent to commit a misdemeanor, not constituting the offense of burglary, the indictment or information need not charge that the offense was done burglariously or wilfully and feloniously.[5]

§ 464. —— Alleging want of consent. The general rule is that an indictment or information charging burglary and larceny from a building need not allege want of consent to the entry or want of consent to the taking of property therefrom, that fact being implied from the language necessary to be used in charging the offense; but in Texas, under the statute, it seems that it is necessary to negative consent to entry[1] and to allege want of consent to the taking of the property,[2] and where the property is jointly owned consent must be negatived as to each of the owners;[3] but where the entry is alleged to have been by force, the want of the owner's or occupier's consent need not be specifically alleged,[4] and the same is true when there is a charge of breaking and entering.[5]

4 State v. Boggs, 4 Penn. (Del.) 95, 53 Atl. 360.

5 Tilly v. State, 21 Fla. 242.

1 Entry without consent of occupant being charged, not necessary to aver without consent of any one with authority to give such consent.—Mace v. State, 9 Tex. App. 110; Reed v. State, 14 Tex. App. 662.

2 Young v. State, 42 Tex. Cr. Rep. 301, 14 Am. Cr. Rep. 133, 59 S. W. 890; Moray v. State, 61 Tex. Cr. Rep. 547, 135 S. W. 569.

Allegations of indictment in Fox v. State, (Tex. Cr.) 135 S. W. 570, were held insufficient for failure to allege that the stolen goods were taken without the owner's consent.—Fox v. State, 61 Tex. Cr. Rep. 544, 135 S. W. 570.

3 Young v. State, 42 Tex. Cr. Rep. 301, 14 Am. Cr. Rep. 133, 59 S. W. 890.

4 Summers v. State, 9 Tex. App. 396; Buntain v. State, 15 Tex. App. 485; Langford v. State, 17 Tex. App. 445; Dennis v. State, 71 Tex. Cr. Rep. 162, 158 S. W. 1008.

5 Sullivan v. State, 13 Tex. App. 462, overruling Brown v. State, 7 Tex. App. 619; Smith v. State, 22 Tex. App. 350, 3 S. W. 238; Dennis v. State, 7 Tex. Cr. Rep. 162, 158 S. W. 1008.

§ 465. —— ATTEMPT TO COMMIT THE OFFENSE. In those cases where the statute defining and punishing burglary also defines and punishes an attempt to commit the crime, or attempts to commit crime generally are defined and punishment prescribed in another statute or section of a code,[1] an indictment charging an attempt to commit burglary framed in the language of the statute is sufficient,[2] where as thus framed the indictment contains all the elements of the crime sought to be charged, otherwise these elements must be specifically alleged.[3] The indictment or information must allege, not only the intent[4] to commit burglary, but also the overt acts relied upon as constituting the attempt.[5]

1 See People v. Jones, 263 Ill. 564, 105 N. E. 744.

2 People v. Murray, 67 Cal. 103, 6 Am. Cr. Rep. 54, 7 Pac. 178. See, also, ante, § 458.

3 Charging accused "in the nighttime, feloniously did attempt to break and enter, with intent goods and chattels in said building then and there being found then and there feloniously to steal, take and carry away, and in such attempt" did specified acts, sufficiently charged an attempted burglary.—Com. v. Shedd, 140 Mass. 451, 5 N. E. 254.

4 **Intent may be inferred** from the acts proven.—Com. v. Shedd, 140 Mass. 451, 5 **Am. Cr. Rep. 61,** 5 N. E. 254.

5 State v. Doran, 99 Me. 329, 105 **Am. St. Rep.** 278, 59 Atl. 440; Com. v. Shedd, 140 Mass. 451, 5 **Am. Cr. Rep.** 61, 5 N E. 254; Smith v. State, 60 Neb. 204, 14 **Am. Cr. Rep.** 146, 94 N. W. 106; Clarke's Case, 6 Gratt. (Va.) 675; Hicks v. Com., 86 Va. 223, 19 **Am. St. Rep.** 891, 9 S. E. 1024.

Attempt to commit burglary involves guilty intent, but the law does not punish a mere guilty intent; some overt act to carry out that intent must be alleged and proved. See Gray v. State, 63 Ala. 66; State v. Wilson, 30 Conn. 500; Cunningham v. State, 49 Miss. 685; People v. Moran, 123 N. Y. 254, 20 **Am. St. Rep.** 732, 10 **L. R. A.** 109, 8 N. Y. Cr. Rep. 105, 25 N. E. 412; State v. Jordan, 75 N. C. 27; State v. Colvin, 90 N. C. 717; Smith v. Com., 54 Pa. St. 209, 93 **Am. Dec.** 686; Hicks v. Com., 86 Va. 223, 19 **Am. St. Rep.** 891, 9 S. E. 1024; State v. Baller, 26 W. Va. 90, 53 **Am. Rep.** 66.

—"**Attempt implies more than an intention** formed. Some step toward consummation must be taken before the intention becomes an attempt" (Gray v. State, 63 Ala. 66, 73), and "the act must reach far enough toward the accomplishment of the desired result as to be the commencement of the consummation of the offense after the preparations are made."—

Particular felony intended to be committed in the unlawful breaking and entering must be alleged.[6] It is not sufficient to aver an unlawful breaking and entering with intent to commit one of the felonies mentioned in a designated statute, or a specified section of the code, under which the indictment is drawn,[7] or to allege an attempt to commit a felony, the nature of which is to the grand jurors unknown.[8] However, the felony intended to be committed on the unlawful breaking and entering need not be as fully and specifically set forth as is required in an indictment charging the actual commission of the felony.[9]

§ 466. INTENT MUST BE ALLEGED. The general rule, both at common law and under statute, is that an averment of the existence of an intent, at the time of breaking into and entering the building, to steal, or to commit some other felony, is essential to make an indictment or information charging burglary sufficient,[1] although there are

Hicks v. Com., 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024.

—Mere preparation for an attempt is not indictable. See Kerr's Whart. Crim. Law, § 219.

6 Smith v. State, 68 Neb. 204, 94 N. W. 106.

"Violently" and against her will to ravish a named female, occupant of the house unlawfully entered, held not to be a sufficient allegation of the felony intended to be committed in breaking and entering.—People v. Jones, 263 Ill. 564, 105 N. E. 744.

7 Smith v. State, 68 Neb. 204, 14 Am. Cr. Rep. 146, 94 N. W. 106.

8 People v. Jones, 263 Ill. 564, 105 N. E. 744.

9 It is ordinarily sufficient to state the intended offense generally as by alleging "an intent to steal, or commit the crime of larceny, rape, or arson."—State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440.

1 Oliver v. State, 17 Ala. 587; Ogletree v. State, 28 Ala. 693; Murray v. State, 48 Ala. 675; Bell v. State, 48 Ala. 684, 17 Am. Rep. 40; Barber v. State, 78 Ala. 19; Shotwell v. State, 43 Ark. 345; Reed v. State, 66 Ark. 110, 49 S. W. 350; People v. Nelson, 58 Cal. 104; State v. Eaton, 3 Harr. (Del.) 544; State v. Lockhart, 24 Ga. 420; State v. Gay, 25 La. Ann. 472; Moore v. Com., 47 Mass. (6 Metc.) 243, 39 Am. Dec. 724; People v. Stewart, 44 Mich. 484, 7 N. W. 71; State v. Buchanan, 75 Miss. 349, 22 So. 875; Draughn v. State, 76 Miss. 574, 11 Am. Cr. Rep. 192, 25 So. 153; Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Jones v. State, 11 N. H. 269, 2 Ben. & H. Lead. Cr. Cas. 46; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; State

cases holding that burglary, in and of itself, is a felony,[2] and that an indictment charging burglary may be good without the allegation of an intent to commit a felony, where it shows that a felony was in fact committed.[3]

The particular felony intended to be committed must be alleged,[4] it not being sufficient to allege "some crime

v. Robertson, 32 Tex. 159; State v. Brady, 14 Vt. 353.

Charging general intent to steal, only, insufficient. — Webster v. State, 9 Tex. App. 75.

Intent sufficiently charged in State v. Powell, 61 Kan. 81, 58 Pac. 968; State v. Neddo, 92 Me. 71, 42 Atl. 253; State v. Taylor, 136 Mo. 66, 37 S. W. 907; State v. Ellsworth, 130 N. C. 690, 41 S. E. 548; State v. Staton, 133 N. C. 642, 45 S. E. 362.

2 See Jones v. State, 12 Ga. App. 813, 78 S. E. 474.

Under statute, of course, burglary and grand larceny are distinct felonies of the same grade, subjected to the same nature of punishment, though committed at one and the same time and in the carrying out of an unlawful breaking into and entering and may be joined in the same indictment, but are not subject to the doctrine of merger. See Johnson v. State, 29 Ala. 62, 65 **Am. Dec.** 383; Wilson v. State, 37 Ala. 134; Bell v. State, 48 Ala. 684, 17 **Am. Rep.** 40; Hamilton v. State, 36 Ind. 280, 286, 10 **Am. Rep.** 22.

3 Barber v. State, 78 Ala. 19; In re Saxton, 2 Harr. (Del.) 533; Olive v. Com., 68 Ky. (5 Bush) 376; State v. Neddo, 92 Me. 71, 42 Atl. 253; Com. v. Hope, 39 Mass. (22 Pick.) 6; Com. v. Hersey, 84 Mass. (2 Allen) 173; State v. Taylor, 136 Mo. 66, 37 S. W. 907; Jones v. State, 11 N. H. 269, 2 Ben. & H. Lead. Cr. Cas. 46; State v. Johnson, 119 N. C. 883, 26 S. E. 163; Com. v. Brown, 3 Rawle (Pa.) 207; Davis v. State, 43 Tenn. (3 Cold.) 77; Pardue v. State, 63 Tenn. (4 Baxt.) 10; Rex v. Furnival, 1 R. & R. 331; Dobbs' Case, 2 East P. C. 513.

4 People v. Nelson, 58 Cal. 104; State v. Eaton, 3 Harr. (Del.) 554; State v. Lockhart, 24 Ga. 420; Kyle v. Com., 111 Ky. 404, 23 Ky. L. Rep. 708, 14 **Am. Cr. Rep.** 143, 63 S. W. 782, overruling Slaughter v. Com., 15 Ky. L. Rep. 569, 24 S. W. 622; State v. Celestin, 138 La. 407, 70 So. 342; State v. Buchanan, 75 Miss. 349, 22 So. 875; Mason v. People, 26 N. Y. 200.

Contra: State v. Groves, 80 Ohio St. 361, 17 **Ann. Cas.** 361, 88 N. E. 1096; State v. Williamson, 50 Tenn. (3 Heisk.) 483; Portwood v. State, 29 Tex. 47, 94 **Am. Dec.** 258; Wilburn v. State, 41 Tex. 237; Simms v. State, 2 Tex. App. 110; Philbrick v. State, 2 Tex. App. 517; Rodriguez v. State, 12 Tex. App. 552.

"A misdemeanor or a felony" being charged in indictment or information as the intent of the accused at the time of breaking into and entering, is sufficient, under the Washington statute.—

to the grand jurors unknown" was intended to be committed by the accused,[5] or charging an intention to commit a crime designated in a particular section of the code or statute.[6] This is the general rule of the adjudicated cases, and the only safe course for the pleader to follow. The mere allegation of an intent to commit a felony, without specifying a particular felony, is a mere conclusion of the pleader.[7] The facts constituting the elements of the particular felony need not be alleged, it being sufficient to name the felony;[8] yet the mere allegation of an intent to commit a designated felony, without an averment of the overt acts tending towards its accomplishment, is said not to be sufficient; those overt acts must

State v. Lewis, 42 Wash. 672, 85 Pac. 668.

"Broke and entered a railroad car with intent to commit a felony," though substantially in the language of the statute, is insufficient because it contains no description of the overt acts of the accused in attempting to commit the crime charged, nor any specification of the particular felony which the accused is charged with attempting to commit after breaking into the car, fails to apprise the defendant of the specific offense with which he is charged as required by the constitution (Me. Const., art. 1, § 6), and for that reason is fatally defective.—State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440.

Describing such felony with all its statutory evidence, requirement under Texas code.—Rodriguez v. State, 12 Tex. App. 552.

—Felony intended to be committed need not be set forth fully and technically.—Com. v. Doherty, 64 Mass. (10 Cush.) 52.

5 State v. Buchanan, 75 Miss. 349, 22 So. 875.

6 Smith v. State, 68 Neb. 204, 94 N. W. 106.

7 Kyle v. Com., 111 Ky. 404, 23 Ky. L. Rep. 708, 14 Am. Cr. Rep. 143, 63 S. W. 782, overruling Slaughter v. Com., 15 Ky. L. Rep. 569, 24 S. W. 622.

8 Shotwell v. State, 43 Ark. 345; People v. Burns, 63 Cal. 614; People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074; Houser v. State, 58 Ga. 78; Mecum v. State, 95 Iowa 433, 64 N. W. 286; State v. Watson, 102 Iowa 651, 72 N. W. 283; State v. Powell, 61 Kan. 81, 58 Pac. 968; Miller v. Com., 14 Ky. L. Rep. 225, 20 S. W. 198; McRae v. State, 20 Ky. L. Rep. 1199, 49 S. W. 22; Radley v. Com., 28 Ky. L. Rep. 477, 89 S. W. 519 ("with the intent to commit a felony therein, to-wit, grand larceny"); State v. Gay, 25 La. Ann. 472; Com. v. Doherty, 64 Mass. (10 Cush.) 52; State v. Carr, 146 Mo. 1, 47 S. W. 790; State v. Shelton, 90 Tenn. 539, 18 S. W. 253.

be set forth,[9] or the indictment or information will be fatally defective and can not be cured by verdict.[10]

§ 467. —— Adultery. An indictment or information charging accused with breaking into and entering a dwelling-house in the night-time with the intent to commit adultery, need not set out the name of the female with whom accused intended to commit the adultery.[1]

§ 468. —— Arson. An indictment or information charging that accused entered a designated building or store with the felonious intention then and there to commit arson, sufficiently specifies the felony which it is charged the accused intended to commit,[1] without stating the facts constituting the crime of arson.[2] But it has been held that under the Alabama statute,[3] an averment that the accused broke and entered a described building or store "with intent to set fire to or burn" the property or store of a person named, without averring that accused broke and entered with the intent "wilfully" to set fire to and burn, is bad on demurrer.[4]

9 See, supra, § 465; also, State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440.

Acts intended to be committed by accused should be set forth, so that court may know whether they constitute a felony.—Kyle v. Com., 111 Ky. 404, 23 Ky. L. Rep. 708, 63 S. W. 723, overruling Slaughter v. Com., 15 Ky. Law Rep. 569, 24 S. W. 622.

Entry with felonious and burglarious intent the property of said A, being in said house, "feloniously and burglariously to steal," held not to be sufficient to charge burglary under the Arkansas statute, providing two grades of larceny, one of which is a misdemeanor and the other a felony.—Reed v. State, 66 Ark. 110, 49 S. W. 350.

10 In re McVey, 50 Neb. 481, 70 N. W. 51; Smith v. State, 68 Neb. 204, 14 Am. Cr. Rep. 146, 94 N. W. 106. See In re Lloyd, 51 Kan. 501, 33 Pac. 307; State v. Frazier, 53 Kan. 87, 42 Am. St. Rep. 274, 36 Pac. 58; Proctor v. Com., 14 Ky. L. Rep. 248, 20 S. W. 213; State v. Harney, 101 Mo. 470, 14 S. W. 657; State v. Colvin, 90 N. C. 717.

1 State v. Hall, 168 Iowa 221, 150 N. W. 97.

1 Shotwell v. State, 43 Ark. 345; People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

2 People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

3 Rev. Code (1873), § 3695.

4 Pairo v. State, 49 Ala. 25.

§ 469. —— Larceny. Where the indictment or information charges that the accused broke and entered, or attempted to break and enter,[1] any building specified in the statute with the intent to steal,[2] the allegation must

1 See, supra, § 465.

2 **As to sufficiency of allegations** in indictment or information charging intent to steal. See: KAN.—State v. Powell, 61 Kan. 85, 58 Pac. 968. KY.—Mitchell v. Com., 88 Ky. 349, 11 S. W. 209; Kyle v. Com., 111 Ky. 404, 23 Ky. Law Rep. 708, 14 Am. Cr. Rep. 143, 63 S. W. 782, overruling Slaughter v. Com., 15 Ky. Law Rep. 569, 24 S. W. 622; Radley v. Com., 28 Ky. Law Rep. 477, 89 S. W. 519. LA.—State v. Curtis, 116 La. 749, 41 So. 58. ME.—State v. Neddo, 92 Me. 71, 42 Atl. 253. MASS.—Josslyn v. Com., 47 Mass. (6 Metc.) 263. MISS.—Draughn v. State, 76 Miss. 574, 25 So. 153. MO.—State v. Henly, 30 Mo. 509; State v. McGraw, 87 Mo. 161; State v. Taylor, 136 Mo. 66, 37 S. W. 907. NEB.—Smith v. State, 68 Neb. 204, 94 N. W. 106. N. C.—State v. Taylor, 98 N. C. 704, 4 S. E. 29; State v. Ellsworth, 130 N. C. 690, 41 S. E. 548. S. D.—State v. Lewis, 13 S. D. 166, 82 N. W. 406. TENN.—State v. Shelton, 90 Tenn. (6 Pick.) 539, 18 S. W. 253. TEX.—West v. State, 35 Tex. 89; Webster v. State, 9 Tex. App. 75; Jones v. State, (Tex. Cr.) 55 S. W. 491.

"Broke into and entered" a building described, being charged without the allegation of an "intention to steal, take and carry away," but further alleging that accused "feloniously took and carried away" certain specified articles of personal property of a specified person "of the value of more than one hundred dollars," does not charge burglary, but grand larceny only, by reason of the omission of the allegation of an intent to steal.—Bell v. State, 48 Ala. 684, 17 Am. Rep. 40.

Charge of breaking into and entering need not be in the words of the statute.—Josslyn v. Com., 47 Mass. (6 Met.) 236.

Charging intent to steal in general terms insufficient under Texas Penal Code.—Webster v. State, 9 Tex. App. 75.

Degree of larceny intended to be committed by accused need not be alleged.—People v. Smith, 86 Cal. 238, 24 Pac. 988.

"Did feloniously and burglariously break and enter" with intent to commit the crime of larceny therein, being duly charged, the indictment is insufficient unless it further charges an intent to "feloniously and burglariously take and carry away" specified goods and chattels in such house.—Draughn v. State, 76 Miss. 574, 25 So. 153.

"Did steal, take, and carry away" designated goods from a dwelling-house, held to be a sufficient averment of felonious intention.—State v. Neddo, 92 Me. 71, 42 Atl. 253.

"Feloniously" or "feloniously and burglariously" need not be used in an indictment charging a breaking and entering "with intent to steal, take, and carry away by fraud and stealth" certain described goods of another person

set out the acts required to constitute the crime of steal-

"with intent to deprive," etc.—State v. Lewis, 13 S. D. 166, 82 N. W. 406. See, also, Jones v. State, (Tex. Cr.) 55 S. W. 491.

General intent to steal completes the offense, and an indictment averring such general intent, without setting out facts or particulars, has been held sufficient in Massachusetts.—Com. v. Doherty, 64 Mass. (10 Cush.) 52.

Intent to "feloniously steal" must be charged in an indictment alleging conspiracy to commit burglary.—Smith v. State, 93 Ind. 67.

"Intent to steal and commit a felony therein" sufficiently charges the intent with which building burglarized.—State v. Powell, 61 Kan. 81, 58 Pac. 968.

"Intent to steal, take and carry away" the "drygoods, groceries and money of said A, of the value of one hundred dollars," sufficiently defines the felony intended to be committed.—State v. Shelton, 90 Tenn. (6 Pick.) 539, 18 S. W. 253.

"Intent to steal the goods, chattels and money of A, and also with intent to steal the goods, chattels and money of B," in an indictment alleging burglary, does not charge two distinct offenses.—State v. Christmas, 101 N. C. 749, 8 S. E. 361.

"Larcey" charged as the crime accused intended to commit in breaking into and entering a stable, the indictment was held bad, because no such felony as "larcey" is known to the law. The court say: "'Larcey' is certainly not 'larceny,' nor does the maxim of idem sonans apply."—People v. St. Clair, 56 Cal. 406.

Mere clerical errors or misspelled words, in an intelligent and efficient administration of the criminal law, are not permitted to defeat the ends of justice, where it is reasonably manifest that the error is a mere clerical one, or the misspelling does not change the force and effect of the indictment. It is just such petty quibbles or unjustifiable and inexcusable ultra technical decisions as the above—and it is a reproach to the judiciary of the country that there are so many of them—which bring the administration of the criminal law into deserved disrepute in various parts of the country; not being based upon any sound principle of law or established rule of construction, maintaining no vital principle, protecting no fundamental personal right, they are indefensible from any view, and the sole and only purpose they serve is to debauch the administration of the criminal law, defeat the ends of justice, and to turn loose to prey upon society unwhipped of justice persons who have been proven to be guilty of the crime charged, and richly meriting punishment. The decisions, collected elsewhere in this treatise, show that in an enlightened and efficient administration of the criminal law, such trifles as the obvious clerical error of omitting an "n," is not permitted to defeat the ends of justice. See, supra, § 322.

"Larceny" employed instead of statutory term "felony and other infamous crime," objection can not be taken after verdict on motion to quash.—State v. Tytus, 98 N. C. 704, 4 S. E. 29.

ing at common law,[3] the object charged to be the intention of the accused to steal must be the subject-matter of a larceny,[4] and it must be alleged that the property intended to be thus taken was the property of another.[5]

§ 470. —— Rape. An indictment or information charging breaking into and entering a dwelling-house in the night-time with the intent to commit therein the crime of

"Larceny," in statute punishing breaking into and entering a shop adjoining a dwelling-house "with intent to commit 'larceny,'" is not a "term of art" which is indispensable in an indictment charging the offense, and for which no substitute, description or definition is permissible.—Josslyn v. Com., 47 Mass. (6 Metc.) 236.

Larceny need not be alleged in an indictment for burglary in Georgia.—Jones v. State, 12 Ga. App. 813, 78 S. E. 474.

Taking away with the felonious intent to deprive the owner permanently of his property and converting it to the use of the accused without the owner's consent, being omitted from an indictment in the language of the statute charging burglary with the intent to steal, does not render the indictment defective.—Mitchell v. Com., 88 Ky. 349, 11 S. W. 209; McRea v. Com., 20 Ky. Law Rep. 1199, 49 S. W. 22.

[3] Sullivan v. State, 7 Okla. Cr. Rep. 10, 123 Pac. 569.

Compare: Com. v. Doherty, 64 Mass. (10 Cush.) 52, holding that the felony intended to be committed need not be set forth fully and technically.

"Burglariously" a term of art necessary to be used in West Virginia.—State v. Cottrell, 45 W. Va. 837, 32 S. E. 162.

Theft of specific articles alleged in a charge of breaking and entering "with intent to commit theft," sufficient without setting out the essential elements of the theft.—Williams v. State, 24 Tex. App. 69, 5 S. W. 838; Bigham v. State, 31 Tex. Cr. Rep. 244; 20 S. W. 577.

[4] **Dog not subject-matter of larceny** at common law and in some of the states, and an indictment charging burglary with intent to steal and carry away a dog is fatally defective.—State v. Lymus, 26 Ohio St. 400, 20 **Am. Rep.** 772. See Ward v. State, 48 Ala. 161, 17 **Am. Rep.** 31; Harrington v. Miles, 11 Kan. 480, 15 **Am. Rep.** 355; Findlay v. Bear, 8 Serg. & R. (Pa.) 571; Seentell v. New Orleans & C. R. Co., 166 U. S. 698, 41 **L. Ed.** 1169, 17 Sup. Ct. Rep. 693; R. v. Robinson, Bell's C. C. 34, 5 Jur. N. S. 203, 28 L. J. M. C. 58.

The common law rule has been changed by statute in most of the states in respect to dogs being property and subject-matter of larceny.—See Hamby v. Samson, 105 Iowa 112, 67 **Am. St. Rep.** 285, 40 **L. R. A.** 508, 74 N. W. 918; Rockwell v. Oakland Circuit Judge, 133 Mich. 11, 94 N. W. 378; People v. Campbell, 4 Park. Cr. Rep. 386.

[5] People v. Mendelson, 264 Ill. 453, 106 N. E. 249.

rape, will be sufficient where the accused is informed by it of the nature of the offense with which he is charged, without setting forth the offense of rape[1] technically and fully,[2] and need not aver under which set of circumstances specified in the statute[3] the crime was committed or intended to be accomplished.[4] In North Carolina a charge that accused so entered the dwelling-house of a named female, "with the intent feloniously and violently, and against her will, the said" female "to carnally know and abuse," has been held to be a sufficient allegation of the intent;[5] but in Illinois an allegation of a like entry "with intent violently and against her will to ravish" said female, has been held to be insufficient to support a conviction.[6]

§ 471. DESCRIPTION OF PROPERTY STOLEN OR TO BE STOLEN—OWNERSHIP AND VALUE. In an indictment or information charging burglary with the intent to steal, take and carry away goods and chattels[1] or personal property[2] of another, it is not necessary to describe the property, or aver what particular or specific goods, chat-

1 **Elements of the offense** intended to be committed, must be set forth under Texas statute.—Allen v. State, 18 Tex. App. 120. See Burke v. State, 5 Tex. App. 74.

Charging accused unlawfully and forcibly broke and entered into a dwelling house in the night-time "with intent then and there to commit the crime of rape," has been held not to sufficiently charge an intent to commit rape under Texas statute.—State v. Williams, 41 Tex. 98.

2 State v. Gay, 25 La. Ann. 472; Com. v. Doherty, 64 Mass. (10 Cush.) 52.

"Then and there" intended to commit the rape, need not be alleged in an indictment charging breaking and entering with intent to commit rape.—Com. v. Doherty, 64 Mass. (10 Cush.) 52.

3 As Kerr's Cal. Pen. Code, 1915, § 261.

4 People v. Burns, 63 Cal. 614.

5 State v. Staton, 133 N. C. 642, 45 S. E. 362.

6 People v. Jones, 263 Ill. 564, 105 N. E. 744. The objection to the indictment was that it did not charge intent to "forcibly" accomplish that object, force being a necessary element of rape, and "violently," as charged, is not synonymous with "forcibly."

1 **"Personal"** before the words "goods and chattels" not required to render indictment valid.—Choen v. State, 85 Ind. 209.

2 **"Property"** of a person named charged as intended to be stolen,

tels or property was intended to be taken,[3] or to allege that accused intended to steal property[4] then and there being in said house or building,[5] the simple charge of breaking and entering with the intent to commit larceny being sufficient,[6] as the essence of the offense is the intent to commit larceny.[7]

Ownership of goods or chattels or property stolen, or intended to be stolen, need not be alleged,[8] such allegation being mere surplusage;[9] yet, where laid, ownership

does not render indictment bad for uncertainty on the ground that the word "property" includes both real estate and personal property. —Sims v. State, 136 Ind. 358, 36 N. E. 278.

3 ALA.—Kelly v. State, 72 Ala. 244. CAL.—People v. Ah Ye, 31 Cal. 451. FLA.—Jones v. State, 18 Fla. 889. GA.—Houser v. State, 58 Ga. 78; Lanier v. State, 76 Ga. 304; Boyd v. State, 4 Ga. App. 273, 61 S. E. 134. IDAHO—People v. Stapleton, 2 Idaho 49, 3 Pac. 6. OHIO—Spencer v. State, 13 Ohio 401. S. C.—State v. Langford, 55 S. C. 322, 74 **Am. St. Rep.** 746, 33 S. E. 370. TEX.—Summers v. State, 9 Tex. App. 396; Neiderluck v. State, 23 Tex. App. 38, 3 S. W. 573; Stephens v. State, 69 Tex. Cr. Rep. 379, 154 S. W. 1001. VA.—Wright v. Com., 82 Va. 183.

4 See authorities in footnote 2, this section.

5 People v. Shaler, 32 Cal. 36.

6 People v. Shaler, 32 Cal. 36; Choen v. State, 85 Ind. 209; State v. Jones, 10 Iowa 206; Womack v. State, 74 Tenn. (6 Lea) 146.

7 State v. Jennings, 79 Iowa 513, 44 N. W. 799; State v. Ray, 79 Iowa 765, 44 N. W. 800.

8 DEL.—State v. Lee, Houst. C. C. 335. FLA.—Jones v. State, 18 Fla. 889; Crosky v. State, 46 Fla. 122, 13 **Am. Cr. Rep.** 682, 35 So. 153. GA.—Lanier v. State, 76 Ga. 304; Berry v. State, 92 Ga. 47, 17 S. E. 1006. See Kidd v. State, 101 Ga. 528, 28 S. E. 990; Bradley v. State, 2 Ga. App. 622, 58 S. E. 1064; Boyd v. State, 4 Ga. App. 273, 61 S. E. 134. IOWA—State v. Morrisey, 22 Iowa 158; State v. Jennings, 79 Iowa 513, 44 N. W. 799; State v. Ray, 79 Iowa 765, 44 N. W. 800. MASS.—Com. v. Moore, 130 Mass. 45. MO.—State v. Tyrrell, 98 Mo. 354, 11 S. W. 734; State v. Riddle, 245 Mo. 451, **Ann. Cas.** 1914A, 884, 43 **L. R. A.** (N. S.) 150, 150 S. W. 1044. VT.—State v. Hodgdon, 89 Vt. 148, 94 Atl. 301. VA.—Wright v. Com., 82 Va. 183. TEX.—Mays v. State, 50 Tex. Cr. Rep. 391, 97 S. W. 703; Roberson v. State, 51 Tex. Cr. Rep. 335, 101 S. W. 800; Harris v. State, 51 Tex. Cr. Rep. 564, 103 S. W. 390; Moray v. State, 61 Tex. Cr. Rep. 547, 135 S. W. 569. WIS.—Neubrandt v. State, 53 Wis. 89, 9 N. W. 824. ENG.—Reg. v. Whitehead, 9 Car. & P. 429, 38 E. C. L. 175; Rex v. Jenks, 2 Leach C. C. 774.

9 Brown v. State, 72 Miss. 990, 18 So. 431; James v. State, 77 Miss. 370, 78 **Am. St. Rep.** 527, 26 So. 929; State v. Simpson, 32 Nev.

must be proved as laid,[10] although there are authorities to the contrary.[11] Where no ownership of goods or property is alleged, it seems, the charge is one of breaking and entering, merely.[12] Where ownership is alleged, it may be laid in different persons.[13]

138, Ann. Cas. 1912C, 115, 104 Pac. 244.

10 State v. Lee, Houst. C. C. (Del.) 335; Crosky v. State, 46 Fla. 122, 13 Am. Cr. Rep. 682, 35 So. 153; Com. v. Moore, 130 Mass. 45; Mays v. State, 50 Tex. Cr. Rep. 391, 97 S. W. 703; Roberson v. State, 51 Tex. Cr. Rep. 335, 101 S. W. 800; Harris v. State, 51 Tex. Cr. Rep. 564, 103 S. W. 390; Moray v. State, 61 Tex. Cr. Rep. 547, 135 S. W. 569; Neubrandt v. State, 53 Wis. 89, 9 N. W. 824.

11 Kidd v. State, 101 Ga. 528, 28 S. E. 990; Johnson v. Com., 87 Ky. 189, 7 S. W. 927; State v. Nelson, 101 Mo. 477, 10 L. R. A. 39, 14 S. W. 718; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34; State v. Riddle, 245 Mo. 451, Ann. Cas. 1914A, 884, 43 L. R. A. (N. S.) 150, 150 S. W. 1044; State v. Simpson, 32 Nev. 138, Ann. Cas. 1912C, 115, 104 Pac. 244; Mulrooney v. State, 26 Ohio St. 326.

In Kentucky such a variance is no ground for reversal.—Johnson v. Com., 87 Ky. 189, 7 S. W. 927.

12 Bowen v. State, 106 Ala. 178, 17 So. 335.

13 People v. Thompson, 28 Cal. 214.

Executor of estate of decedent is to be alleged as the owner where a grave is entered and the grave-clothes of the corpse taken. —2 Hale P. C. 181.

Joint ownership of property taken—e. g., partnership property, and the like—indictment or information may lay ownership in any one of the joint owners. See Spalding v. State, 17 Ala. 440; Com. v. O'Brien, 94 Mass. (12 Allen) 183; State v. Ellison, 58 N. H. 325.

Special ownership in property taken—in sheriff by virtue of a levy, in janitor of a school building or an officer of a corporation, by virtue of his position—ownership may be so laid in the indictment or information.—State v. Burns, 109 Iowa 436, 80 Pac. 545; Linhart v. State, 33 Tex. Cr. Rep. 504, 27 S. W. 260; Smith v. State, 34 Tex. Cr. Rep. 124, 29 S. W. 775; Lega v. State, 36 Tex. Cr. Rep. 38, 34 S. W. 926, 35 S. W. 381; Humphrey v. State, (Tex. Cr.) 40 S. W. 489; Lamater v. State, 38 Tex. Cr. Rep. 249, 42 S. W. 304; Shelton v. State, 52 Tex. Cr. Rep. 611, 108 S. W. 679; Clark v. State, 58 Tex. Cr. Rep. 181, 125 S. W. 12.

Bailee—e. g., county treasurer, and the like—where property was in his possession, may be alleged as owner.—Bradley v. State, 2 Ga. App. 622, 58 S. E. 1064; People v. Smith, 1 Park. Cr. Rep. (N. Y.) 329; Huling v. State, 17 Ohio St. 583.

—Gratuitous bailee, ownership of stolen property may be laid in. —Wimbish v. State, 89 Ga. 294, 15 S. E. 325.

—Railroad company may be alleged to be the owner in an indictment charging breaking into a railroad car and stealing goods in the possession of the railroad

Value of the goods or chattels or other property stolen, or intended to be stolen, according to the almost universal rule, need not be alleged,[14] as it will be presumed that the property had some value,[15] and the fact that the theft of property of a value of less than twenty dollars does not constitute a felony, does not change the rule.[16] In those cases, however, where the statute provides different grades of the larceny committed in burglary, and makes those grades depend upon the value of the goods or property stolen, or intended to be stolen, if it is sought to charge and secure a conviction for the higher grade or degree of the offense, it is necessary to allege the value of the goods or chattels or property taken or intended to be taken.[17]

company for the purposes of transportation and delivery.—State v. Davenport, 25 Del. (2 Boyce) 12. See Stokes v. State, 84 Ga. 258, 10 S. E. 740; Hall v. State, 7 Ga. App. 115, 66 S. E. 390; State v. Long, 5 Ohio Dec. 617.

—Widow in possession of property of decedent's estate at time of burglarious entering and taking, may be laid as the owner of the property taken.—Com. v. McGorty, 114 Mass. 299.

14 ALA.—Matthews v. State, 55 Ala. 65. CAL.—People v. Ah Ye, 31 Cal. 451. GA.—Lanier v. State, 76 Ga. 304; Tarver v. State, 95 Ga. 222, 21 S. E. 381; Boyd v. State, 4 Ga App. 273, 61 S. E. 134. IND.—Hunter v. State, 29 Ind. 80; Short v. State, 63 Ind. 376. IOWA—State v. Jones, 10 Iowa 206; State v. Jennings, 79 Iowa 513, 44 N. W. 799; State v. Ray, 79 Iowa 765, 44 N. W. 800. MASS.—Josslyn v. Com., 47 Mass. (6 Metc.) 236; Com. v. Williams, 56 Mass. (2 Cush.) 582. MO.—State v. Beckworth, 68 Mo. 82; State v. Yandle, 166 Mo. 589, 66 S. W. 532. MONT.—State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459. OHIO—Spears v. State, 2 Ohio St. 583. TEX.—Hamilton v. State (Tex. Cr.) 24 S. W. 32; Gilder v. State, 61 Tex. Cr. Rep. 16, 133 S. W. 883; Bradford v. State, 62 Tex. Cr. Rep. 424, 138 S. W. 118; Stephens v. State, 69 Tex. Cr. Rep. 579, 154 S. W. 1001. UTAH—State v. Hows, 31 Utah 168, 87 Pac. 163. WIS.—Hall v. State, 48 Wis. 688, 4 N. W. 1068; State v. Kane, 63 Wis. 260, 6 Am. Cr. Rep. 99, 23 N. W. 488.

15 People v. Ah Ye, 31 Cal. 451.

16 State v. Jones, 10 Iowa 206; Hall v. State, 48 Wis. 688, 4 N. W. 1068.

Contra: Philbrick v. State, 2 Tex. App. 517.

17 Grand larceny alleged in an indictment charging burglary without an averment as to the value of the goods and chattels stolen, or intended to be stolen, is insufficient.—Territory v. Duncan, 5 Mont. 478, 6 Pac. 353.

§ 472. Breaking and entry—Necessity of alleging. Breaking into and entering[1] a dwelling-house or other designated building, being an essential element of the crime of burglary, must be alleged in an indictment or information charging that offense.[2] The manner of breaking must be specified;[3] but an allegation of an entry by force has been said to be sufficient without an averment of entry by means of breaking,[4] because any act of physical force, however slight, by which any obstruction to an entry is overcome or removed and entry effected, constitutes the crime of burglary.[5] The indictment or information may charge in one count an entry without breaking, and in another count charge the entry by means of breaking.[6]

Breaking without entry,[7] *or entry without breaking,*[8] being charged, the indictment will be fatally defective.

Negativing right to enter, on the part of the accused, is essential to the validity of an indictment or information charging burglary; that is to say, the indictment must

1 **As to breaking out of house constituting burglary,** see Kerr's Whart. Crim. Law, § 983; R. v. Compton, 7 Car. & P. 139, 32 Eng. C. L. 450.

2 1 Hale P. C. 549; Fielding's Case, Dyer 58, 99.

As to sufficiency of charge of breaking and entering, see Drury v. Com., 162 Ky. 123, 172 S. W. 94; State v. Burns, 131 La. 396, 59 So. 823.

An allegation that the accused in the night-time entered feloniously, burglariously, and with force and arms is substantially to say that he broke into and entered.—People v. Long, 43 Cal. 444.

3 Conner v. State, 14 Mo. 561.

4 Bradford v. State, 62 Tex. Cr. Rep. 424, 138 S. W. 118.

5 Gaddie v. Com., 117 Ky. 468, 111 **Am. St. Rep.** 259, 78 S. W. 162; Ferguson v. State, 52 Neb. 432, 66 **Am. St. Rep.** 512, 72 N. W. 590; Claiborne v. State, 113 Tenn. 261, 106 **Am. St. Rep.** 833, 68 **L. R. A.** 859, 83 S. W. 352.

6 Benton v. Com., 91 Va. 782, 21 S. E. 495.

7 Pines v. State, 50 Ala. 153; State v. Whitby, 15 Kan. 402; Webb v. Com., 87 Ky. 129, 9 Ky. Law Rep. 1007, 7 S. W. 900.

8 An indictment alleging that defendant entered with intent to steal alleges an offense under Crim. Code, 1902, § 163, even though there is no allegation that the entry was without a breaking. —State v. Ross, 83 S. C. 434, 65 S. E. 443.

show that the entry was a trespass;[9] yet it has been said that the entry need not necessarily be a trespass, or without consent of the owner or occupier, in those cases in which entry was made with the intent to steal.[10]

§ 473. DESCRIPTION OF BUILDING—IN GENERAL. The premises alleged to have been burglarized must be described in the indictment or information charging the same,[1] and the name of the building must be given under

[9] State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459.

Charging "wilfully, unlawfully and feloniously" attempting to enter or entering, sufficiently negatives right of accused to enter.—Ibid.

[10] People v. Brittain, 142 Cal. 8, 100 Am. St. Rep. 95, 75 Pac. 314.

[1] Packer v. State, 114 Ala. 690, 22 So. 791; Wallace v. State, 99 Ark. 92, 137 S. W. 551; People v. Warner, 25 Cal. App. 775, 145 Pac. 543; Simpson v. State, 5 Okla. Cr. Rep. 57, 113 Pac. 549.

Burglary of an out-house being charged, it is necessary to allege that it was adjoining to and occupied in connection with the dwelling-house. — State v. Randall, 36 Wash. 438, 78 Pac. 998.

"House" is a sufficient description of the building alleged to have been burglarized, when it is intended to allege and prove that it was a dwelling-house, under a statute making the breaking and entering of a "dwelling-house" burglary, because the term "house," in its primary and common signification, and in indictments charging burglary, imports a "dwelling-house."—See Reed v. State, 66 Ark. 110, 49 S. W. 350; Com. v. Elliston, 14 Ky. Law Rep. 216, 20 S. W. 214; Thompson v. People, 3 Park. Cr. Rep. (N. Y.) 206; Williams v. State, 42 Tex. Cr. Rep. 602, 62 S. W. 1057, affirming 61 S. W. 359, under a statute making it a distinct crime of burglary to enter a "private residence" "by force, threats, or fraud at night," the charge being sufficient as an allegation of breaking and entering a "private residence" in the day-time.

Contra: Ford v. State, 112 Ind. 373, 14 N. E. 241; Daniel v. Coulsting, 7 Man. & G. 122, 125, 49 Eng. C. L. 122, 125.

"Mansion house" is sufficiently descriptive of a dwelling-house in an indictment for burglary.—Devoe v. Com., 44 Mass. (3 Metc.) 316; Com. v. Pennock, 3 Serg. & R. (Pa.) 199; Armour v. State, 22 Tenn. (3 Humph.) 379; Fletcher v. State, 78 Tenn. (10 Lea) 338.

Sufficient description: A description characterizing the house as "used and occupied" by a named person is sufficient. — Wallace v. State, 99 Ark. 92, 137 S. W. 551.

A description of the building entered as that in which the United States post office at G is located, is a sufficient description, as there is but one post office there, and where it lays the ownership in a named person it is certainly good. People v. Warner, 25 Cal. App. 775, 145 Pac. 543.

Breaking and entering a planing-

some statutes;[2] but the general rule is that the character of the house or building charged to have been broken into and entered need not be alleged,[3] unless it is a private residence.[4] In the description of the premises broken into and entered it is the usual and the safe practice to

mill of a named person "in which said mill was kept for use and deposit" by said person "goods, wares and valuable things," sufficiently shows accused broke into a "building."—State v. Haney, 110 Iowa 26, 81 N. W. 151.

"Building of Carnegie Steel Company" a sufficient description of the building burglarized, in the absence of a demand for a bill of particulars.—Com. v. Johnston, 19 Pa. Super. Ct. 241.

"In the state and county aforesaid, broke and entered a certain house therein situate, and being used and possessed by one A," is a sufficient description of the house burglarized. — Reed v. State, 66 Ark. 110, 49 S. W. 350.

Insufficient description. — Dunn v. Com., 119 Ky. 457, 27 Ky. Law Rep. 113, 84 S. W. 321.

Because the indictment described the house as "dwell-house" instead of "dwelling-house," it was held fatally defective in Parker v. State, 114 Ala. 690, 22 So. 791, on the ground that the omission of "ing" was matter of substance, when it was manifestly simply a clerical error, and should have been regarded as a harmless one.

Breaking and entering smokehouse being charged, without an allegation that the building was used in connection with any dwelling-house, indictment fatally defective.—Dunn v. Com., 119 Ky. 457, 27 Ky. Law Rep. 113, 84 S. W. 321.

Where the house was described as "occupied S" instead of "occupied by S," it is fatally defective. —Scroggins v. State, 36 Tex. Cr. Rep. 117, 35 S. W. 968.

These rulings both absurd and hide-bound by ultra technicality, not in keeping with efficient and enlightened administration of the criminal law. See, supra, § 322, and § 469, footnote 2.

2 State v. Dale, 141 Mo. 284, 64 **Am. St. Rep.** 513, 42 S. W. 722.

"It will be observed that the indictment gives no name to the building. If it was necessary to prove the kind of building it was, then by the same token it was necessary to allege it."—State v. Dale, 141 Mo. 284, 64 **Am. St. Rep.** 513, 42 S. W. 722.

3 Stephens v. State, 69 Tex. Cr. Rep. 379, 154 S. W. 1001.

For descriptions held sufficient, see Murray v. State, 48 Ala. 681; State v. Haney, 110 Iowa 26, 81 N. W. 151; Reed v. State, 66 Ark. 110, 49 S. W. 350; State v. Malloy, 30 La. Ann. 61; State v. James, 120 La. 533, 45 So. 416; Sullivan v. State, 13 Tex. App. 464; Gundy v. State, 72 Wis. 1, 7 **Am. Cr. Rep.** 262, 38 N. W. 328.

4 Stephens v. State, 69 Tex. Cr. Rep. 379, 154 S. W. 1001.

Compare: Shaffer v. State (Tex. Cr.) 65 S. W. 1072, where the court refused to quash the indictment for failure to allege that the burglarized house was a private residence.

employ the words of the statute,[5] and if to such place the statute adds a descriptive word or phrase, it must be covered by allegation.[6] In all cases the description must be such as to bring the house or building within the statute providing the breaking and entering of such a building or house shall constitute the offense of burglary.[7]

Identification of building or house alleged to have been burglarized by description in the indictment or information in so far necessary, only, as will protect the defendant, should he be acquitted, from being a second time put in jeopardy for the same offense, or, on conviction, from being subject to a second punishment for the same offense;[8] and when the description accomplishes this purpose it is sufficient.[9]

Cases concerning description of dwelling-houses,[10] private residences, [11] buildings within curtilage,[12] shops and

5 Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; People v. Carr, 255 Ill. 203, Ann. Cas. 1913D, 864, 41 L. R. A. (N. S.) 1209, 99 N. E. 357.

6 State v. Dale, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722.

7 Dickinson v. State, 148 Ala. 676, 41 So. 929; People v. Schafer, 161 Cal. 573, 119 Pac. 920; State v. South, 136 Mo. 673, 38 S. W. 716; State v. Dale, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722.

8 Butler v. State, 22 Ala. 43; Johnson v. Com., 87 Ky. 189, 7 S. W. 927; State v. Trapp, 17 S. C. 467, 43 Am. Rep. 614.

9 Anderson v. State, 48 Ala. 665, 17 Am. Rep. 36; State v. Trapp, 17 S. C. 467, 43 Am. Rep. 614.

10 Williams v. State, 2 Ga. App. 394, 58 S. E. 549; Radley v. State, 174 Ind. 645, 92 N. E. 541; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87, 2 Cow. Cr. Rep. 331, affirming 11 Hun 336; Thompson v. People, 3 Park. Cr. Rep. (N. Y.) 208; Com. v. Pennock, 3 Serg. & R. (Pa.) 199; Nevills v. State, 47 Tenn. (7 Cold.) 82; Favro v. State, 39 Tex. Cr. Rep. 452, 73 Am. St. Rep. 950, 46 S. W. 932; State v. Cox, 39 Wash. 345, 81 Pac. 848; Clark v. State, 69 Wis. 203, 2 Am. St. Rep. 272, 33 N. W. 436.

11 Fonville v. State, (Tex. Cr.) 62 S. W. 573; Martinus v. State, 47 Tex. Cr. Rep. 528, 122 Am. St. Rep. 709, 84 S. W. 831; Johnson v. State, 50 Tex. Cr. Rep. 116, 96 S. W. 45; Lewis v. State, 54 Tex. Cr. Rep. 636, 114 S. W. 818; Knuckles v. State, 55 Tex. Cr. Rep. 6, 114 S. W. 825; Malley v. State, 58 Tex. Cr. Rep. 425, 126 S. W. 598; Sedgwick v. State, 57 Tex. Cr. Rep. 420, 123 S. W. 702.

12 Ward v. State, 50 Ala. 120; Daniels v. State, 78 Ga. 101, 6 Am. St. Rep. 238; Hutchins v. State, 3 Ga. App. 300, 59 S. E. 848; Draughn v. State, 76 Miss. 574, 25 So. 153; State v. Schuchmann, 133

offices,[13] stores,[14] warehouses,[15] storehouses,[16] hotels,[17] barns,[18] chicken-houses,[19] smoke-houses,[20] gin-houses,[21]

Mo. 111, 33 S. W. 35, 34 S. W. 842; State v. South, 136 Mo. 673, 38 S. W. 716; Fletcher v. State, 78 Tenn. (10 Lea) 338; State v. Randall, 36 Wash. 438, 78 Pac. 998; State v. Kane, 63 Wis. 260, 23 N. W. 488; Nicholls v. State, 68 Wis. 420, 60 **Am. St. Rep.** 870, 32 N. W. 543.

13 Adams v. State, 13 Ala. App. 330, 69 So. 357; State v. Ferguson, 149 Iowa 476, 128 N. W. 840; Larned v. Com., 53 Mass. (12 Metc.) 240; Com. v. Bowden, 80 Mass. (14 Gray) 103; Com. v. Moriarity, 135 Mass. 540; Byrnes v. People, 37 Mich. 515; Beckford v. People, 39 Mich. 209; State v. Canney, 19 N. H. 135; Bigham v. State, 31 Tex. Cr. Rep. 244, 20 S. W. 577; State v. Sufferin, 6 Wash. 107; 32 Pac. 1021.

14 Hawkins v. State, 8 Ala. App. 234, 62 So. 974; State v. Smith, 5 La. Ann. 340; State v. Moore, 28 La. Ann. 66; State v. Canney, 19 N. H. 135; Com. v. McMonagle, 1 Mass. 517; Com. v. Bowden, 80 Mass. (14 Gray) 103; Com. v. Whalen, 131 Mass. 419; McNutt v. State, 68 Neb. 207, 14 **Am. Cr. Rep.** 127, 94 N. W. 143; People v. Marks, 4 Park. Cr. Rep. (N. Y.) 153; State v. Johnson, 64 Ohio St. 270, 60 N. E. 219.

15 Presley v. State, 61 Fla. 46, 54 So. 367; Roy v. Com., 75 Ky. (12 Bush) 397; Koster v. People, 8 Mich. 431; State v. Watson, 141 Mo. 338, 42 S. W. 726; Spencer v. State, 13 Ohio 401; State v. Dolson, 22 Wash. 259, 60 Pac. 653.

16 Ex parte Vincent, 26 Ala. 145, 62 **Am. Dec.** 714; Rimes v. State, 36 Fla. 90, 18 So. 114; Davis v. State, 51 Fla. 37, 40 So. 179; Hale v. Com., 98 Ky. 353, 33 S. W. 91; Drury v. Com., 162 Ky. 123, 172 S. W. 94; State v. Sweeney, 135 La. 566, 65 So. 743; Quinn v. People, 71 N. Y. 561, 27 **Am. Rep.** 87; Hagar v. State, 35 Ohio St. 268; State v. Johnson, 64 Ohio St. 270, 60 N. E. 219; Hollister v. Com., 60 Pa. St. 103.

17 Thomas v. State, 97 Ala. 4, 12 So. 409; Jones v. State, 75 Ga. 825; Bruen v. People, 206 Ill. 417, 69 N. E. 24; State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Johnson, 4 Wash. 593, 30 Pac. 672; State v. Burton, 27 Wash. 528, 67 Pac. 1097.

18 Orrell v. People, 94 Ill. 456, 34 **Am. Rep.** 241; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Pitcher v. People, 16 Mich. 142; People v. Griffith, 133 Mich. 607, 95 N. W. 719; Ratekin v. State, 26 Ohio St. 420.

19 Lucas v. State, 144 Ala. 63, 3 **L. R. A.** (N. S.) 412, 39 So. 821; Gunter v. State, 79 Ark. 432, 96 S. W. 181; People v. Stickman, 34 Cal. 245; Gillock v. People, 171 Ill. 307, 49 N. E. 712; State v. Helms, 179 Mo. 280, 78 S. W. 592.

20 Pressley v. State, 111 Ala. 34, 20 So. 647; Richardson v. State, 115 Ala. 113, 22 So. 558; Dunn v. Com., 119 Ky. 457, 84 S. W. 321; Unseld v. Com., 140 Ky. 529, 140 **Am. St. Rep.** 393, 131 S. W. 263; State v. Burdett, 145 Mo. 674, 47 S. W. 796; Fletcher v. State, 78 Tenn. (10 Lea) 338; Benton v. Com., 91 Va. 782, 21 S. E. 495.

21 Stone v. State, 63 Ala. 119; State v. Evans, 18 S. C. 137.

depots,[22] cribs,[23] granaries,[24] tool-houses,[25] mill-houses,[26] cellars,[27] house-boats,[28] fruit-stands,[29] vaults,[30] and billiard-halls.[31]

§ 474. —— Buildings within curtilage. An indictment or information charging accused broke and entered a building described as "within the curtilage and protection of the dwelling-house," is sufficient description of the building alleged to have been burglarized without giving the name of the building or the uses to which put,[1] but where the indictment or information fails to use those descriptive words it will not be sufficient,[2] where drawn under a statute declaring that the breaking and entering of "any building within the curtilage of a dwelling-house" shall constitute the crime of burglary.

§ 475. —— Negativing adjacency to dwelling-house. Where the statute provides that the breaking into and entering certain buildings and premises not within the curtilage and not adjacent to a dwelling-house shall con-

22 Dickinson v. State, 148 Ala. 676, 41 So. 929; People v. Young, 65 Cal. 225, 3 Pac. 813; Daniels v. State, 78 Ga. 101, 6 Am. St. Rep. 238; State v. Ferguson, 149 Iowa 476, 128 N. W. 840; Com. v. Winkler, 165 Ky. 269, 176 S. W. 1012; State v. Edwards, 109 Mo. 315, 19 S. W. 91; State v. Bishop, 51 Vt. 287, 31 Am. Rep. 690.

23 Wood v. State, 18 Fla. 967; Roberts v. State, 55 Miss. 421; Barber v. State (Tex. Cr.), 69 S. W. 515; Gilford v. State, 48 Tex. Cr. 312, 87 S. W. 698.

24 State v. Hecox, 83 Mo. 531.

25 People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964.

26 McElreath v. State, 55 Ga. 562; State v. Haney, 110 Iowa 26, 81 N. W. 151; State v. Sampson, 12 S. C. 567, 32 Am. Rep. 513.

27 State v. Brower, 127 Iowa 687, 104 N. W. 284; State v. Clark, 89 Mo. 423, 1 S. W. 332; Reg. v. Hill, 2 M. & Rob. (Eng.) 458.

28 Nagel v. People, 229 Ill. 598, 82 N. E. 315.

29 People v. Hagan, 60 Hun 577, 14 N. Y. Supp. 233.

30 People v. Richards, 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371, reversing 44 Hun 278.

31 Simpson v. State, 5 Okla. Cr. Rep. 57, 113 Pac. 549.

1 Bryant v. State, 60 Ga. 358.

Not forming part of dwelling-house need not be alleged in the indictment or information.—State v. Burdett, 145 Mo. 674, 47 S. W. 796.

2 State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842.

stitute burglary, an indictment or information charging the breaking and entering of such a building by accused, must allege that the building or premises thus alleged to have been broken into and entered is not situated within the curtilage and not adjacent to a dwelling-house;[1] but describing the premises as an office,[2] or as a store,[3] has been held to sufficiently negative the idea that the premises described is within the curtilage or adjacent to a dwelling-house.

§ 476. —— Railroad car. Entering a railroad car with intent to commit grand or petit larceny being declared by statute to be burglary,[1] an indictment or information charging the accused with the offense of burglary by entering a railroad car with intent to steal, must describe the railroad car alleged to have been burglarized[2] with precision and certainty, either by stating the number of the car,[3] or otherwise distinguishing it from other cars of the same train,[4] and if the railroad car charged to have

1 Com. v. Tuck, 37 Mass. (20 Pick.) 356; Koster v. People, 8 Mich. 431; Byrnes v. People, 37 Mich. 515; Bickford v. People, 39 Mich. 209.

Contra: State v. Kane, 63 Wis. 260, 23 N. W. 488, followed in Gundy v. State, 72 Wis. 1, 38 N. W. 328.

2 Rimes v. State, 36 Fla. 90, 18 So. 114.

3 Devoe v. Com., 44 Mass. (3 Metc.) 316; Evans v. Com., 44 Mass. (3 Metc.) 453; Phillips v. Com., 44 Mass. (3 Metc.) 588.

Contra: Com. v. Tuck, 37 Mass. (20 Pick.) 356.

1 As in Kerr's Cal. Pen. Code, 1915, § 459.

2 A description that the defendant entered "the freight and express car of the American Express Company" mentioned in the count is sufficient to show that the offense was committed in a place prohibited by law.—Nicholls v. State, 68 Wis. 416, 60 Am. Rep. 870, 7 Am. Cr. Rep. 106, 32 N. W. 543.

It need not be specified whether it was a box, closed, flat, or open car.—Aguillar v. State (Tex. Cr.), 26 S. W. 405.

An objection to the sufficiency of the description of the car must be made before trial and can not be availed of at the trial.—State v. Stutches, 163 Iowa 4, 144 N. W. 597.

3 People v. Webber, 138 Cal. 145, 13 Am. Cr. Rep. 698, 70 Pac. 1089; Sullivan v. State, 7 Okla. Cr. Rep. 307, 123 Pac. 569.

4 People v. Webber, 138 Cal. 145, 13 Am. Cr. Rep. 698, 70 Pac. 1089; Sullivan v. State, 7 Okla. Cr. Rep. 307, 123 Pac. 569.

been burglarized is not thus particularly described and individuated the indictment or information will be insufficient.[5] Where the description follows the language of the statute, and specifically names the owner of the car, the consignor and the consignee, it will be sufficient, it seems.[6]

§ 477. —— OFFICES, SHOPS, STORE-HOUSES, WAREHOUSES, ETC. Under statutes providing that where a person breaks into and enters any office, shop, store, booth, tent, warehouse, or other building[1] in which goods, wares, merchandise, or other things of value are kept, with intent to steal, it constitutes the crime of burglary, an indictment or information charging accused did break and enter premises designated must, by descriptive allegations, bring the premises designated within the provisions of the statute.

5 People v. Webber, 138 Cal. 145, 13 Am. Cr. Rep. 698, 70 Pac. 1089, in which the information alleged accused "did unlawfully, feloniously and burglariously enter a certain railroad car and train, to-wit, a railroad car and train owned and operated by the Southern Pacific Company (a corporation)."

In holding the indictment insufficient the court say: "One may commit other offenses on a train of cars, but one can only commit burglary of a railroad car of a train. Each car is separate and distinct from every other car of the train. Cars are being added to and detached from the train at points along the line during its trip; and then, too, on through lines, such as the line of the Southern Pacific Company, there are many trains, freight and passenger, running daily. The defendant should be informed with some degree of certainty at least as to the particular car he is charged with having feloniously entered. There is no difficulty in ascertaining the fact, for all cars bear some distinguishing mark or number. The Penal Code does not relieve the prosecuting attorney from the necessity of informing the defendant with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare for his defense, and upon acquittal or conviction, plead his jeopardy against further prosecution." Citing People v. Lee, 107 Cal. 477, 40 Pac. 754; People v. Ward, 110 Cal. 369, 42 Pac. 894.

6 Morris v. United States, 229 Fed. 516.

1 As is provided by Mo. Rev. Stats., 1889, § 3526, and those of similar provisions.

Barn charged to have been burglarized, the description will be insufficient where that term is not by allegation brought within the provision of the statute, the word "barn" not appearing in the statute.[2]

Chicken-house or hen-house charged as premises burglarized by accused, indictment or information need not describe the building as especially constructed or made for the use to which it was put, such building being of a substantial kind, and well known, in communities where poultry is raised, as the building where chickens and other poultry are housed.[3]

Office charged to have been burglarized by accused, it is not necessary to allege that the premises were not adjacent to or used in connection with a dwelling-house, even in those cases where there are two statutes, one providing as to offices adjoining, and the other as to offices not adjoining, a dwelling-house, both statutes imposing a similar punishment.[4]

"Shop" used in statute, indictment charging accused with breaking and entering a "store," is sufficiently descriptive of the premises in Louisiana,[5] but not in Massachusetts.[6]

"Shop" and "store" both appearing in the statute, an indictment or information must correctly describe and name the premises broken into and entered; an allegation that accused broke into and entered a "store" of a named person and certain goods "in said shop aforesaid

2 State v. South, 136 Mo. 673, 38 S. W. 617; State v. Dale, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722.

3 Lucas v. State, 144 Ala. 63, 3 L. R. A. (N. S.) 412, 39 So. 821, "the structures that must be thus described are of temporary character, erected for special purposes, or occasions."

4 Devoe v. Com., 44 Mass. (3 Metc.) 316; Evans v. Com., 44 Mass. (3 Metc.) 453; Phillips v. Com., 44 Mass. (3 Metc.) 558; Larned v. Com., 53 Mass. (12 Metc.) 240.

Compare: Com. v. Tuck, 37 Mass. (20 Pick.) 363; Com. v. Hope, 39 Mass. (22 Pick.) 1.

5 State v. Smith, 5 La. Ann. 340; Moore v. State, 38 La. Ann. 66.

6 Com. v. McMonagle, 1 Mass. 517.

did steal, take and carry away," is bad on demurrer, for the reason that "store" and "shop" in the statute are not synonymous, and "shop," being descriptive of the place of the larceny, can not be rejected as surplusage.[7]

Store charged to have been burglarized, the indictment must allege the premises to be a "building," under the Missouri statute.[8] "Store-house" of a designated person charged to have been broken and entered, is a sufficient description.[9] "A store-house commonly called a drug-store," is a proper description of the premises on the charge of burglarizing a drug-store.[10]

——*"Store-room"* charged to have been broken into under a statute using the word "store-house," has been held to be insufficient under the Ohio statute, and that objection is available after verdict;[11] but under amendment[12] the same court holds that "a certain store-room, then and there the property of" a person named, is a sufficient description.[13]

Warehouse charged to have been burglarized, it is sufficient to designate and describe it by that name;[14] and a description as a "granary, warehouse, and building" of a person named, "a building in which divers goods, merchandise and valuable things were then and there kept for sale and deposited," is a sufficient description of a warehouse, the word "granary" may be treated as surplusage.[15] "Warehouse-building," is a good description of a "warehouse," the word "building" added in nowise changes the meaning.[16]

7 State v. Canney, 19 N. H. 135.

8 Com. v. McMonagle, 1 Mass. 517.

9 Hale v. Com., 98 Ky. 353, 33 S. W. 91.

10 McNutt v. State, 68 Neb. 207, 94 N. W. 143.

11 Hager v. State, 35 Ohio St. 268.

12 Ohio Rev. Stats., (1879) § 6835, as amended by 82 Ohio Laws, p. 161.

13 State v. Johnson, 64 Ohio St. 270, 60 N. E. 219.

14 Spencer v. State, 13 Ohio 401.

15 State v. Watson, 141 Mo. 338, 42 S. W. 726.

16 State v. Dolson, 22 Wash. 259, 60 Pac. 653.

§ 478. Ownership of premises—Necessity of allegation as to. An indictment or information charging accused with having committed burglary, must allege the ownership of the premises broken and entered,[1] laying that possession in a person other than the accused,[2] where it is the entire and only description of the prem-

1 ALA.—Ward v. State, 50 Ala. 120; Beall v. State, 53 Ala. 460, 2 Am. Cr. Rep. 463; Graves v. State, 63 Ala. 134; Thomas v. State, 97 Ala. 3, 12 So. 409; Adams v. State, 13 Ala. App. 330, 69 So. 357. CAL.—People v. Parker, 91 Cal. 91, 27 Pac. 537. CONN.—Com. v. Keena, 63 Conn. 329, 28 Atl. 522. FLA.—Pells v. State, 20 Fla. 776, 5 Am. Cr. Rep. 96; Davis v. State, 51 Fla. 37, 40 So. 179; Vicente v. State, 66 Fla. 197, 63 So. 423. ILL.—Willis v. People, 2 Ill. 399; Wallace v. State, 63 Ill. 451. IND.—McCrillis v. State, 69 Ind. 159. IOWA—State v. Morrissey, 22 Iowa 158; State v. Jelinek, 95 Iowa 420, 64 N. W. 259; State v. Wrand, 108 Iowa 73, 78 N. W. 788. KAN.—State v. Fockler, 22 Kan. 542. LA.—Contra: State v. Clifton, 30 La. Ann. 951. MASS.—Com. v. Harnett, 69 Mass. (3 Gray) 450; Com. v. Perris, 108 Mass. 1. MISS.—James v. State, 77 Miss. 370, 78 Am. St. Rep. 527, 26 So. 929. MO.—State v. Jones, 168 Mo. 398, 68 S. W. 566; State v. James, 194 Mo. 268, 5 Ann. Cas. 1007, 92 S. W. 679; State v. Horned, 178 Mo. 59, 76 S. W. 593. NEB.—Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Hahn v. State, 60 Neb. 489, 14 Am. Cr. Rep. 112, 83 N. W. 674. OHIO—Wilson v. State, 34 Ohio St. 199. OKLA.—State v. Simpson, (Okla. Cr.) 113 Pac. 549. ORE.—Contra: State v. Wright, 19 Ore. 258, 24 Pac. 229. W. VA.—State v. Reece, 27 W. Va. 375; State v. Hupp, 31 W. Va. 355, 6 S. E. 919. WIS.—Jackson v. State, 55 Wis. 589, 13 N. W. 448. ENG.—R. v. White, 1 Leach C. C. 552.

2 A man can not burglarize his own house is the general rule of law (see Kerr's Whart. Crim. Law, § 1019), unless he has parted with the right of entry (State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459; Davis v. State, 38 Ohio St. 506); and it may possibly be, though it is not so declared on principle, that having a right of entry, if the owner enters for the purpose of, and with the intention of, committing a felony therein, such act will constitute burglary, for it was resolved in 8 Jacobi 1, in one of Lord Coke's most famous reports, uniformly followed alike in England and in this country, that "if a man abuse an authority given to him by law, he becomes a trespasser ab initio." —Six Carpenters' Case, 8 Co. Rep. 146, 77 Eng. Repr. 695.

1 Smith's Lead. Cas. (Hare & Wallace's ed.), pt. I, p. 274.

The right of a man to enter his own house is "an authority given by law," and if he "abuse that authority" and becomes "a trespasser ab initio" in his own house, will that fact make his act of entry "with the felonious intent" an act of burglary? It is suggested as a possibility, but not so maintained from principle. It is said, inter

ises the accused is charged with having entered,[3] and this ownership must be alleged with reasonable certainty.[4] It has been said that there are two reasons, only, for requiring the ownership of the premises to be alleged in an indictment or information charging burglary. First, for the purpose of showing on the record that the building alleged to have been broken into and entered is not the dwelling-house of the accused, inasmuch as he can not commit the offense of burglary by breaking into his own house.[5] Second, for the purpose of so identifying the property and the offense that the accused will be protected against a second prosecution or punishment for the same offense, and when the ownership is alleged to be in a person who is not the accused, and that allegation is proved upon the trial, the reasons for this requirement are fully met.[6]

Ownership need not be alleged in those cases in which the premises are otherwise sufficiently described and identified[7] to meet the purposes for which the ownership is required to be alleged as above set forth,[8] and the ac-

alia arguendo, and must be regarded as pure dictum, in State v. Mish, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459, that "the unlawfulness of his intentions with regard to acts contemplated by him after entry can not, in a criminal case, characterize his rightful act of entry."

3 People v. Parker, 91 Cal. 91, 27 Pac. 537.

4 Beall v. State, 53 Ala. 460, 2 Am. Cr. Rep. 463; Wallace v. State, 63 Ill. 451; State v. Morrissey, 22 Iowa 158; State v. Fockler, 22 Kan. 542; Com. v. Perris, 108 Mass. 1; Jackson v. State, 55 Wis. 589, 13 N. W. 448.

An allegation that the building was a store-house, the property of P, is a sufficient allegation of ownership.—Davis v. State, 54 Fla. 34, 44 So. 757.

Grave is opened at night and the grave-clothes are stolen, the ownership must be laid in the executor or administrator of the deceased. —2 Hale's P. C. 181.

An allegation that the house entered belonged to G. W. F. sufficiently avers the ownership.—State v. Fox, 80 Iowa 312, 20 Am. St. Rep. 425, 45 N. W. 874.

5 See, supra, footnote 2.

6 State v. Trapp, 17 S. C. 467, 43 Am. Rep. 614.

7 State v. Wilson, 36 S. D. 416, 155 N. W. 186.

8 See, supra, this section, footnotes 5 and 6, and text going therewith.

cused can not be misled as to the property referred to,[9] as where the premises are described by street and street number,[10] and also as a designated club-house, occupied by persons to the district attorney unknown.[11] And where the indictment avers that the entry of a designated public house was a trespass, the ownership of the room or building need not be specifically alleged, although, when known, it is safer practice to allege the ownership.[12]

Ownership unknown, that fact must be averred,[13] and this will constitute a sufficient averment of ownership of premises otherwise sufficiently described.[14]

§ 479. —— SUFFICIENCY OF ALLEGATION. It is sufficient allegation of ownership where it is laid in the person having the actual and visible occupancy or possession and control at the time of the breaking and entry,[1] or in one having the present right to the use and occupancy,[2] although the real ownership is in another;[3] the occupancy, or the claim to the right of occupancy, being

9 People v. Rogers, 81 Cal. 209, 22 Pac. 592; People v. Price, 143 Cal. 351, 77 Pac. 73.

10 People v. Price, 143 Cal. 351, 77 Pac. 73; State v. Clifton, 30 La. Ann. 951.

11 State v. Clifton, 30 La. Ann. 951.

12 State v. Mish, 36 Mont. 168, 122 **Am. St. Rep.** 343, 92 Pac. 459.

13 State v. Morrissey, 22 Iowa 158; State v. Davis, 138 Mo. 107, 39 S. W. 460.

14 Hamilton v. People, 24 Colo. 301, 51 Pac. 425.

1 ALA.—Matthews v. State, 55 Ala. 65; Peck v. State, 147 Ala. 100, 41 So. 759. ILL.—Smith v. People, 115 Ill. 17, 6 **Am. Cr. Rep.** 80, 3 N. E. 733. NEB.—Winslow v. State, 26 Neb. 308, 41 N. W. 1116; Hahn v. State, 60 Neb. 487, 14 **Am. Cr. Rep.** 112, 82 N. W. 674. NEV.—State v. Simas, 25 Nev. 432, 62 Pac. 242. OKLA.—Simpson v. State, 5 Okla. Cr. Rep. 57, 113 Pac. 549. TEX.—Favro v. State, 39 Tex. Cr. Rep. 452, 73 **Am. St. Rep.** 950, 46 S. W. 932.

Where building occupied and in the possession of a person having control thereof has some rooms let to lodgers and for other purposes, the whole of the building may be considered the dwelling of such person in whom ownership should be alleged.—Hahn v. State, 60 Neb. 487, 14 **Am. Cr. Rep.** 112, 82 N. W. 674.

2 State v. Mish, 36 Mont. 168, 122 **Am. St. Rep.** 343, 92 Pac. 459.

3 Webb v. State, 52 Ala. 422.

rightful as against the accused, although unlawful as against the person claiming title to the property.[4]

Corporation owner of property burglarized, indictment or information must allege the ownership in the corporation, not in that of a naked agent occupying the premises,[5] and an allegation of the corporate name is sufficient,[6] without an averment of the incorporation and right to do business,[7] which will be implied;[8] and when incorporation is averred, it will be treated as surplusage, and need not be proved.[9]

Railroad car charged to have been burglarized by accused, ownership of the car must be alleged,[10] and under some statutes[11] the real owner must be named, although the car was in the possession, use and control of another

4 Houston v. State, 38 Ga. 165; Smith v. People, 115 Ill. 17, 6 Am. Cr. Rep. 80, 3 N. E. 733; State v. Johnson, 4 Wash. 592, 9 Am. Cr. Rep. 145, 30 Pac. 672.

5 Emmonds v. State, 87 Ala. 12, 6 So. 54; Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23, 7 So. 48.

Ownership laid in "Wilborn M. Bass, business manager of Beulah Co-operative Store of the Beulah Alliance," held to be insufficient in Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23, 7 So. 48.

6 Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23, 7 So. 48; Hatfield v. State, 76 Ga. 499; Com. v. Moriarty, 135 Mass. 540; Fisher v. State, 40 N. J. L. (11 Vr.) 169.

"Building of the C. Company" was held sufficient in Com. v. Johnson, 19 Pa. Super. Ct. 241.

Building alleged to be the office of a designated corporation held sufficient, where it was used by the corporation as its main or general office, although it had several other offices in the town.—Com. v. Moriarty, 135 Mass. 540.

7 Fisher v. State, 40 N. J. L. (11 Vr.) 169; State v. Shields, 89 Mo. 259, 1 S. W. 336.

8 Norton v. State, 74 Ind. 337.

9 Crawford v. State, 68 Ga. 822.

10 Graves v. State, 63 Ala. 143; Johnson v. State, 73 Ala. 483; Cooper v. State, 89 Ga. 222; 15 S. E. 291; Darter v. Com., 9 Ky. Law Rep. 277, 5 S. W. 48; James v. State, 77 Miss. 370, 78 Am. St. Rep. 527, 26 So. 929; State v. Ellis, 102 Miss. 541, 59 So. 841; State v. Davis, 138 Mo. 107, 39 S. W. 460.

"Goods in car kept for use, or on deposit, or for transportation," must be alleged under Alabama Code (1876), § 4344. — Graves v. State, 63 Ala. 143.

"On Glasgow branch of the Louisville & Nashville Railroad, at the depot near the town of Glasgow," held insufficient as not showing ownership of the car.—Carter v. Com., 9 Ky. Law Rep. 277, 5 S. W. 48.

11 As Ala. Code, 1876, § 4344.

corporation at the time,[12] and the ownership must be proved as laid;[13] but the prevailing rule is that the ownership of the car may be laid in the railroad company having the custody and control of the car at the time.[14]

§ 480. —— JOINT OWNERSHIP. In a case of joint ownership of the property the indictment or information may properly lay the ownership in any one[1] or in all of the owners,[2] nothing in the statute requiring otherwise. Thus, where the property was that of a partnership, it was held that the ownership was properly laid in the head of the firm who was in and about the premises burglarized, and in possession at the time as one of the joint owners.[3]

§ 481. —— HUSBAND AND WIFE. Where the premises burglarized consist of a dwelling-house occupied by a husband and wife as their family residence, an indictment or information properly lays the ownership of the premises in the husband, notwithstanding the fact that

12 Johnson v. State, 73 Ala. 483, 2 Am. St. Rep. 396; People v. Webber, 138 Cal. 145, 13 Am. Cr. Rep. 698, 70 Pac. 1089.

13 Johnson v. State, 73 Ala. 483, 2 Am. St. Rep. 396; People v. Webber, 138 Cal. 145, 13 Am. Cr. Rep. 698, 70 Pac. 1089; State v. Hill, 48 W. Va. 132, 35 S. E. 831.

14 Burrow v. State, 147 Ala. 114, 41 So. 987; Gilbert v. State, 116 Ga. 819, 14 Am. Cr. Rep. 134, 43 S. E. 47; State v. McIntire, 59 Iowa 264, 13 N. W. 286; State v. Parker, 16 Nev. 79; Smith v. State, 34 Tex. Cr. Rep. 124, 29 S. W. 775.

"Possession, care, custody and control" of a named railroad company, held sufficient in State v. McIntire, 59 Iowa 264, 13 N. W. 286, and the same doctrine is announced in Gilbert v. State, 116 Ga. 819, 14 Am. Cr. Rep. 134, 43 S. E. 47; Hamilton v. State, 26 Tex. App. 206, 9 S. W. 687; Pyland v. State, 33 Tex. Cr. Rep. 382, 26 S. W. 621.

Charging accused broke into and entered a railroad car marked "C. of Ga. 201," and alleging that such car was "in the custody and control" of another railroad company, held sufficient allegation of ownership of the car in Gilbert v. State, 116 Ga. 819, 14 Am. Cr. Rep. 134, 43 S. E. 47.

1 Com. v. Thompson, 75 Mass. (9 Gray) 108; Whorton v. State, 68 Tex. Cr. Rep. 187, 151 S. W. 300.

2 Whorton v. State, 68 Tex. Cr. Rep. 187, 151 S. W. 300.

3 Lewis v. State, 72 Tex. Cr. Rep. 377, 162 S. W. 866.

the legal title to the property is in the wife;[1] and this has been said to be true even though the wife is at the time living separate and apart from her husband in a house provided out of an estate vested in trust for her sole use, and the husband had never been in the house burglarized.[2] Thus, where the indictment charged the burglarizing of a smoke-house used in connection with a dwelling-house occupied by a husband and wife as their home, which was on the same premises as the dwelling-house, and subject to the ordinary family use, the ownership was properly laid in the husband, although both the dwelling-house and the smoke-house were the separate property of the wife.[3]

Community property charged to have been burglarized by the accused, ownership of the property is properly laid in the husband;[4] but can not be laid in the wife, unless the husband has abandoned her.[5]

Ownership in wife may be laid in those cases in which

1 Young v. State, 100 Ala. 126, 14 So. 872; Richardson v. State, 115 Ala. 113, 22 So. 558; Harrison v. State, 74 Ga. 801; Yarborough v. State, 86 Ga. 396, 12 S. E. 650; State v. Short, 54 Iowa 392, 6 N. W. 584; R. v. Smyth, 5 Car. & P. 201, 24 Eng. C. L. 526.

2 R. v. French, Russ. & Ry. C. C. 491; R. v. Wilford, Russ. & Ry. C. C. 517.

Cases turn on common-law point wife can own no property, and is carried to the extent that where husband was a convicted felon serving sentence in prison at time of the burglary, and wife was continuing to occupy house as her dwelling-house with her family, ownership was required to be laid in the convict husband. — R. v. Whitehead, 9 Car. & P. 429, 38 Eng. C. L. 255.

In this country, however, where a wife is living separate and apart from her husband, having full charge and control of the house burglarized, ownership is properly laid in her as her dwelling-house. —Drecker v. State, 18 Ohio 308.

3 Richardson v. State, 115 Ala. 113, 22 So. 558.

4 Jones v. State, 47 Tex. Cr. Rep. 126, 122 Am. St. Rep. 680, 80 S. W. 530.

5 See Ware v. State, 2 Tex. App. 547; Jones v. State, 47 Tex. Cr. Rep. 126, 122 Am. St. Rep. 680, 80 S. W. 530.

Husband has control of community property, wife's interest merely an expectancy, doctrine in some jurisdictions. See People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67; Spreckels v. Spreckels, 116 Cal. 339, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228.

the premises burglarized are her separate property;[6] but where title is in the husband ownership can not be laid in the wife,[7] except in those cases where the husband has abandoned his wife.[8]

§ 482. —— Landlord and tenant. It has already been seen that it is sufficient to lay ownership of burglarized property in the person in possession and control at the time of the offense.[1] Ownership should be laid in the occupant of the premises and not in the holder of the legal title,[2] unless the occupant is a mere servant.[3] Leased property should be described as the house of the tenant,[4] but may also be described as that of the landlord.[5]

§ 483. —— Rooms and apartments. In the case of entering a room or apartment in a building consisting of several similar rooms and apartments of a similar character, but all under one proprietorship and management, with intent to steal, the ownership may be laid as the dwelling-house of the person occupying the room or apartment under a hiring from the person in possession

6 State v. Trapp, 17 S. C. 467, 43 Am. Rep. 614; Smith v. State, 53 Tex. Cr. Rep. 643, 111 S. W. 939; State v. Peach, 70 Vt. 283, 40 Atl. 732.

Where the separate property of the wife is under the control of the husband, ownership may be laid in him. — Combs v. State, (Tex. Cr.) 49 S. W. 585.

7 Jackson v. State, 102 Ala. 167, 15 So. 344; Morgan v. State, 63 Ga. 307.

8 Jones v. State, 47 Tex. Cr. Rep. 126, 122 Am. St. Rep. 680, 80 S. W. 530. See Ware v. State, 2 Tex. App. 547.

1 See, supra, § 479.

2 Hale v. State, 122 Ala. 85, 26 So. 236; Adams v. State, 13 Ala. App. 330, 69 So. 357.

3 Adams v. State, 13 Ala. App. 330, 69 So. 357.

4 State v. Golden, 49 Iowa 48; Brown v. State, 81 Miss. 143, 14 Am. Cr. Rep. 125, 33 So. 170; State v. Rand, 33 N. H. 216; Simpson v. State, 5 Okla. Cr. Rep. 57, 113 Pac. 549.

Allegation house is occupied by a designated person as lessee of the owner is immaterial and can perform no other office than to further identify property already sufficiently described. — State v. Dan, 18 Nev. 345, 5 Am. Cr. Rep. 93, 4 Pac. 336.

5 Kennedy v. State, 81 Ind. 379; Winslow v. State, 26 Neb. 308, 41 N. W. 1116.

and control of the whole building;[1] that is, the ownership may be laid in either the general possessor or in special occupant at the time of the offense.[2]

Dormitory room in a school building burglarized, the premises must be described as the private residence of the occupant, under the Texas statute.[3]

Hotel room burglarized which is at the time of the offense in the occupancy of a transient guest, the ownership, occupancy and control of the room as a "dwelling-house" must be laid in the hotel-keeper and not in his guest;[4] but in those cases in which the occupant has the room for a term, as from week to week, at a stipulated rental, the ownership may be laid in the hotel-keeper[5] or in the occupant of the room.[6] Thus, one who has no place of abode other than a room in a hotel, for which he pays a weekly rental, and in which he keeps his personal effects, has such an interest in the room as to take him out of the common-law rule above set out, and an indictment or information may properly lay the ownership in him as

1 People v. Sinclair, 38 Cal. 137; State v. Johnson, 4 Wash. 593, 9 Am. Cr. Rep. 145, 30 Pac. 672. See Leslie v. State, 35 Fla. 171, 180, 17 So. 555.

2 Boyd v. State, 4 Ga. App. 273, 61 S. E. 134.

3 Mays v. State, 50 Tex. Cr. Rep. 391, 97 S. W. 703.

4 Rodgers v. People, 86 N. Y. 360, 40 Am. Rep. 548.

Common-law doctrine is the doctrine announced in this case. East says: "If the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper."—1 East P. C. 502.

"If A comes to an inn of B and there has a chamber appointed for his lodgings, and this chamber is broken up burglarily, it shall suppose it to be domus mansionalis of B, the inn-keeper, because the interest is in him, and A hath only the use of it for his lodging, without any certain interest."—1 Hale P. C. 557.

"If several persons dwell in a house, as servants, guests, tenants at will, or otherwise, having no fixed or certain interest in any part thereof, and burglary be committed in any of their apartments, it seems clear that the indictment shall lay the offense in the mansion-house of the proprietor."—1 Hawk. P. C. 134.

5 Moore v. State, 59 Tex. Cr. Rep. 361, 128 S. W. 1115.

6 People v. Carr, 255 Ill. 203, Ann. Cas. 1913D, 864, 41 L. R. A. (N. S.) 1209, 99 N. E. 357; State v. Johnson, 4 Wash. 593, 9 Am. Cr. Rep. 145, 30 Pac. 672.

his dwelling-house;[7] and where ownership is thus laid in such occupant of the room, it is not necessary to allege a hiring for any definite length of time.[8]

§ 484. —— Corporation as owner. The sufficiency of an allegation in an indictment or information of the corporate ownership of premises burglarized has been already discussed,[1] and it remains to add here that it is pretty generally held that it is not necessary to allege that a corporation is the owner of premises burglarized, or that, as a corporation, it was capable of holding property.[2] Thus, an indictment charging burglary describing the ownership of the premises as that of "the San Diego and Coronado Water Company," without alleging whether it was a corporation or an association, was held to be a sufficient allegation of the ownership.[3] But there are cases to the effect that the indictment should allege whether the "company" was a corporation or an unincorporated association, and if the latter, that the individuals composing the association should be designated by name.[4] Where ownership is laid in a corporation, the

7 State v. Johnson, 4 Wash. 592, 9 Am. Cr. Rep. 145, 30 Pac. 672.

8 State v. Burton, 27 Wash. 528, 67 Pac. 1097.

1 See, supra, § 479.

2 ALA.—Bailey v. State, 116 Ala. 437, 22 So. 918. CAL.—People v. Henry, 77 Cal. 445, 19 Pac. 830. GA.—Hatfield v. State, 76 Ga. 499. IOWA—State v. Watson, 102 Iowa 651, 72 N. W. 283. MASS.—Com. v. Williams, 56 Mass. (2 Cush.) 582; Com. v. Moriarity, 135 Mass. 540. MINN.—State v. Golden, 86 Minn. 206, 90 N. W. 398. MO.—State v. Shields, 89 Mo. 259, 6 Am. Cr. Rep. 98, 1 S. W. 336. NEV.—State v. Simas, 25 Nev. 432, 62 Pac. 242. N. H.—State v. Rand, 33 N. H. 216; State v. Scripture, 42 N. H. 485. N. J.—Fisher v. State, 40 N. J. L. (11 Vr.) 169. N. Y.—People v. McCloskey, 5 Park. Cr. Rep. 57. OHIO—Burke v. State, 34 Ohio St. 79; Hamilton v. State, 34 Ohio St. 82. FED.—Morris v. United States, 229 Fed. 516.

It is sufficient to aver ownership in a corporation by the corporate name.—Bailey v. State, 116 Ala. 437, 22 So. 918.

See, supra, § 479, footnote 6.

3 People v. Henry, 77 Cal. 445, 19 Pac. 830, under provision of Cal. Pen. Code, § 959.

See, also, supra, § 479, footnote 6.

4 Pells v. State, 20 Fla. 774, 5 Am. Cr. Rep. 96.

incorporation should be alleged, under the Missouri statute,[5] but this does not seem to be required elsewhere.[6]

§ 485. —— Partnership as owner. The sufficiency of allegation as to joint and partnership ownership of property broken into and entered has been discussed,[1] and it remains to add here that ownership of the burglarized premises may be laid in a partnership[2] by the firm name,[3] or ownership may be laid in one of the partners.[4] If ownership is alleged in a partnership, the names of the copartners must be alleged under the Missouri statute.[5]

§ 486. —— Decedent's estate. It has been held in Alabama that an indictment for burglary charging the accused with breaking and entering the house of a person at the time deceased may properly describe the premises as the property of the estate of a person deceased, naming him,[1] on the ground that the identification of the house by description as to ownership is so far necessary, only, as is requisite to protect the accused from being put a second time in jeopardy for the same cause or being a second time punished for the same offense;[2] but that doctrine has been overruled,[3] and it is now held in that state that the ownership can not be laid in the estate

5 State v. Jones, 168 Mo. 398, 68 S. W. 566; State v. Horned, 178 Mo. 59, 76 S. W. 953; State v. James, 194 Mo. 268, 5 Ann. Cas. 1007, 92 S. W. 679; State v. Kelley, 206 Mo. 685, 105 S. W. 606; State v. Henschel, 250 Mo. 263, 157 S. W. 311.

6 See, supra, § 479, footnotes 7-9.

1 See, supra, § 480.

2 Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87, 2 Cow. Cr. Rep. 331.

3 People v. Rogers, 81 Cal. 209, 22 Pac. 592. See People v. Henry, 77 Cal. 445, 19 Pac. 830.

4 Coates v. State, 31 Tex. Cr. 257, 20 S. W. 585. See, also, supra, § 480.

5 State v. Jones, 168 Mo. 398, 68 S. W. 566.

1 Anderson v. State, 48 Ala. 665, 17 Am. Rep. 36; Murray v. State, 48 Ala. 675.

2 Anderson v. State, 48 Ala. 665, 17 Am. Rep. 36. See, also, supra, §§ 478, 479.

3 Beall v. State, 53 Ala. 460, 2 Am. Cr. Rep. 463, overruling Anderson v. State, 48 Ala. 665, 17 Am. Rep. 36, and Murray v. State, 48 Ala. 675.

of a person deceased,[4] and this seems to be the doctrine in Missouri, also.[5] But in Iowa, in a case where it was averred that the premises was the property of the estate of a named decedent, "in which his widow and children kept goods and valuable things," the court held this to be a sufficient description of the ownership of the premises under the statute.[6]

At common law the premises burglarized must be the mansion-house or dwelling-house of the person in whom ownership is laid in a charge of burglary,[7] and to constitute the premises his dwelling-house the same, or some portion of it, must be occupied by him as his dwelling place and home.[8] As a decedent's "estate" is incapable of measuring up to the requirements of the common law as respects residence and occupancy, it would seem, on principle, the inevitable conclusion that ownership can not justly be laid in the estate of a decedent. However, it may properly be laid in the administrator or executor of his estate, under the American statutes, doubtless, as well as under the common law.[9]

§ 487. Occupancy of premises. An indictment or information charging accused with breaking and entering a dwelling-house, in the absence of provision in the statute to the contrary, need not allege that any one was in the house at the time,[1] or set out the names of the dwellers therein,[2] and where the pleader undertakes to set out the names of the occupants an error in this re-

4 Beall v. State, 53 Ala. 460, 2 Am. Cr. Rep. 463.

5 State v. Hammons, 226 Mo. 604, 126 S. W. 422.

6 State v. Franks, 64 Iowa 39, 19 N. W. 832.

7 2 Russell on Crimes (9th Am. ed.) 15.

8 Id. 21.

9 See 3 Chit. Crim. Law 1102; 2 East P. C. 499.

1 State v. Reid, 20 Iowa 413; State v. Neddo, 92 Me. 71, 42 Atl. 253; Bell v. State, 20 Wis. 599.

Contra: Under Ohio statute of 1833. Forsythe v. State, 6 Ohio 20.

2 State v. Emmons, 72 Iowa 265, 33 N. W. 672.

gard will not be fatal where the allegations are otherwise sufficient.[3] But where the statute divides the offense into grades or degrees and inflicts punishment varying according to the degree, and it is sought to charge the higher grade or degree there must be an allegation that some one was in the house at the time of the commission of the offense.[4]

§ 488. Possession of burglar's tools. An indictment or information charging accused with having possession of burglar's tools, with the intent to use such implements for the purpose of breaking open houses and other depositories of goods or money, to steal from the owners thereof goods, money and things of value, must contain a statement of the facts constituting the offense in plain and concise language so that the accused may be fully apprised of the exact nature of the charge against him,[1] but need not describe either the buildings intended to be broken into and entered,[2] the property intended to be taken and carried away, or the name of the owner or owners.[3]

3 State v. Emmons, 72 Iowa 265, 33 N. W. 672.

"Occupied A" instead of "occupied by A," held fatal in Scroggins v. State, 36 Tex. Cr. Rep. 117, 35 S. W. 968.

Indefensible technical decision in case of a manifest clerical error, merely. See, supra, § 322.

4 Second degree burglary, only, is charged by an indictment which fails to allege that the house was actually occupied at the time of the offense, under North Carolina Act, 1889, ch. 434.—Harris v. People, 44 Mich. 305, 6 N. W. 677; State v. Fleming, 107 N. C. 905, 12 S. E. 131.

Burglar armed at the time of the offense, and some one lawfully in the house, the statute making the offense of a higher grade or degree and inflicting a heavier punishment, a charge that accused was armed will be disregarded as surplusage unless there is also an allegation that some one was in the house at the time.—Harris v. People, 44 Mich. 305, 6 N. W. 677.

1 State v. Erdlen, 127 Iowa 620, 103 N. W. 984.

See, also, supra, § 457.

2 People v. Edwards, 93 Mich. 636, 53 N. W. 778; Scott v. State, 65 N. W. 61.

3 Com. v. Tivnon, 74 Mass. (8 Gray) 375, 69 Am. Dec. 248.

§ 489. JOINDER OF BURGLARY AND SUBSIDIARY OFFENSE. The crime of burglary and the crime of larceny following the burglarious breaking and entry are an exception to the general rule that two distinct crimes can not be charged in an indictment or information.[1] The reason for this seems to be that the burglarious entry with the intent to steal, and the consummation of that intent by actual theft, are so intimately connected that the two crimes may be charged in the same count,[2] or in separate counts of the same indictment,[3] without laying the indictment open to the objection that it is bad for duplicity.[4] This joinder is allowed, it is said, in order that there may be a conviction of the one if there is a failure

1 See, supra, §§ 292 et seq.

Two offenses growing out of same transaction can not be charged in same indictment, but there is no objection to charging various phases of the crime in separate counts in the same indictment — e. g., charging in three counts respectively robbery, larceny, and receiving stolen goods. —Tobin v. People, 104 Ill. 565, 4 Am. Cr. Rep. 555. See Hiner v. People, 34 Ill. 297; Lyons v. People, 68 Ill. 271; Bennett v. People, 96 Ill. 602.

2 ILL.—People v. Goodwin, 263 Ill. 99, 104 N. E. 1018. GA.—Gilbert v. State, 65 Ga. 449. KAN.—State v. Mooney, 93 Kan. 353, 144 Pac. 228. LA.—State v. King, 37 La. Ann. 662; State v. Nichols, 37 La. Ann. 779. Burglary and larceny may be charged as a single crime.—State v. Fuselier, 134 La. 632, 64 So. 493. MISS.—James v. State, 77 Miss. 370, 78 Am. St. Rep. 527, 26 So. 929; Brown v. State, 103 Miss. 664, 60 So. 727. MO.—State v. Blockberger, 247 Mo. 600, 153 S. W. 1031. OHIO—Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340. TEX.—Howard v. State, 8 Tex. App. 447; Dunham v. State, 9 Tex. App. 330; Miller v. State, 16 Tex. App. 417, 5 Am. Cr. Rep. 94. W. VA.—State v. Flanagan, 48 W. Va. 115, 35 S. E. 862.

3 ALA.—Bell v. State, 48 Ala. 684; Arden v. State, 6 Ala. App. 64, 60 So. 538. CAL.—People v. Piner, 11 Cal. App. 542, 105 Pac. 780. GA.—Scott v. State, 14 Ga. App. 806, 82 S. E. 376. ILL.—Lyons v. People, 68 Ill. 271; People v. Moeller, 260 Ill. 375, 103 N. E. 216; People v. Goodwin, 263 Ill. 99, 104 N. E. 1018. IND.—Choen v. State, 85 Ind. 209. LA.—State v. Huey, 48 La. Ann. 1382, 20 So. 915; State v. Perry, 116 La. 231, 40 So. 686; State v. Natcisse, 133 La. 584, 63 So. 182. PA.—Com. v. Church, 17 Pa. Super. Ct. 39. WYO.—Ackerman v. State, 7 Wyo. 504, 54 Pac. 228.

4 Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

Burglary and larceny forming one transaction can not be charged

to establish the other.[5] It has been said that such an indictment charges but one offense, and that offense is burglary,[6] the larceny being merged in the burglary,[7] and that on a general verdict of guilty the sentence must be for burglary.[8] The better doctrine is thought to be, and the one that is supported by the weight as well as the number of adjudicated cases, is that two crimes are charged,[9] and that the accused may be convicted on the charge of burglary and acquitted on the charge of larceny, and vice versa;[10] where there are two or more defendants jointly charged in such an indictment, some may be convicted of the burglary and acquitted of the larceny, while others are acquitted of the burglary and convicted on the charge of larceny.[11] However, a conviction of the charge of burglary has been held

in one indictment under a statute providing that one offense only may be charged in the same indictment.—State v. Smith, 2 N. D. 515, 52 N. W. 320.

5 Aiken v. State, 41 Neb. 263, 59 N. W. 888; Smith v. State, 22 Tex. App. 350, 3 S. W. 238; Ex parte Peters, 2 McC. 403, 12 Fed. 461.

6 Stoope v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

7 R. v. Withal, 1 Leach C. C. 88, 2 East P. C. 517.

Conviction of burglary works a merger of the charge of larceny.—State v. Moore, 12 N. H. 44.

8 State v. McClung, 35 W. Va. 280, 13 S. E. 654. See Com. v. Hope, 39 Mass. (22 Pick.) 10; Josslyn v. Com., 47 Mass. (6 Metc.) 240; Roberts v. State, 55 Miss. 421, 424; James v. State, 77 Miss. 370, 372, 78 Am. St. Rep. 527, 26 So. 929; State v. Moore, 12 N. H. 44.

Conviction can not be had for both offenses, under the Texas statute, neither can a separate punishment be assessed for each, or a joint punishment assessed for both.—Miller v. State, 16 Tex. App. 417, 5 Am. Cr. Rep. 94.

Verdict of guilty of burglary, court may sentence for that offense without waiting a response to the charge of larceny.—Breese v. State, 10 Ohio St. 146, 80 Am. Dec. 340.

9 State v. Cocker, 3 Harr. (Del.) 554; State v. Brandon, 7 Kan. 106; State v. Martin, 76 Mo. 337, 4 Am. Cr. Rep. 86; Com. v. Tuck, 37 Mass. (20 Pick.) 360; State v. Owens, 79 Mo. 619; State v. Kennedy, 88 Mo. 341; State v. Grisham, 2 N. C. (1 Hayw.) 17; Shepherd v. State, 42 Tex. 501; R. v. Hungerford, 2 East P. C. 518.

10 R. v. Turner, 1 Sid. 171, 2 East P. C. 519.

11 Gordon v. State, 71 Ala. 315; State v. Martin, 76 Mo. 337, 4 Am. Cr. Rep. 86.

to be no bar to a subsequent prosecution on the charge of larceny connected therewith.[12]

Other subsidiary felonies committed or intended to be committed in connection with a burglarious entry, it follows on principle, may likewise be joined in the indictment, although such subsidiary offense is not necessary to the completion of the crime of burglary, the mere breaking and entering with the intent to commit the subsidiary offense being sufficient.[13]

§ 490. Duplicity. An indictment or information charging accused with burglariously breaking and entering a dwelling-house with the intention of committing two distinct crimes, e. g., to commit adultery[1] and to steal,[2] is not bad for duplicity, for the reason that the intent does not constitute the crime of burglary, although it is an essential ingredient thereof; the offense consists in breaking into and entering with the intent to commit any one of the crimes denounced by the statute, and if there exists an intent at the time of the entry to commit two or more of them, the act of breaking and entering is none the less the crime of burglary.[3] And it has been said that, under the Texas statute, it is not duplicitous to charge breaking and entering in the daytime and also in the night-time, when the two charges

12 See, supra, §§ 466 et seq.

13 See: IOWA — State v. Hayden, 45 Iowa 11; State v. Ridley, 48 Iowa 370; State v. Shaffer, 50 Iowa 290. KAN.—State v. Brandon, 7 Kan. 106. KY.—Olive v. Com., 86 Ky. (5 Bush) 376. MASS.—Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Hope, 39 Mass. (22 Pick.) 1; Josslyn v. Com., 47 Mass. (6 Metc.) 236; Mite v. Com., 52 Mass. (11 Metc.) 581; Leonard v. Com., 53 Mass. (12 Metc.) 240; Jennings v. Com., 105 Mass. 586; Com. v. Darling, 129 Mass. 112. MISS.—Smith v. State, 51 Miss. 822; Roberts v. State, 55 Miss. 421. TENN. — Davis v. State, 43 Tenn. (3 Coldw.) 77. TEX. — Dunham v. State, 9 Tex. App. 330. VA. — Speers v. Com., 17 Gratt. (Va.) 570; Vaughan v. Com., 17 Gratt. (Va.) 576.

1 See, supra, § 467.

2 See, supra, § 469.

3 State v. Fox, 80 Iowa 213, 20 Am. St. Rep. 245, 45 N. W. 874.

refer to the same transaction,[4] without alleging that the building was a private dwelling;[5] also that charging in separate counts night-time burglary, night-time burglary of a private residence, and burglary by force and threats, is not duplicitous.[6]

§ 491. Amendment of indictment or information. An indictment or information charging burglary may be amended as to form where the defendant is not prejudiced thereby.[1] Thus there may be a change in the description of the building burglarized,[2] or in the name of the owners of the building,[3] and the court may allow a change showing the date of the commission of the offense;[4] but where accused is charged with breaking and entering in the day-time, the indictment or information can not be amended so as to charge the breaking and entering to have been in the night-time, to conform to the proof;[5] neither can there be an amendment to an indictment changing the venue of the location of the building burglarized, without a resubmission to the grand jury.[6]

§ 492. Objection to indictment—Manner of making and waiver. An objection to an indictment or information charging burglary must be raised in the manner prescribed by statute or code, or it is deemed to have been waived.[1] Where the indictment or information

4 Martinez v. State, 51 Tex. Cr. Rep. 584, 103 S. W. 930.

5 Johnson v. State, 52 Tex. Cr. Rep. 201, 107 S. W. 52.

6 Jackson v. State, (Tex. Cr.) 71 S. W. 280.

1 There is no prejudice to insert in the indictment the name of the defendant in a count where it had been inadvertently omitted.—State v. Coover, 69 Kan. 382, 76 Pac. 845.

2 State v. Sweeney, 135 La. 566, 65 So. 743.

3 People v. Richards, 44 Hun (N. Y.) 278, 5 N. Y. Cr. Rep. 355.

4 State v. Johnson, 35 La. Ann. 842.

5 State v. Sowell, 85 S. C. 278, 67 S. E. 316.

6 State v. Kelly, 66 N. H. 577, 29 Atl. 843.

1 State v. Rogers, 40 Mont. 248, 106 Pac. 3.

charges burglary with intent to commit a felony, but fails to set out what particular felony was intended,[2] it is demurrable for insufficiency; a failure to demur is not a waiver of the objection.[3] Where the venue is not properly laid so as to give the court into which indictment is returned jurisdiction to try the accused on the charge, objection may be taken on motion in arrest of judgment, although no demurrer was interposed.[4]

2 See, supra, § 465.

3 People v. Nelson, 58 Cal. 104.

4 People v. Webber, 133 Cal. 623, 14 Am. Cr. Rep. 142, 66 Pac. 38.

CHAPTER XXX.

INDICTMENT—SPECIFIC CRIMES.

Champerty and Maintenance.

§ 493. In general. A distinction is drawn between "barratry" and "champerty and maintenance," and for that reason we have treated the two offenses separately.[1] The former offense consists in frequently exciting or stirring up suits and quarrels, either at law or otherwise,[2] while the latter offense is the unlawful maintaining or prosecution of a suit, in consideration of a bargain or contract to have part of the thing in dispute, or some profit out of it,[3] and was not only an offense at common law,[4] but was considered, in the earliest times and in all

1 As to "barratry," see, supra, §§ 441-443.

2 4 Bl. Com. 134; 4 Steph. Com. 262; Co. Litt. 368.

3 4 Bl. Com. 135; Co. Litt. 368b; Fitzh. Nat. Brev. 172; Hawk. P. C. b. I, ch. 84; 2 Inst. 208; Reg. Orig. 183; Stat. Westm. I, ch. 25; Key v. Vattier, 1 Ohio 132; Weakly v. Hall, 13 Ohio 175.

Distinction between champerty and maintenance consists in this: Where there is no agreement to divide the thing regarding which the suit is brought, the party intermeddling is guilty of maintenance only; where there is a bargain or contract to receive part of the thing in suit, the offense is champerty. 4 Chitty's Bl. Com. 135.

Lord Coke's rule is: Every champerty is maintenance, but every maintenance is not champerty.—2 Inst. 208.

4 Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586.

Lord Coke commenting on Westm. I, ch. 25, the first English statute on the subject, says that it was against the common law maxim "culpa est immiscere se rei ad se non pertinenti" (it is culpable conduct for a man to meddle with a thing not belonging to or concerning him), and this other, "pendente lite nihil innovatur" (pending the suit nothing should be changed), and cites Bracton, who wrote before the enactment of Westm. I, ch. 25, to show that it was one of the articles inquirable by the justices in Eyre, before the reign of Edward I, whether suits had been stirred up by certain officers by which

countries, as an offense of great mischief to the public.[5] The crime was indictable at common law, and still is in some of the states of the Union.[6]

In American states the common-law doctrine of champerty and maintenance, as defined by Blackstone, became a part of the law of the land in the original thirteen colonies and those states of the Union[7] which adopted the common law[8] as the basis of their jurisprudence,[9] except in those of the colonies and states in which the courts have declared that the common-law doctrine of champerty and maintenance is not applicable to their circumstances,[10] among these California,[11] Iowa,[12] Vermont,[13]

justice and truth might be suppressed or delayed. See 2 Inst. 208.

Distinction between attorney and advocate drawn by New Jersey court, and common-law doctrine of champerty held not to apply to the former either in "legal history or adjudicated cases." —Schomp v. Schenck, 40 N. J. L. (11 Vr.) 195, 29 Am. Rep. 219.

5 Stanley v. Jones, 7 Benj. 369.

6 Newkirk v. Cone, 18 Ill. 449; Wright v. Meek, 3 Greene (Ia.) 472; Brown v. Beauchamp, 21 Ky. (5 T. B. Mon.) 413, 17 Am. Dec. 81; Thurston v. Perceval, 18 Mass. (1 Pick.) 415; Key v. Vattier, 1 Ohio 132; Douglass v. Wood, 31 Tenn. (1 Swan) 393; McMullen v. Guest, 6 Tex. 275; Danforth v. Streeter, 28 Vt. 490.

See, also, Kerr's Whart. Crim. L., § 2212.

7 But whether to the extent of being punishable as a crime or only as invalidating contracts, which at common law were champertous, it is not necessary in this place to stop to inquire.

8 Scobey v. Ross, 13 Md. 117; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586.

9 See Bayard v. McLane, 3 Harr. (Del.) 139, 212; Thompson v. Reynolds, 73 Ill. 11; Lathrop v. Amherst Bank, 50 Mass. (9 Metc.) 490; Backus v. Byron, 4 Mich. 535; Benedict v. Stuart, 23 Barb. (N. Y.) 421; Ogden v. Des Arts, 4 Duer. (N. Y.) 283; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Allard v. Lamaronde, 29 Wis. 502.

10 See Richardson v. Rowland, 40 Conn. 565; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314.

11 Mathewson v. Fitch, 22 Cal. 86; More v. Massinni, 32 Cal. 590, 595; Hoffman v. Vallejo, 45 Cal. 564; Lucas v. Pico, 55 Cal. 126.

12 **Contracts held in contravention of public policy** and can not be enforced.—Wright v. Meek, 3 Greene (Iowa) 472.

See Boardman v. Thompson, 25 Iowa 488; Adye v. Hanna, 47 Iowa 264, 29 Am. Rep. 484; Langan v. Sankey, 55 Iowa 52, 7 N. W. 393; Hyatt v. Burlington, C. R. & N. R. Co., 68 Iowa 662, 27 N. W. 815.

13 Danforth v. Streeter, 28 Vt. 490.

and perhaps others; while in still other of the states of the Union the doctrine is supplanted by statute, as in Connecticut,[14] Illinois,[15] Kentucky,[16] Maine,[17] New York,[18] Texas,[19] and perhaps elsewhere.

§ 494. INDICTMENT—AT COMMON LAW. The distinction between champerty and maintenance has already been pointed out, as has also the fact that all champerty is maintenance, but that every maintenance is not champerty.[1] An indictment for maintenance may allege that, at a certain time and place, the accused did unjustly and unlawfully maintain and uphold a certain suit which then was depending in a named court, describing it, and setting forth the particular acts of accused which are complained of, contrary to the policy of the law, or if under the statute, contrary to the statute in such case made and provided, and to the manifest hindrance and disturbance of justice, and in contempt, etc., and against the peace and dignity, etc.[2]

§ 495. —— UNDER STATUTE. An indictment under the New York statute, against an attorney charging him with buying a promissory note need not allege that the note was purchased with intent to institute and prosecute suit thereon;[1] nor is it necessary to allege that a prosecution has been begun; neither need the date, amount, nor time of maturity of the note be alleged.[2]

14 Richardson v. Rowland, 40 Conn. 565.

15 Newkirk v. Cone, 18 Ill. 449; Thompson v. Reynolds, 73 Ill. 11 (although not contained in criminal code, indictable).

16 Davis v. Sharron, 54 Ky. (15 B. Mon.) 64.

17 Low v. Hutchinson, 37 Me. 196.

18 Sedgwick v. Stanton, 14 N. Y. 289.

19 Bentinck v. Franklin, 38 Tex. 458.

1 See, ante, § 493, footnote 2.

2 This is substantially the form of Chitty. See 2 Chit. Crim. Law, p. 234.

Elaborated forms will be found in R. v. Langrish, Tremaine P. C. 176, and R. v. Price, Id. p. 177.

1 People v. Walbridge, 6 Cow. (N. Y.) 512.

2 People v. Walbridge, 6 Cow. (N. Y.) 512.

§ 496. —— Conclusion. In this country, where prosecution is at common law, the conclusion need not be "against the form of the statute," etc., notwithstanding the fact that the offense was prohibited by various English statutes,[1] on pain of fine and imprisonment, because those old statutes formed a part of the common law, in so far as applicable, adopted into this country. Where the prosecution is under statute, and the act complained of comes within the provisions of two separate statutes, the conclusion may be simply "contrary to the form of the statute," in the singular.[2]

1 See Westm. I, ch. 25; 1 Edw. III, ch. 14; 20 Edw. III, ch. 4; 1 Rich. II, ch. 4; 32 Hen. VIII, ch. 9.

2 People v. Walbridge, 6 Cow. (N. Y.) 512.

CHAPTER XXXI.

INDICTMENT—SPECIFIC CRIMES.

Chattels, Selling or Removing Mortgaged.

§ 497. In general—Venue. The statutes in the various states making it a criminal offense, and prescribing punishment, to sell or remove or conceal mortgaged personal property, or property partaking of the nature of real property but subject of a chattel mortgage, among which species of property may be classed unplanted[1]

1 ALA.—Jones v. Webster, 48 Ala. 109; Rees v. Coats, 65 Ala. 256; Gaston v. Marengo Imp. Co., 139 Ala. 465, 36 So. 738; Winston v. Farrow, 40 So. 53. ARK.—Jarratt v. McDaniel, 32 Ark. 598; Bell v. Radcliff, 32 Ark. 620. CAL.—Argus v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801; Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679. IND.—Headrick v. Brittain, 63 Ind. 438. IOWA—Wheeler v. Becker, 68 Iowa 723, 28 N. W. 40; Norris v. Hix, 74 Iowa 524, 38 N. W. 395. MINN.—Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Hogan v. Atlantic Elevator Co., 66 Minn. 344, 69 N. W. 1. MISS.—Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682; McCown v. Mayer, 65 Miss. 537, 5 So. 98; Stadeker v. Loeb, 67 Miss. 200, 6 So. 687. NEB.—Sporer v. McDermott, 69 Neb. 533, 96 N. W. 232. N. C.—Robinson v. Ezzell, 72 N. C. 231; Harris v. Jones, 83 N. C. 317; Rawlins v. Hunt, 90 N. C. 270; Rountree v. Britt, 94 N. C. 104. N. D.—Hostetter v. Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49; Schweinber v. Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35. OKLA.—Eckles v. Ray, 13 Okla. 541, 75 Pac. 286. TENN.—Colk v. Foster, 66 Tenn. (7 Baxt.) 98; Watkins v. Wyatt, 68 Tenn. (9 Baxt.) 250, 30 Am. Rep. 63. FED.—Ellett v. Butt, 1 Woods 214, Fed. Cas. No. 4384, affirmed 86 U. S. (19 Wall.) 544, 22 L. Ed. 183.

Contra: Hirst v. Bell, 72 Ala. 336; Hutchinson v. Ford, 72 Ky. (9 Bush) 318, 15 Am. Rep. 711; Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682; Cudworth v.

or growing[2] or matured[3] crops, are as variant, almost, as the states themselves; the particular provisions of any particular statute must be carefully consulted in applying the rules set forth in this subdivision.

Acknowledgment and filing of mortgage for record is required to be alleged in an indictment charging sale, removal or concealment of mortgaged chattels, according to the rule in some of the cases,[4] while in others it is held not necessary either to allege or prove that the mortgage was recorded or filed for record.[5]

Scott, 41 N. H. 456; Milliman v. Neher, 20 Barb. (N. Y.) 37.

Crop must come into existence or be acquired by mortgagor before mortgage lien attaches.—McMaster v. Emerson, 109 Iowa 284, 80 N. W. 389.

In Missouri possession must be taken by mortgagee before mortgage lien will attach.—Littlefield v. Lemley, 75 Mo. App. 511.

In North Dakota limited to crop next maturing.—Schweinber v. Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35.

Yearly crops for indefinite period inoperative as against bona fide purchasers in subsequent years.—Shaw v. Gilmore, 81 Me. 396, 17 Atl. 314.

2 ALA.—Adams v. Tanner, 5 Ala. 740; Robinson v. Maudlin, 11 Ala. 977; Lehmon v. Marshall, 47 Ala. 362; Booker v. Jones, 55 Ala. 266. CAL.—Simpson v. Ferguson, 112 Cal. 180, 44 Pac. 484; Wilkerson v. Thorpe, 128 Cal. 221, 60 Pac. 679. ILL.—Hansen v. Dennison, 7 Ill. App. 73. MINN.—State v. Williams, 32 Minn. 537, 21 N. W. 746; Clare v. Hodges, 44 Minn. 204; 46 N. W. 335. MISS.—Cayce v. Stovall, 50 Miss. 396; Betts v. Ratcliff, 50 Miss. 561. N. Y.—Nestell v. Hewitt, 19 Abb. N. C. 282 (hay to be grown from roots in ground). N. C.—Robinson v. Ezzell, 72 N. C. 231; Cotten v. Willoughby, 83 N. C. 75, 35 Am. Rep. 564; Rawlins v. Hunt, 90 N. C. 270. PA.—Fry v. Miller, 45 Pa. St. 441. TENN.—Williamson v. Steel, 71 Tenn. (3 Lea) 527, 31 Am. Rep. 652. TEX.—Cook v. Steel, 42 Tex. 53.

Contra: Hardeman v. State, 16 Tex. App. 1, 49 Am. Rep. 821.

Is "growing crop" when seed is put in ground.—Wilkinson v. Ketler, 69 Ala. 435; Cotten v. Willoughby, 83 N. C. 75, 35 Am. Rep. 564.

Compare: Comstocks v. Scales, 7 Wis. 159.

3 Hamilton v. State, 94 Ga. 770, 21 S. E. 995. See Grangers' Business Assn. v. Clark, 84 Cal. 201, 23 Pac. 1081; Silberger v. Trilling, 82 Tex. 523, 18 S. W. 591.

4 State v. Harberson, 43 Ark. 378.

5 Barnett v. State, 65 Ark. 80, 44 S. W. 1037.

Language of the statute, or its equivalent,[6] may be followed in the indictment or information, even though it involves a disjunctive allegation, e. g., "did sell, remove or conceal."[7]

Mortgage may be set out in hæc verba, or according to tenor and effect; but strict exactness in setting forth by tenor must be met by strict exactness of proof.[8]

Ownership of the debt secured by the chattel mortgage should be set forth; but laying title in the administrator of a deceased mortgagee, instead of in his heirs, has been held not to render the indictment defective.[9] And in a case where the chattel mortgage is executed to a person as the trustee for another, to whom the debt secured is owing, it is sufficient to allege that such person acting as trustee is the legal owner of the mortgage, without alleging that he is the real holder of the debt secured.[10]

Venue is required to be laid in the county in which the crime occurred, is a general rule of criminal pleading, and in a prosecution charging the fraudulent sale of mortgaged property, the action must be brought in the county in which the fraudulent sale was made, not in the county in which the mortgage was given, or the county from which the property was brought.[11]

§ 498. SELLING MORTGAGED CHATTELS.[1] An indictment or information charging that accused sold or otherwise disposed of designated property alleged to have been mortgaged to another, must also allege that the mort-

6 "Did run" in place of statutory "remove" held good.—Williams v. State, 27 Tex. App. 258, 11 S. W. 114.

7 Nixon v. State, 55 Ala. 120. See Glenn v. State, 60 Ala. 104.

"Did sell, barter, or otherwise dispose of" bad for uncertainty in Arkansas.—Cooper v. State, 37 Ark. 412.

8 Hardeman v. State, 16 Tex. App. 1, 49 Am. Rep. 821; Thomas v. State, 18 Tex. App. 213.

9 State v. Maxey, 41 Tex. 524.

10 Stewart v. State, 60 Tex. Cr. Rep. 92, 131 S. W. 329.

11 Robberson v. State, 5 Tex. App. 502.

1 For forms of indictment for selling mortgaged chattels, see Forms Nos. 628-633.

gage was a valid one,[2] was a subsisting lien[3] and unpaid[4] at the time the fraudulent sale is alleged to have been made,[5] and that the sale was made without the consent[6] —under some statutes, written consent,[7] under other statutes, of the owner and holder of the debt secured by the mortgage, and under some statutes the manner of disposition must be alleged,[8]—but the name of the purchaser or transferee need not be set out.[9] It seems that it is not necessary to allege that the accused owned the property or that he had a mortgageable interest therein.[10] Where the charge is the sale of property that had been conditionally mortgaged, the indictment or information

2 Satchell v. State, 1 Tex. App. 438.

An averment that accused sold property falsely representing it to be free from liens and encumbrances, he well knowing that the property was not free from liens and encumbrances, but that a designated corporation held a chattel mortgage on the property to secure the payment of a specified sum, is sufficient as a basis to show a valid chattel mortgage held by the designated corporation.—Keyes v. People, 100 Ill. App. 163.

Charging that accused "heretofore, to wit, on a named date, executed and delivered to the said A a valid mortgage in writing," is a sufficient allegation that accused executed and delivered a valid mortgage to A previous to the alleged fraudulent sale.—Haile v. State, (Tex. Cr. Rep.) 43 S. W. 999.

3 Satchell v. State, 1 Tex. App. 438.

4 State v. Gustarfson, 50 Iowa 194; State v. Hughes, 38 Neb. 366, 56 N. W. 982; State v. Peckham, 79 N. C. 652; State v. Burns, 80 N. C. 376; Satchell v. State, 1 Tex. App. 438.

Existence of debt, as to sufficiency of allegation of, see Osborne v. State, 109 Ark. 440, 160 S. W. 215.

5 **Existence of mortgage debt** necessary to lien.—McCaskill v. State, 68 Ark. 490, 60 S. W. 234.

As to unplanted crop mortgaged, see, infra, this section, footnote 20 and text going therewith.

6 **Consent** sufficient; written consent not necessary to authorize sale.—State v. Pepin, 22 Ind. App. 373, 53 N. E. 482; State v. Munsen, 72 Mo. App. 543.

7 State v. Hughes, 38 Neb. 366, 56 N. W. 982.

8 State v. Peckham, 79 N. C. 652; State v. Burns, 80 N. C. 376.

Contra: Richter v. State, 4 Ga. App. 274, 61 S. E. 147, wherein it is held that the indictment need not specifically set out how the property was disposed of, to whom disposed of, or how loss was sustained by the mortgagee.

9 See this section, footnote 22 and text going therewith.

10 State v. Williams, 32 Minn. 537, 21 N. W. 746.

must allege that the mortgage had become absolute by the happening of the designated condition before the sale, or it will be insufficient.[11]

Duplicity can not be successfully urged against an indictment or information alleging that accused did "sell and dispose of, to one A, and to divers other persons" not known to the grand jury "the personal property described in said mortgage, to wit, four thousand bushels of No. 2 wheat," for the reason that but one sale is charged —one sale to divers persons, not divers sales to divers persons.[12]

Fraudulent intent is the gist of the offense, and must be sufficiently averred[13] and proved,[14] but it need not be specifically alleged that the act was done with intent to defraud, although such intent is necessary to make the offense complete.[15] Thus, it has been held that an information charging accused with having sold mortgaged property without notification to the mortgagee, or giving information of the existence of the mortgage to the purchaser, need not charge an intent to defraud,[16] and that where such intent is specifically charged it may be regarded as surplusage.[17]

Growing crop,[18] or prospective crop before planted,[19] we have already seen, may be mortgaged. Where a mortgage is executed upon a prospective crop as yet unplanted, indictment or information must allege this fact, that accused thereafter planted or had the crop planted,

11 State v. Devereux, 41 Tex. 383.

12 State v. Williams, 32 Minn. 537, 21 N. W. 746.

13 "Dispose of" is a sufficient description of the intent in Arkansas (under Sand. & H. Dig. § 1868), when there is an allegation in the stating part that accused sold the property.—State v. Crawford, 64 Ark. 194, 41 S. W. 425.

14 Satchell v. State, 1 Tex. App. 438.

15 State v. Hurds, 19 Neb. 316, 27 N. W. 139.

16 People v. Wolfrom, 15 Cal. App. 732, 115 Pac. 1088; People v. Iden, 24 Cal. App. 627, 142 Pac. 117.

17 People v. Iden, 24 Cal. App. 627, 142 Pac. 117.

18 See, supra, § 497, footnote 2.

19 See, supra, § 497, footnote 1.

and that when growing or grown the said mortgage became a lien thereon, and that accused fraudulently disposed of such crop after the mortgage lien attached.[20] Where an indictment or information charges accused executed a chattel mortgage on designated acres of a growing crop, naming it, to secure a debt, and without the consent of the mortgagee, sold all the crop raised on the designated acreage, with intent to defraud, is insufficient because it fails to sufficiently describe the property alleged to have been mortgaged and sold.[21]

Name of purchaser or transferee need not be set out in an indictment or information charging sale or other disposition of mortgaged property.[22]

§ 499. Removing mortgaged chattels.[1] According to the general rule, an indictment or information charging fraudulent removal of mortgaged chattels with intent to defraud the mortgagee should contain all the averments,—as validity of mortgage, existence of lien, and nonpayment of debt at the time of the alleged removal,—required in an indictment or information for selling mortgaged chattels;[2] but there are authorities to the effect that indictment need not allege that the mortgage was in writing,[3] or contain any description or special mention of the

20 Mooney v. State, 25 Tex. App. 31, 7 S. W. 587.

21 Hampton v. State, 124 Ga. 3, 52 S. E. 19.

As to description of property, see, infra, § 501.

22 State v. Crawford, 64 Ark. 194, 41 S. W. 425; Richter v. State, 4 Ga. App. 274, 61 S. E. 147; State v. Hughes, 38 Neb. 366, 56 N. W. 982; State v. Pickens, 79 N. C. 652; State v. Burns, 80 N. C. 376; State v. Perry, 87 S. C. 535, 70 S. E. 304; Smith v. State, 26 Tex. App. 577, 10 S. W. 218; Alexander v. State, 27 Tex. App. 94, 10 S. W. 764; Armstrong v. State, 27 Tex. App. 462, 11 S. W. 462.

Contra: Presley v. State, 24 Tex. App. 494, 6 S. W. 540, cited post, on "Variance," this title.

1 **As to forms of indictment** for removing mortgaged chattels, see Forms Nos. 634-637.

2 See, ante, § 498, footnotes 2-4.

3 Wilson v. State, 43 Neb. 745, 62 N. W. 200.

Contra: Maye v. State, 9 Tex. App. 88.

mortgage,[4] that it was recorded or filed for record,[5] that the mortgagee was the owner of the debt secured by the mortgage,[6] or state the value of the property at the time of the removal.[7] Under those statutes providing removal shall not be made without immediately paying the mortgage debt and thus discharging the lien, where the indictment or information fails to state that accused did not immediately discharge the mortgage lien, it is insufficient because it fails to state an offense.[8]

Language of statute may be followed in describing offense,[9] or language of equivalent import may be used. Thus, under the Texas statute, making it criminal to "remove" mortgaged chattels from the county, an allegation that accused "run" the mortgaged property out of the county, was held to be sufficient.[10]

§ 500. CONCEALING MORTGAGED CHATTELS. An indictment or information charging the statutory offense of concealing mortgaged chattels with intent to defraud the mortgagee need not allege the specific means employed for such concealment.[1] When the indictment or information charges concealing or aiding in the concealment of mortgaged property, the words "aiding" and "concealment" will be rejected as surplusage, because accused

4 Nixon v. State, 55 Ala. 120.

5 Barnett v. State, 65 Ark. 80, 44 S. W. 1037.

Allegation of removal from county where "recorded," is surplusage under statute making it a crime to remove from county where lien created.—Hampton v. State, 67 Ark. 266, 54 S. W. 746.

6 Wilson v. State, 43 Neb. 745, 62 N. W. 200.

Compare: Maye v. State, 9 Tex. App. 88.

Trustee holds legal title in mortgage for security of debt, which he does not own, and may prosecute for fraudulent removal. See Stewart v. State, 60 Tex. Cr. Rep. 92, 131 S. W. 329.

7 Wilson v. State, 43 Neb. 745, 62 N. W. 200.

8 Polk v. State, 65 Wis. 433, 4 So. 540.

9 See, ante, § 497.

10 Williams v. State, 27 Tex. App. 258, 11 S. W. 114.

1 State v. Taylor, 90 Kan. 438, 133 Pac. 861. See Richter v. State, 4 Ga. App. 274, 61 S. E. 147.

can be convicted of concealing the property on proof that he aided in so doing.[2]

§ 501. Description and value. The indictment or information should contain a full and definite description of the property alleged to have been fraudulently sold, removed, or concealed—as the case may be; such as would enable an officer with a writ to locate and identify the property. Thus, it has been held that an indictment describing the property as "twelve acres of cotton," without further description of the property, is bad for want of a sufficient description of the property mortgaged.[1] In a case where the property mortgaged is incorrectly described in the mortgage, an indictment or information charging the fraudulent sale, etc., of such property should allege the description as contained in the mortgage, aver that this description was incorrect, setting out wherein it was incorrect, and then allege the true description of the mortgaged property.[2] Where the indictment or information does not set out the chattel mortgage in hæc verba, or according to tenor, but alleges that certain fully described personal property was then and there under the lien of a valid chattel mortgage, in writing, executed by the accused, on a date named, to a specified corporation, firm or individual; that accused thereafter sold said property, the said chattel mortgage being then and there a valid lien on said property, and owned by the corporation or firm or individual named as mortgagee, is sufficient, not being open to the objection that it does not sufficiently describe the mortgaged property.[3] Fraudulent concealment of mortgaged property being charged, which was described as con-

2 Com. v. Wallace, 108 Mass. 12.

As to sufficiency of description of property mortgaged, see, infra, § 501.

1 Hampton v. State, 124 Ga. 3, 52 S. E. 19.

2 Coleman v. State, 21 Tex. App. 520, 2 S. W. 859.

3 Jones v. State, 35 Tex. Cr. Rep. 565, 34 S. W. 631.

sisting of "a large quantity of ready-made clothing, the whole of the value of five hundred dollars; a large quantity of dry goods, the whole of the value of five hundred dollars; and a large quantity of hats and caps, the whole of the value of five hundred dollars—which said property the grand jurors can not more particularly describe," and alleging that the goods described belonged to A, who had mortgaged the same, giving the mortgage—the description of the property was held to be sufficient and the indictment valid.[4]

Value of mortgaged chattels charged to have been sold or removed or concealed is required to be alleged under some statutes, and especially is this true where the statute[5] provides that where the property is under a named value a designated punishment shall be inflicted, and where the value is over the designated amount another and greater punishment shall be inflicted—thereby providing two distinct offenses, with different punishments attached, distinguishable by the value of the property involved.[6] In the absence of such a provision and distinction in the grade or degree of punishment to be inflicted on conviction, value need not be alleged in the indictment or information[7] or found by the jury.[8]

§ 502. Variance. An indictment or information charging concealing, disposing of or removing mortgaged chattel property with the intent to defraud the mortgagee, should set out particularly the specific offense, and the exactness in setting forth must be met with the same exactness in the proof[1] or there will be a fatal variance. Thus, under an indictment or information charging fraudulent removal and concealment of

4 Com. v. Strangford, 112 Mass. 280.

5 As S. C. Crim. Code, 1902, § 337.

6 State v. Perry, 87 S. C. 535, 70 S. E. 304.

7 Wilson v. State, 43 Neb. 745, 62 N. W. 200; State v. Ladd, 32 N. H. 110.

8 State v. Ladd, 32 N. H. 110.

1 See, supra, § 497, footnote 8 and text going therewith.

mortgaged chattels, the only question involved and submitted to the jury being whether the accused was guilty of removing and concealing such property, a conviction of disposing of mortgaged property is not warranted and can not be sustained.[2] In those states where the name of the person to whom mortgaged chattels were sold is required to be set forth,[3] an allegation that the property was disposed of "to a person unknown to the grand jury," is insufficient where the evidence shows that the name was known or could have been ascertained by the exercise of slight diligence.[4]

Describing the property mortgaged, without setting out the mortgage in hæc verba but according to its tenor,[5] though not as fully as in the mortgage, the latter is admissible in evidence;[6] and the fact that the mortgage covers more property than is alleged to have been disposed of, does not constitute a variance.[7]

Describing mortgage as having been executed by the accused, the fact that it was executed by accused and another does not constitute a variance;[8] and neither does the fact that the instrument was a trust deed instead of a mortgage,[9] or the fact that the mortgage was executed to the designated person as a trustee.[10] Where the description charged the debt secured was a note signed by accused and his wife, and the note offered in evidence was signed by accused alone, this was held not to constitute a variance.[11]

2 State v. Miller, 255 Mo. 223, 164 S. W. 482.

3 See, supra, § 498, footnote 22.

4 Presley v. State, 24 Tex. App. 494, 6 S. W. 540.

5 See, supra, § 497.

6 Glass v. State, 23 Tex. App. 425, 5 S. W. 131.

7 Jones v. State, 35 Tex. Cr. Rep. 565, 34 S. W. 631.

8 Nixon v. State, 55 Ala. 120; State v. Perry, 87 S. C. 535, 70 S. E. 304.

9 Osborne v. State, 109 Ark. 440, 160 S. W. 215.

10 Sweat v. State (Tex. Cr. Rep.), 59 S. W. 265. See Stewart v. State, 60 Tex. Cr. Rep. 92, 131 S. W. 329.

The word "trustee" does not affect the mortgage, or change the relation of the parties.—Sweat v. State (Tex. Cr. Rep.), 59 S. W. 265.

11 State v. Miller, 74 Kan. 667, 87 Pac. 723.

Disposing of property subject to two mortgages, being charged, both of which were alleged to have been executed by the accused, is supported by evidence of a chattel mortgage executed by accused and another and defendant as manager of a company, and another mortgage executed by a company and the accused in his individual capacity and as treasurer of a company;[12] and a failure of the evidence to show an unlawful disposition under one of the chattel mortgages will not warrant an acquittal where there is evidence tending to show an unlawful disposition under the other chattel mortgage.[13]

Description of live stock mortgaged which sets out the age, brand and color of the animal or animals, being descriptive of the identity of the animals, such descriptions are material, and must be established by the proof.[14] Thus, it has been held that a charge describing the mortgaged property as "one bull five years old," is not supported by evidence that the accused sold "a red but-headed bull."[15] But a charge that two cows and two calves were sold while subject to the lien of a chattel mortgage is sustained by a mortgage covering the two cows, for the reason that the offspring of mortgaged stock, born after the execution of the mortgage, are subject to the lien of the mortgage.[16]

12 State v. Boyer, 86 S. C. 260, 68 S. E. 573.

13 Id.

14 Coleman v. State, 21 Tex. App. 520, 2 S. W. 850.

15 Gibson v. State, 16 Ga. App. 265, 85 S. E. 199.

16 Dyer v. State, 88 Ala. 225, 7 S. W. 267.

CHAPTER XXXII.

INDICTMENT—SPECIFIC CRIMES.

Common Scold.

§ 503. In general.[1] The offense of being a common scold was indictable at common law[2] and is indictable in a few of the states of the Union;[3] and for that reason is given treatment here. It is to be noted, however, that the punishment now inflicted is that for a minor public nuisance,[4] and not the old punishment of the ducking stool.

§ 504. Form and sufficiency of indictment. According to the old rule, an indictment or information charging this offense must allege that at a stated time in a given place, the accused was a common scold,[1] to the

1 As to form of indictment, see Form No. 638.

2 See Kerr's Whart. Crim. Law, § 1713.

In Com. v. Hutchinson, 5 Clark (Pa.) 321, 3 Am. L. Reg. 113, Judge Galbraith denied the indictability of a common scold, on the ground of the uncertainty of the punishment to be inflicted; but this holding has been overruled in Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153.

3 By fine and imprisonment.—James v. Com., 12 Serg. & R. (Pa.) 236; Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153.

4 Kerr's Whart. Crim. Law, § 1713.

1 Com. v. Hutchins, 5 Pa. L. J. 321; Com. v. Pray, 30 Mass. (13 Pick.) 359; Baker v. State, 53 N. J. L. (24 Vr.) 45, 20 Atl. 858; United States v. Royall, 3 Cr. C. C. 618, Fed. Cas. No. 16201; R. v. Foxby, 6 Mod. 11, 87 Eng. Repr. 776; R. v. Urlyn, 2 Wm. Saund. 308, 85 Eng. Repr. 1107; R. v. Hardwick, 1 Sid. 282, 82 Eng. Repr. 1107; R. v. Cooper, 2 Str. 1246, 93 Eng. Repr. 1160; R. v. Taylor, 2 Str. 849, 93 Eng. Repr. 891; J'Anson v. Stuart, 1 T. R. 748, 99 Eng. Rep. 1357.

Compare: Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153.

common nuisance of the public.[2] The technical term "common scold" was required to be used; no other form of expression could be substituted therefor.[3]

Modern liberality in criminal pleading is making serious inroads into the staid and musty forms of the common law requiring strict technical allegation in strict technical words, and it is highly probable that an indictment or information not containing the technical phrase, "common scold," but framed in such appropriate language as showed that at the time and place named accused was a common scold and a public nuisance, would be upheld,[4] when the charge showed the place to be a public place and the offensive language used within the hearing of citizens present, and to their great annoyance;[5] but the careful and conservative pleader will not omit the time-honored technical phrase, notwithstanding the fact that there are parallel cases in which formal technical words and phrases formerly necessary have been held to be immaterial in charging burglary,[6] murder,[7] rape,[8] robbery,[9] and so forth.

2 Baker v. State, 53 N. J. L. (24 Vr.) 45, 20 Atl. 858; Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153; R. v. Cooper, 2 Str. 1246, 93 Eng. Repr. 1160.

Indictment need not lay the offense ad noncumentum omnium ligeorum, etc., but that diversorum is sufficient, for the reason that it appears from the nature of the offense that it could not be a common nuisance.—2 Hawk. P. C. 323.

3 "Calumniatrix" or "communis rixa" used in an indictment instead of "ripatrix,"—Old English law latin for a scolding woman,—held to render indictment bad, and judgment arrested on motion.—R. v. Foxby, 6 Mod. 11.

4 Such an indictment was upheld in Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153, citing Barker v. Com., 19 Pa. St. 413; but the reasoning of the court seems to place the ruling on the ground that the acts described constituted a public nuisance.

5 See Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 27 Atl. 843.

6 Mully v. Com. 45 Mass. (4 Metc.) 357.

7 Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

8 People v. McDonald, 9 Mich. 150.

Compare, however, Davis v. State, 42 Tex. 226.

9 State v. Robinson, 29 La. Ann. 364.

§ 505. ANGER AND MALICE. The indictment or information need not allege either anger or malice, neither of these being necessary to constitute the offense,[1] it being sufficient simply to aver that accused is a common scold.[2]

§ 506. ALLEGATION OF SPECIFIC ACTS. The offense consisting in a course of conduct,[1] the specific act constituting the alleged offense need not be set out in the indictment or information,[2] though the specific facts or particulars necessary to show a course of conduct should be set out.[3]

§ 507. JOINDER OF DEFENDANTS. From the very nature of the offense it is peculiar to the accused, and another can not be involved therein. Another may be guilty of a like offense, but can not be guilty of the same offense. Hence two defendants can not be joined in an indictment or information charging the offense of being a common scold.[1]

1 United States v. Royall, 3 Cr. C. C. 618, Fed. Cas. No. 16201.

2 See authorities, supra, § 504; also State v. O'Mally, 48 Iowa 501; J'Anson v. Stuart, 1 T. R. 748.

1 See Com. v. Pray, 30 Mass. (13 Pick.) 359; Baker v. State, 53 N. J. L. (24 Vr.) 45, 20 Atl. 858; James v. Com., 12 Serg. & R. (Pa.) 220; R. v. Hannon, 6 Mod. 311.

2 Baker v. State, 53 N. J. L. (24 Vr.) 45, 20 Atl. 858.

3 R. v. Urlyn, 2 Wm. Saund. 308, 85 Eng. Rep. 1107.

1 See, supra, § 352; Lindsey v. State, 48 Ala. 169; R. v. Dovey, 15 Jur. 230, 2 Eng. L. & Eq. 532; R. v. Hayes, 2 Moo. & Ry. 155; R. v. Philips, 2 Str. 921, 93 Eng. Repr. 943.

CHAPTER XXXIII.

INDICTMENT—SPECIFIC CRIMES.

Criminal Conspiracy.

§ 508. In general—Charging the offense.[1] The general rules in criminal pleading govern in the case of a charge of conspiracy. The indictment or information should allege an intent to do an unlawful act, or to accomplish a lawful purpose by unlawful means;[2] and where the act or end to be accomplished is in itself lawful, but the means to be used are unlawful, the means intended to be or actually used must be set out as a component part of the offense.[3] In those cases in which the offense consists in the conspiracy itself, and not in the acts done or means used to accomplish the purpose, an indictment charging in general terms will be sufficient where it describes an unlawful conspiracy for the accomplishment of a bad purpose by an unlawful act.[4]

1 **For forms of indictment for** criminal conspiracy, in all its ramifications, see Forms Nos. 656-702, 2006-2009.

2 IOWA—State v. Harris, 38 Iowa 246. ME.—State v. Roberts, 34 Me. 320. MICH.—People v. Richards, 1 Mich. 217, 51 **Am. Dec.** 75; Alderson v. People, 4 Mich. 414, 69 **Am. Dec.** 321. N. H. —State v. Straw, 42 N. H. 394; State v. Parker, 43 N. H. 85. VT. —State v. Stewart, 59 Vt. 273, 59 **Am. Rep.** 710, 9 Atl. 559. FED.— Pettibone v. United States, 148 U. S. 197, 37 **L. Ed.** 419, 13 Sup. Ct. Rep. 542; United States v. Gardner, 42 Fed. 829. ENG.—R. v. Seward, 1 Ad. & El. 713, 28 Eng. C. L. 185; R. v. Gill, 2 Barn. & Ald. 205, 20 **Rev. Rep.** 467; R. v. Jones, 4 Barn. & Ad. 345, 24 Eng. C. L. 71; R. v. Best, 2 Ld. Raym. 1167, 92 Eng. Repr. 272.

3 Com. v. Hunt, 45 Mass. (4 Metc.) 111, Thatch. Cr. Cas. 609, 38 **Am. Dec.** 346; People v. Richards, 1 Mich. 216, 51 **Am. Dec.** 75; People v. Arnold, 46 Mich. 268, 9 N. W. 406; See Cole v. People, 84 Ill. 219 (dis. op.); Snow v. Wheeler, 113 Mass. 186; People v. Barkelow, 37 Mich. 455; State v. Parker, 43 N. H. 83; United States v. Cruikshank, 92 U. S. 542, 23 **L. Ed.** 588.

See, also, **infra**, § 516.

4 ILL.—Spies v. People, 122 Ill. 1, 3 **Am. St. Rep.** 320, 6 **Am. Cr. Rep.** 570, 12 N. E. 865, 17 N. E. 898. MASS.—Com. v. Judd, 2 Mass. 329, 3 **Am. Dec.** 54; Com. v. Hunt, 45 Mass. (4 Metc.) 111, Thatch. Cr. Cas. 609, 38 **Am. Dec.** 346; Com. v. Andrews, 132 Mass. 263. MICH.— People v. Arnold, 46 Mich. 271. N. J.—Wood v. State, 47 N. J. L. (18 Vr.) 464. N. Y.—Ynguanzo v. Solomon, 3 Daly 157. PA.—Clary v. Com., 4 Pa. St. 210; Com. v. Goldsmith, 12 Phila. 632. VT.— State v. Stewart, 59 Vt. 273, 59 **Am. Rep.** 710, 9 Atl. 559. FED.— United States v. Stevens, 44 Fed. 141. ENG.—R. v. Peck, 9 Ad. & El. 686, 36 Eng. C. L. 240; R. v. Gill, 2 Barn. & Ald. 204; R. v. Harris, 1 Car. & M. 661, 41 Eng.

Ordinary and concise language should be employed in the indictment or information, and it should be such as is sufficient to enable a person of ordinary understanding to comprehend and know what is intended to be charged against the accused,[5] and should be so precise and definite as to enable the accused to make his defense and, on acquittal or conviction, permit him to set up the plea of former jeopardy to a subsequent indictment based on the same facts.[6] While an indictment or infor-

C. L. 358; Walsby v. Auley, 3 El. & Bl. 516; Hilton v. Eckersley, 6 El. & Bl. 47, 88 Eng. C. L. 47, 119 Eng. Repr. 781; R. v. Eccles, 1 Leach C. C. 274; R. v. Bykerdyke, 1 Moo. & R. 179; R. v. Rowlands, 17 Q. B. 671, 79 Eng. C. L. 670; R. v. Ferguson, 2 Stark. 489, 3 Eng. C. L. 500; R. v. Mawbey, 6 T. R. 619, 101 Eng. Repr. 736; Mogul Steamship Co. v. McGregor, 15 Q. B. Div. 476; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; R. v. Selsby, 5 Cox C. C. 495; R. v. Druitt, 10 Cox C. C. 592; R. v. Bunn, 12 Cox C. C. 316.

5 United States v. Cella, 37 App. D. C. 423, certiorari denied in 223 U. S. 728, 56 L. Ed. 633, 32 Sup. Ct. Rep. 526; Lanasa v. State, 109 Md. 602, 71 Atl. 1058; People v. Miles, 192 N. Y. 541, 84 N. E. 1117, affirming 123 App. Div. 862, 22 N. Y. Cr. Rep. 9, 108 N. Y. S. 510; Smith v. U. S., 157 Fed. 721; Heike v. United States, 112 C. C. A. 615, 192 Fed. 83, affirming 175 Fed. 852.

An averment that the accused and one Samuels "did conspire and agree together" sufficiently charges the crime of conspiracy.—People v. Smith, 147 Ill. App. 146.

The indictment will be held good if it substantially charge the particular offense for which he is to be or has been tried; and though defective it will be upheld where the rights of the defendants could not have been prejudiced by any imperfection.—Tapack v. United States, 220 Fed. 445.

Critical or grammatical objections can not prevail where one of ordinary intelligence can not be misled.—Powers v. Com., 110 Ky. 386, 53 L. R. A. 245, 61 S. W. 735, 63 S. W. 976.

Term by which offense known used in the indictment, this will be sufficient.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321.

6 IND.—Landringham v. State, 49 Ind. 186. IOWA—State v. Potter, 28 Iowa 554. KY.—Com. v. Ward, 92 Ky. 158, 17 S. W. 283. MASS.—Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Harley, 48 Mass. (7 Metc.) 506; Com. v. Wallace, 82 Mass. (16 Gray) 221. MONT.—Territory v. Garland, 6 Mont. 14, 9 Pac. 578. N. Y.—People v. Willis, 24 Misc. 537, 13 N. Y. Cr. Rep. 346, 54 N. Y. Supp. 129, 34 App. Div. 203, 14 N. Y. Cr. Rep. 414, 54 N. Y. Supp. 642, affirmed 158 N. Y. 392, 53 N. E. 29; March v. People, 7 Barb. 391. N. C.—State v. Enloe, 20 N. C. 508. PA.—Com. v. Foering, Bright. 315, 4 Pa. L. J. Rep. 29; Com. v. Gallagher, 2 Pa. L. J.

mation charging a conspiracy must state, with as much certainty as possible, the facts which constitute the offense intended to be charged,[7] yet the pleading need not be more specific than was the agreement of the conspirators.[8] The same degree of certainty and particularity is not required in charging an unexecuted, as in alleging an executed, conspiracy.[9]

Bill of particulars may be ordered by the court, on motion therefor, in those cases where (1) the allegations

Rep. 297; Com. v. Galbraith, 6 Phila. 281, 24 Leg. Int. 109; Com. v. Goldsmith, 12 Phila. 632, 35 Leg. Int. 420. VT.—State v. Keach, 40 Vt. 113. FED.—United States v. Mills, 33 U. S. (7 Pet.) 138, 8 L. Ed. 636; United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14983; United States v. Walsh, 5 Dill. C. C. 58, Fed. Cas. No. 16636; United States v. Watson, 17 Fed. 145; United States v. Furo, 18 Fed. 901; United States v. Newton, 48 Fed. 218; United States v. Adler, 49 Fed. 736; Haynes v. United States, 42 C. C. A. 34, 101 Fed. 817; United States v. Green, 115 Fed. 343; United States v. Melfi, 118 Fed. 899; Smith v. United States, 157 Fed. 721; United States v. Aviles, 222 Fed. 474. ENG.—R. v. Jones, 4 Barn. & Ad. 345, 24 Eng. C. L. 156.

[7] Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; State v. Van Pelt, 136 N. C. 333, 1 Ann. Cas. 495, 68 L. R. A. 760.

Certainty to a common intent sufficient to identify the offense is all that is required.—Williamson v. U. S., 207 U. S. 447, 52 L. Ed. 278, 28 Sup. Ct. Rep. 171.

"All facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings, because conspiracy is the crime with which the defendants stand charged, and with the nature and character of which they, under constitutional safeguards, are entitled to be advised. But when the conspiracy charged is one to commit an offense, and that offense (as in the case of all offenses against the United States) is clearly defined by statute, no high degree of particularity is required in describing it. If enough is shown to make it appear that an offense against the United States has been committed it is sufficient."—Thomas v. United States, 84 C. C. A. 486, 156 Fed. 906, 17 L. R. A. (N. S.) 720.

[8] Hyde v. United States, 27 App. Cas. D. C. 362; Garland v. State, 102 Md. 83, 21 Ann. Cas. 28, 75 Atl. 631; Dealey v. United States, 152 U. S. 539, 38 L. Ed. 545, 14 Sup. Ct. Rep. 680; Thomas v. United States, 84 C. C. A. 486, 156 Fed. 906, 17 L. R. A. (N. S.) 720; Mays v. United States, 179 Fed. 610.

[9] Brown v. State, 2 Tex. App. 115.

in the indictment or information are such as tend to confuse the accused,[10] (2) do not clearly apprise accused of the crime with which charged,[11] or (3) the counts are general in form and do not give accused the specific information of special counts;[12] and on the trial the prosecution will be restricted to the facts set out in the bill of particulars furnished accused.[13]

§ 509. —— Form and sufficiency of indictment. It is thought that where the conspiracy charged is in itself a misdemeanor or to accomplish an end which is a misdemeanor, or the combination and end being legal to accomplish the object by acts which are a misdemeanor, the prosecution may be by information; but that in those cases in which the conspiracy itself or the object to be attained is a felony, or the combination and object being legal, the means to be used being a felony, the prosecution should be by indictment.[1] Thus, it has been said that inasmuch as a conspiracy to defraud the United States is an infamous crime,[2] there must be a presentment or in-

10 Com. v. Meserve, 154 Mass. 64, 27 N. E. 997; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 327; United States v. Walsh, 5 Dill. C. C. 58, 61, Fed. Cas. No. 16636; R. v. Hamilton, 7 Car. & P. 448, 32 Eng. C. L. 579; R. v. Kenrick, 5 Q. B. 49, 43 Eng. C. L. 48; R. v. Stopylton, 8 Cox C. C. 69; R. v. Brown, 8 Cox C. C. 69.

Purpose of bill of particulars merely to give accused notice of the particular acts relied upon by the prosecution to establish the conspiracy.—Com. v. Bartilson, 85 Pa. St. 482.

—Altered or supplemented at any time to meet the exigencies of the case.—Id.

11 Id. See McDonald v. People, 126 Ill. 150, 9 Am. St. Rep. 547, 7 Am. Cr. Rep. 137, 18 N. E. 817.

12 R. v. Hamilton, 7 Car. & P. 448, 32 Eng. C. L. 579.

13 McDonald v. People (Magruder, J., dissenting), 126 Ill. 150, 9 Am. St. Rep. 547, 7 Am. Cr. Rep. 137, 18 N. E. 817, reversing 25 Ill. App. 350, and distinguishing Ochs v. People, 124 Ill. 399, 16 N. E. 662; Regent v. People, 96 Ill. App. 189; R. v. Esdaile, 1 Fost. & F. 213.

Accused going to trial without bill of particulars being furnished, the court will not limit prosecution in evidence as a fact regarding which a disclosure was sought.—R. v. Esdaile, 1 Fost. & F. 213.

1 See, supra, §§ 126-130.

2 **As to what constitute infamous crimes,** see, supra, § 130.

dictment by a grand jury before the accused can be prosecuted.[3] Where the offense of criminal conspiracy has not been defined by statute, though prohibited, the offense may be charged as at common law, particularly in those states in which the common-law crimes and offenses are in force in the absence of statutory enactment.[4]

Language of the statute, or words of equivalent meaning and import, under the general rule for pleading statutory offenses,[5] will be sufficient in those cases in which the statute sets forth all the elements of the offense fully and without uncertainty or ambiguity;[6] in all other cases an indictment or information in the language of the statute will be insufficient, a full and particular statement in the pleading of all the facts and circumstances, such as will apprise the accused of the offense sought to be

3 United States v. Wells, 163 Fed. 313.

4 United States v. London, 176 Fed. 976.

5 See, supra, §§ 269 et seq.

6 ILL.—Cole v. People, 84 Ill. 216; Williams v. People, 67 Ill. App. 344; Towne v. People, 89 Ill. App. 258, 15 Am. Cr. Rep. 433; Chicago W. & V. Coal Co. v. People, 114 Ill. App. 75, affirmed in 214 Ill. 421, 73 N. E. 770; People v. Smith, 144 Ill. App. 129, affirmed in 239 Ill. 91, 87 N. E. 885. IND.—Allen v. State, 183 Ind. 37, 107 N. E. 471. IOWA—State v. Ormiston, 66 Iowa 143, 23 N. W. 370; State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Soper, 118 Iowa 1, 91 N. W. 774. KY.—Sellers v. Com., 76 Ky. (13 Bush) 331; Com. v. Bryant, 11 Ky. Law Rep. 426, 12 S. W. 276. LA.—State v. Slutz, 106 La. 182, 30 So. 298. ME.—State v. Locklin, 81 Me. 251, 16 Atl. 895. N. Y.—People v. Goslin, 67 App. Div. 16, 73 N. Y. S. 520, affirmed in 171 N. Y. 627, 63 N. E. 1120. VT.—State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559. WIS.—State v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 15 Am. Cr. Rep. 332, 85 N. W. 1046. FED.—United States v. Wilson, 60 Fed. 890; United States v. Greene, 115 Fed. 343; United States v. White, 171 Fed. 775 (laying the words of the agreement in the language of the statute). ENG.—R. v. Rowlands, 17 Q. B. 671, 79 Eng. C. L. 671.

Where the complaint states the offense in the language of the statute and then goes on and charges the carrying out of the particular purpose in a particular way naming overt acts it will be construed that the facts were first stated according to their legal effect and secondly in detail.—State v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 15 Am. Cr. Rep. 332, 85 N. W. 1046.

Conspiracy to defraud United States can not be charged in the language of the statute.—United States v. Hess, 124 U. S. 483, 31

charged, being necessary to a valid indictment or information under such a statute.[7]

Code form prescribed, an indictment or information in language analogous thereto will be sufficient.[8]

"Falsely and maliciously" are said to be indispensable to a valid indictment charging conspiracy in some jurisdictions, and are required to be used, not in connection with the allegation of conspiracy, but in connection with the allegation of the act done. However, it seems that where the falsity and malice of the act are sufficiently shown by an averment that the conspirators "well knew," etc., the omission of the words "falsely and maliciously," or their use in the wrong connection, will not vitiate the indictment or information.[9]

Conclusion "contrary to law" is in effect to charge a common-law conspiracy.[10]

Negativing exceptions, in an indictment or information charging criminal conspiracy, is not required as to every exception provided in a statute collaterally involved.[11]

§ 510. —— TIME OF CONSPIRACY. In some jurisdictions the time and place[1] of a criminal conspiracy must be alleged in the indictment or information,[2] but the more general and better doctrine is that the exact date need

L. Ed. 516, 8 Sup. Ct. Rep. 571; In re Benson, 58 Fed. 962.

7 Towne v. People, 89 Ill. App. 258, 15 Am. Cr. Rep. 433; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Hess, 124 U. S. 483, 31 L. Ed. 516, 8 Sup. Ct. Rep. 571; Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Crafton, 4 Dill. C. C. 145, Fed. Cas. No. 14881; In re Wolf, 27 Fed. 601; In re Greene, 52 Fed. 101; In re Benson, 58 Fed. 692; United States v. Wilson, 60 Fed. 890; United States v. Taffe, 86 Fed. 113; Haynes v. United States, 42 C. C. A. 34, 101 Fed. 817; R. v. Peck, 9 Ad. & E. 686, 36 Eng. C. L. 362, 119 Eng. Repr. 1372.

8 Thompson v. State, 106 Ala. 67, 9 Am. Cr. Rep. 199, 17 So. 512.

9 Elkin v. People, 24 How. Pr. (N. Y.) 272, affirmed 28 N. Y. 177.

10 People v. Smith, 144 Ill. App. 129, affirmed in 239 Ill. 91, 87 N. E. 885.

11 United States v. White, 171 Fed. 775.

1 As to place, see, infra, § 511.

2 United States v. Soper, 4 Cr. C. C. 623, Fed. Cas. No. 16353.

not be laid,[3] it being sufficient to allege the conspiracy as having been formed on a day or time prior to the finding of the indictment,[4] and within the period of the statute of limitations.[5] Some of the cases are to the effect that an indictment charging a conspiracy formed at a time which is barred by the statute of limitations will be good where it alleges the conspiracy to be a continuing one, and sets out overt acts[6] alleged to have been done thereunder within the period of limitation,[7] although there are well-reasoned cases which deny this doctrine;[8] the safe course for the pleader in such a case is to allege a new conspiracy within the period of limitation as having taken place at the time of the overt act complained of, the

3 United States v. Pacific & A. R. & Nav. Co., 4 Alaska 685; Imboden v. People, 40 Colo. 142, 90 Pac. 608; People v. Smith, 144 Ill. App. 129, affirmed in 239 Ill. 91, 87 N. E. 885; Bradford v. United States, 81 C. C. A. 607, 152 Fed. 617.

Allegation of time not material, yet proper to be considered as indicating another indictment, alleging another date, is for a separate offense.—Gallagher v. People, 211 Ill. 158, 71 N. E. 842, affirming O'Donnell v. People, 110 Ill. App. 158.

4 United States v. Pacific & A. R. & Nav. Co., 4 Alaska 685.

Alleging conspiracy entered into on or about the month of February, 1896, held to be sufficiently specific as to time.—People v. Willis, 34 App. Div. 203, 14 N. Y. Cr. Rep. 414, 54 N. Y. Supp. 642, reversing 24 Misc. 537, 13 N. Y. Cr. Rep. 346, 54 N. Y. Supp. 129, affirmed 158 N. Y. 392, 53 N. E. 29.

5 People v. Smith, 144 Ill. App. 129, affirmed in 239 Ill. 91, 87 N. E. 885.

6 **Overt acts** done under a criminal conspiracy, it has been held, are not the thing denounced by U. S. Rev. Stats., § 5440, 2 Fed. Stats. Ann., 1st ed., p. 247, but the conspiracy itself.—United States v. Britton, 108 U. S. 199, 27 L. Ed. 698, 2 Sup. Ct. Rep. 531; Dealy v. United States, 152 U. S. 546, 38 L. Ed. 547, 14 Sup. Ct. Rep. 680; Lorenz v. United States, 24 App. D. C. 337, writ certiorari denied in 196 U. S. 640, 49 L. Ed. 631, 25 Sup. Ct. Rep. 796. But see United States v. Eccles, 181 Fed. 906.

7 United States v. Eccles, 181 Fed. 906. See Ochs v. People, 124 Ill. 399, 16 N. E. 662; United States v. Green, 115 Fed. 350; United States v. Brace, 149 Fed. 874; United States v. Green, 146 Fed. 889, affirmed 154 Fed. 401; Ware v. United States, 84 C. C. A. 503, 154 Fed. 577, 12 L. R. A. (N. S.) 1053; Arnold v. Weil, 157 Fed. 429; Jones v. United States, 89 C. C. A. 303, 162 Fed. 417.

8 Fire Ins. Co. v. State, 75 Miss. 24, 22 So. 99; Com. v. Bartilson, 85 Pa. St. 482.

existence of a conspiracy at the time of the overt act being sufficient to toll the statute of limitations.[9]

Time conspiracy to exist need not be laid as a fixed period.[10]

Amendment to an indictment or information, which fails to state the specific time of a conspiracy and of the last overt act thereunder, may be allowed, there being no timely objection to the indictment on account of these defects.[11]

§ 511. —— PLACE OF CONSPIRACY. The place where, as well as the time when,[1] a conspiracy was entered into, is required to be set forth in an indictment or information charging a criminal conspiracy;[2] but this is required to be done with such fullness and particularity, only, as will be sufficient to confer on the court jurisdiction to try the offense;[3] and inasmuch as the place of the overt act may be the place of jurisdiction, the exact place where the conspiracy was entered into need not be alleged,[4] for it is now the well-established rule of law

9 See Com. v. Bartilson, 85 Pa. St. 482.

10 State v. Eastern Coal Company, 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1.

11 State v. Unsworth, 85 N. J. L. 237, 88 Atl. 1097, affirming 84 N. J. L. 22, 86 Atl. 64.

1 As to time when, see, supra, § 510.

2 United States v. Soper, 4 Cr. C. C. 623, Fed. Cas. No. 16353.

3 Gallagher v. People, 211 Ill. 158, 71 N. E. 842, affirming 110 Ill. App. 250; State v. Dreany, 65 Kan. 292, 12 Am. Cr. Rep. 626, 69 Pac. 182; State v. Nugent, 77 N. J. L. 84, 71 Atl. 485; United States v. Smith, 2 Bond 323, Fed. Cas. No. 16322 (averment offense committed within district, sufficient); United States v. Soper, 4 Cr. C. C. 623, 27 Fed. Cas. No. 16353; United States v. Marx, 122 Fed. 969; United States v. Aviles, 222 Fed. 474 (holding that it is sufficient to allege that some of the overt acts occurred at a place within the jurisdiction of the court).

The venue may be laid in the county where the agreement was entered into, or in any county in which any overt act was done by any of the conspirators in furtherance of their designs.—People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

4 Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, 32 Sup. Ct. Rep. 793; Brown v. Elliott, 225 U. S. 392, 56 L. Ed. 1136, 32 Sup. Ct. Rep. 812.

Where the county in which the

that a criminal conspiracy, the gravamen of which is the act of conspiracy itself, may be prosecuted either in the jurisdiction in which the criminal conspiracy was entered into, although the unlawful design is consummated or the unlawful acts done in another jurisdiction,[5] or in the jurisdiction in which an overt act is committed in pursuance of the conspiracy, notwithstanding the fact that some or all of the conspirators were never present in the latter jurisdiction.[6]

alleged conspiracy was set forth the averment may be rejected as surplusage.—United States v. Smith, 2 Bond 232, Fed. Cas. No. 16322.

5 ALA.—Thompson v. State, 106 Ala. 67, 17 So. 512. IOWA—State v. Loser, 132 Iowa 419, 104 N. W. 337. MD.—Bloomer v. State, 48 Md. 521. N. J.—State v. Nugent, 77 N. J. L. 84, 71 Atl. 485. N. Y.—People v. Peckens, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883; People v. Summerfield, 48 Misc. 242, 19 N. Y. Cr. Rep. 503, 96 N. Y. Supp. 502; People v. Murray, 95 N. Y. Supp. 107. TEX.—Ex parte Rogers, 10 Tex. App. 655, 38 Am. Rep. 654; Rogers v. State, 11 Tex. App. 608. FED.—Dealy v. United States, 152 U. S. 539, 38 L. Ed. 545, 14 Sup. Ct. Rep. 680; Price v. Henkel, 216 U. S. 493, 54 L. Ed. 581, 30 Sup. Ct. Rep. 257; United States v. Howell, 56 Fed. 21; Marrash v. United States, 93 C. C. A. 511, 168 Fed. 225; United States v. Noblom, 12 Pitts. L. J. 140; Fed. Cas. No. 15896. ENG.—R. v. Kahn, 4 Fost. & F. 68.

6 D. C.—United States v. King, 9 Mackey 404. KY.—International Harvester Co. v. Com., 137 Ky. 668, 126 S. W. 352. MICH.—People v. Arnold, 46 Mich. 268, 9 N. W. 406. MISS.—Fire Ins. Co. v. State, 75 Miss. 24, 22 So. 99. N. Y.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; People v. Rathbun, 21 Wend. 538; People v. Summerfield, 48 Misc. 242, 19 N. Y. Cr. Rep. 503, 96 N. Y. Supp. 502. N. C.—State v. Turner, 119 N. C. 341, 25 S. E. 810. OHIO—Hughes v. State, 29 Ohio Cir. Ct. Rep. 237. OKLA.—Pearce v. Territory, 11 Okla. 438, 68 Pac. 504. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Com. v. Spencer, 6 Pa. Super. Ct. 256; Com. v. Westervelt, 11 Phila. 461, 32 Leg. Int. 346; Com. v. Tack, 1 Brews. 511; Com. v. Corlies, 3 Brews. 575. TEX.—Raleigh v. Cook, 60 Tex. 438. FED.—Hyde v. Shine, 199 U. S. 62, 50 L. Ed. 90, 25 Sup. Ct. Rep. 760; Brown v. Elliott, 225 U. S. 392, 56 L. Ed. 1136, 32 Sup. Ct. Rep. 812; United States v. Rendskopf, 6 Biss. C. C. 259, Fed. Cas. No. 16165; United States v. Sperry, 10 Int. Rev. Rec. 205, Fed. Cas. No. 15369; United States v. Newton, 52 Fed. 275; Arnold v. Weil, 157 Fed. 429; Robinson v. United States, 96 C. C. A. 307, 172 Fed. 105; United States v. Campbell, 179 Fed. 762; United States v. Reddin, 193 Fed. 798; United States v. Wells, 113 C. C. A. 194, 192 Fed. 870, certiorari refused 225 U. S. 714, 56 L. Ed. 1269,

§ 512. —— NAMES OF CONSPIRATORS. In the absence of a statutory requirement to that effect, an indictment or information need not allege the names of the conspirators[1] is the better doctrine, although there are authorities to the contrary;[2] and this is true even though the names of all of the conspirators are known to the grand jury,[3] in which case it may even be alleged that the names are to the grand jury unknown,[4] except in case of an indictment or information charging a conspiracy in restraint of trade,[5] in which case the names of all the known parties to the conspiracy must be alleged.[6] Hence it follows that it is sufficient for an indictment or information to allege that the names of the conspirators are to the grand jury unknown, when in fact they are unknown.[7]

32 Sup. Ct. Rep. 842. ENG.—R. v. Brisac, 4 East 164. CANADA—R. v. Connolly, 25 Ont. 151; R. v. O'Gorman, 18 Ont. L. Rep. 427.

1 State v. Lewis, 142 N. C. 626, 9 Ann. Cas. 604, 7 L. R. A. (N. S.) 669, 55 S. E. 600.

North Carolina Laws, § 3698, revisal of 1905, provides that "if any person shall conspire," etc. The court say: "The 'con' in the word 'conspire' embraces the idea that it is an act done with another or others. Even if the statute had used the words 'with others,' it would have been sufficient to recite in the bill 'with others,' without charging their names or that they were unknown." — State v. Lewis, supra. See State v. Capps, 71 N. C. 96; State v. Hill, 79 N. C. 658.

2 Sullivan v. People, 108 Ill. App. 328.

3 People v. Smith, 239 Ill. 91, 87 N. E. 885.

4 People v. Sacramento Butchers' Protective Assn., 12 Cal. App. 471, 107 Pac. 712; People v. Smith, 239 Ill. 91, 87 N. E. 885, affirming 114 Ill. App. 129; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Lewis, 142 N. C. 626, 9 Ann. Cas. 604, 7 L. R. A. (N. S.) 669, 55 S. E. 600; Jones v. U. S., 103 C. C. A. 142, 179 Fed. 584.

Compare: State v. McDonald, 1 McC. L. (S. C.) 532, 10 Am. Dec. 691.

5 See, infra, section on "Conspiracy in Restraint of Trade."

6 See People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 7 Pac. 828; State v. Dreany, 65 Kan. 292, 12 Am. Cr. Rep. 626, 69 Pac. 182; Heine v. Com., 91 Pa. St. 145; United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774.

Compare: People v. Sacramento Butchers' Protective Assn., 12 Cal. App. 471, 107 Pac. 712.

7 CAL.—People v. Sacramento Butchers' Protective Assn., 12 Cal. App. 471, 107 Pac. 712. ILL.—Cooke v. People, 231 Ill. 9, 82 N. E. 863; Sullivan v. People, 108 Ill. App. 328. MASS.—Com. v. Davis,

§ 513. —— AIDER OF INSUFFICIENT CHARGE BY OTHER AVERMENTS. In those cases in which an indictment or information imperfectly or insufficiently sets out the unlawful combination, the instrument can not be aided by a subsequent averment of overt acts done in pursuance of the alleged conspiracy.[1] When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the charging part of the indictment or information; and if the criminality of the offense which is intended to be charged consists in the agreement to compass or promote some purpose, not in and of itself criminal or unlawful, by the use of falsehood, force, fraud, or other criminal or unlawful means, such intended use of falsehood, force, fraud, or other criminal or unlawful means must be fully set out in the charging part of the indictment.[2] Matter preceding or following such charging part, or qualifying or descriptive words used, will not be sufficient to cure the defect.[3]

9 Mass. 415; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346. N. Y.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122. PA.—Com. v. Edwards, 135 Pa. 474, 19 Atl. 1064; Com. v. Foering, 4 Clark 29, 6 Pa. Law J. 281. FED.—Miller v. United States, 66 C. C. A. 399, 133 Fed. 337; Wong Din v. United States, 68 C. C. A. 340, 135 Fed. 702; Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, 17 L. R. A. (N. S.) 720; United States v. Dahl, 225 Fed. 909.

1 MASS.—Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 436; Com. v. Shedd, 61 Mass. (7 Cush.) 514. MICH.—People v. Arnold, 46 Mich. 268, 9 N. W. 406. N. Y.—People v. Willis, 24 Misc. 537, 13 N. Y. Cr. Rep. 346, 54 N. Y. Supp. 129, 34 App. Div. 203, 14 N. Y. Cr. Rep. 414, 54 N. Y. Supp. 642, affirmed in 158 N. Y. 392, 53 N. E. 29. VT.—State v. Keach, 40 Vt. 113. FED.—United States v. Britton, 108 U. S. 199, 27 L. Ed. 698, 2 Sup. Ct. Rep. 536; Pettibone v. United States, 148 U. S. 203, 37 L. Ed. 422, 13 Sup. Ct. Rep. 542; United States v. Milner, 36 Fed. 890. ENG.—Reg. v. Rex, 7 Adol. & E. N. S. (7 Q. B.) 782, 53 Eng. C. L. 782. CANADA—Horse-Man v. R., 16 Up. Can. Q. B. 543.

Compare: R. v. Spragg, 2 Burr. 993, 97 Eng. Repr. 669.

2 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 436.

3 Id.

§ 514. COMBINATION OR CONFEDERACY OF PARTIES. The unlawful agreement, confederation, combination or common purpose of the persons conspiring must be alleged fully and distinctly by a word or phrase in appropriate language in the charging part of the indictment or information,[1] and that it was corrupt;[2] no subsequent averment or allegation will aid and render sufficient an imperfect or insufficient charge of unlawful combination or agreement;[3] it must charge the fact of conspiracy against all,[4] although the overt act may be charged against one only,[5] or the indictment be against one individual of the combination,[6] but when one only is charged it must be alleged that he conspired with another or others.[7] The charge of combination or agreement has been held to be sufficiently alleged when expressed as: Assembled and agreed;[8] concerted together for the purpose of maliciously injuring another in his business;[9] conspired;[10] conspired and confederated together;[11] did falsely and maliciously conspire and agree;[12] did unlawfully conspire, combine,

1 State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Slutz, 106 La. 182, 30 So. 298; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; State v. Barry, 21 Mo. 504; Johnson v. State, 26 N. J. L. (2 Dutch.) 313; Com. v. Quay, 7 Pa. Dist. Rep. 723; Com. v. Hadley, 13 Pa. Co. Ct. 188; State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476 (two or more must be charged with the conspiring); United States v. Adler, 49 Fed. 736; Wright v. United States, 48 C. C. A. 37, 108 Fed. 805; R. v. Gill, 2 Barn. & Ald. 204, 20 Rev. Rep. 407.

2 See Johnson v. State, 26 N. J. L. (2 Dutch.) 313; Wood v. State, 47 N. J. L. 461, 1 Atl. 509.

3 See, supra, § 513.

4 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 15 Sup. Ct. Rep. 680.

5 See, infra, § 519.

6 See, infra, § 519.

7 "With divers persons to the grand jury unknown," is a good charge of combination or confederation, even though the names of the other conspirators are known to the grand jury. See, supra, § 512.

8 State v. Berry, 21 Mo. 504.

9 State (ex rel. Durner) v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 15 Am. Cr. Rep. 332, 85 N. W. 1046.

10 Wright v. United States, 48 C. C. A. 37, 108 Fed. 805.

Conspired to cheat.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Lambert v. People, 9 Cow. (N. Y.) 578.

11 State v. Grant, 86 Iowa 216, 53 N. W. 120.

12 Com. v. Hadley, 13 Pa. Co. Ct. 188.

confederate and agree together;[13] falsely combined;[14] feloniously, fraudulently and deceitfully did conspire and agree together;[15] unlawfully and falsely did combine and agree together;[16] unlawfully did conspire and combine together,[17] and the like.

§ 515. OBJECT OR PURPOSE OF COMBINATION. Like the combination itself, spoken of in the preceding section, the object or purpose of the combination must be clearly and fully set forth in language appropriate and sufficient to show that the object to be accomplished or the end to be attained was and is unlawful,[1] stating the particular

13 State v. Hewett, 31 Me. 396.

14 Johnson v. State, 26 N. J. L. (2 Dutch.) 313.

15 Thomas v. People, 113 Ill. 531, 5 Am. Cr. Rep. 127.

16 Com. v. Quay, 7 Pa. Dist. Rep. 723.

17 R. v. Gill, 2 Barn. & Ald. 204, 20 Rev. Rep. 407.

1 COLO. — Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111. ILL.— Towne v. People, 89 Ill. App. 258. IND. — Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105; State v. McKinstry, 50 Ind. 465; Miller v. State, 79 Ind. 188. IOWA— State v. Savage, 48 Iowa 562. ME.—State v. Bartlett, 30 Me. 134; State v. Ripley, 31 Me. 386; State v. Roberts, 34 Me. 320. MD.—State v. Buchanan, 5 Harr. & J. 217, 9 Am. Dec. 534. MASS.—Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Barnes, 132 Mass. 242. MICH.— Alderman v. People, 4 Mich. 428, 69 Am. Dec. 321; People v. Saunders, 25 Mich. 119, note; Schwab v. Mabley, 47 Mich. 573. N. J.— Wood v. State, 47 N. J. L. 464. N. C.—State v. Trammell, 24 N. C. (2 Ired. L.) 379. WIS.—State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719. FED. — Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. De Grieff, 16 Blatchf. 20, Fed. Cas. No. 14936; United States v. Taffe, 86 Fed. 113; United States v. Melfi, 118 Fed. 899. CANADA. — Horseman v. R., 16 Up. Can. Q. B. 543.

Charging conspiracy to do an act so another person named should commit a felony, held not to be a sufficient allegation that the purpose of the act was to induce such person to commit a felony.—Com. v. Barnes, 132 Mass. 242.

Conspiracy to commit arson attempted to be charged by an indictment alleging that the accused and others "feloniously, wilfully and maliciously did conspire, cooperate, and agree together to burn . . . a certain residence building," the court held that the words "feloniously, wilfully and maliciously" applied to the act of conspiracy and not to the act of

crime or offense to be accomplished.[2] There need not be an allegation that the object or purpose of the conspiracy was accomplished,[3] or the unlawful agreement executed;[4] but in those states in which there is a merger accomplished of felony or misdemeanor, the indictment or information should allege that the purpose was not accomplished.[5]

Common-law crime alleged to be the object to be accomplished, the indictment or information may describe it by using the technical term by which it is well known to the law,[6] the acts which, if consummated, would constitute

burning, and for that reason the indictment failed to charge an intent to commit arson under the statute. — Lipschitz v. People, 25 Colo. 261, 53 Pac. 111.

Conspiracy to commit robbery sought to be charged, an indictment alleging the accused persons conspired "to forcibly and feloniously take from the person of" a person named fails to state a charge of a conspiracy to rob, because it does not charge that the act was to be accomplished by "violence," or "by putting in fear." — Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105.

"To cheat and defraud" imports a criminal object.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596.

To injure, cheat and defraud of property held not to sufficiently charge an unlawful purpose. The court say: "Cheating and defrauding a person of property, though never right, was not necessarily an offense at common law. The transaction might be dishonest and immoral, and still not be unlawful in the sense in which the term is used in criminal law." —State v. Hewett, 31 Me. 396; Hartman v. Com., 5 Pa. St. 60. But see Thomas v. People, 113 Ill. 531, 5 Am. Cr. Rep. 127, and supra, § 514, footnote 10.

2 **Proviso in statute** that the crime intended to be committed need not be charged, held to be unconstitutional. — McLaughlin v. State, 45 Ind. 338; Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105.

3 Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Territory v. Carland, 6 Mont. 14, 9 Pac. 578; State v. Hickling, 41 N. J. L. 208, 32 Am. Rep. 198; State v. Brady, 107 N. C. 822, 12 S. E. 325.

4 Com. v. Judd, 2 Mass. 357; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 128, 38 Am. Dec. 346; State v. Noyes, 25 Vt. 419.

5 Elsey v. State, 47 Ark. 572.

6 State v. Grant, 86 Iowa 216, 53 N. W. 120; Com. v. Eastman, 55 Mass. (1 Cush.) 190, 48 Am. Dec. 596; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 328; People v. Saunders, 25 Mich. 119, note; State v. Parker, 43 N. H. 84; Hazen v. Com., 23 Pa. St. 363.

the crime need not be set out;[7] where the pleader does not use the well-known technical term by which the crime is designated, but attempts to state the ingredients of the crime sought to be charged, they must be set out as fully as they would be required in an indictment charging the offense as completed.[8]

Statutory offense charged as the object sought to be accomplished, the purpose of the conspiracy must be set out in such a manner as to show clearly that it falls within the prohibition of the statute;[9] but it is not necessary to describe the offense intended to be committed as fully and with the particularity required in an indictment in which his commission is charged.[10]

§ 516. MEANS TO BE EMPLOYED TO ACCOMPLISH OBJECT. In those cases in which the object and purpose of the conspiracy and combination was the performance of an act which is in and of itself unlawful, either at common

7 ALA.—Thompson v. State, 106 Ala. 67, 9 Am. Cr. Rep. 199, 17 So. 512. COLO.—Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111. IOWA—State v. Potter, 28 Iowa 554; State v. Savage, 48 Iowa 562; State v. Ormiston, 66 Iowa 143, 23 N. W. 370; State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Soper, 118 Iowa 1, 91 N. W. 774. ME.—State v. Ripley, 31 Me. 386. MASS.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596. MICH. — People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Arnold, 46 Mich. 268, 9 N. W. 406. PA.—Hazen v. Com., 23 Pa. St. 355. TEX. — Browne v. State, 2 Tex. App. 115. VT.—State v. Keach, 40 Vt. 113. WIS.—State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719.

8 Lipschitz v. People, cited supra, footnote 1; Scudder v. State, 62 Ind. 13; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321.

9 ILL.—Cole v. People, 84 Ill. 216. IND.—Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105; State v. McKinstry, 50 Ind. 467. MASS. — Com. v. Eastman, 55 Mass. (1 Cush.) 190, 48 Am. Dec. 596. N. H.—State v. Parker, 43 N. H. 84. PA.—Hartman v. Com., 5 Pa. St. 60; Hazen v. Com., 23 Pa. St. 364. FED.—United States v. Cruikshank, 92 U. S. 542, 556, 23 L. Ed. 588, 591; United States v. De Grieff, 16 Blatchf. 20, 25 Fed. Cas. No. 14936; United States v. Gardner, 42 Fed. 831; United States v. Sanges, 48 Fed. 78; United States v. Adler, 49 Fed. 738.

10 Ching v. United States, 55 C. C. A. 304, 118 Fed. 538.

law or under statute, a general averment of the conspiracy and its object, alleging the corrupt intention,[1] is sufficient without an allegation as to the means by which the act was to be accomplished and the end attained,[2]

[1] As to intention, see, infra, § 517.

[2] ARIZ. — Tribolet v. United States, 11 Ariz. 436, 16 L. R. A. (N. S.) 223, 95 Pac. 85. COLO.— Moore v. People, 31 Colo. 336, 73 Pac. 30; Imboden v. People, 40 Colo. 142, 90 Pac. 608. HAWAII — Rex v. Ho Fon, 7 Hawaii 757. ILL. — Cowen v. People, 14 Ill. 348; Johnson v. People, 22 Ill. 314; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Cole v. People, 84 Ill. 216, 218; Thomas v. People, 113 Ill. 581, 5 Am. Cr. Rep. 127; People v. Smith, 239 Ill. 91, 87 N. E. 885; People v. Nall, 242 Ill. 284, 89 N. E. 1012; Chicago, W. & N. Coal Co. v. People, 114 Ill. App. 75, affirmed 214 Ill. 421, 73 N. E. 770; People v. Darr, 179 Ill. App. 130. IOWA— State v. Jones, 13 Iowa 269; State v. Potter, 28 Iowa 554; State v. Stevens, 30 Iowa 391; State v. Harris, 38 Iowa 248; State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370; State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Soper, 118 Iowa 1, 91 N. W. 774. ME.—State v. Bartlett, 30 Me. 132; State v. Ripley, 31 Me. 386; State v. Roberts, 34 Me. 320; State v. Mayberry, 48 Me. 218. MD.—State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534; Garland v. State, 112 Md. 83, 21 Ann. Cas. 28, 75 Atl. 631. MASS.— Com. v. Ward, 1 Mass. 473; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Shedd, 61 Mass. (7 Cush.) 515. MICH. — People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Alderman v. People, 4 Mich. 414, 428, 69 Am. Dec. 321, 328; People v. Clark, 10 Mich. 310; People v. Saunders, 25 Mich. 119 note; People v. Winslow, 39 Mich. 505; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Schwab v. Mabley, 47 Mich. 573; People v. Petheram, 64 Mich. 252, 31 N. W. 188; People v. Watson, 75 Mich. 582, 42 N. W. 1005; People v. Dyer, 79 Mich. 480, 44 N. W. 937; People v. Butler, 111 Mich. 483, 69 N. W. 734; People v. Summers, 115 Mich. 537, 73 N. W. 818; People v. Bird, 126 Mich. 631, 86 N. W. 127; People v. Lamb, 153 Mich. 675, 117 N. W. 539. MONT.— Territory v. Carland, 6 Mont. 14, 9 Pac. 578. N. H.—State v. Parker, 43 N. H. 83. N. J.—Johnson v. State, 26 N. J. L. (2 Dutch.) 323; State v. Young, 37 N. J. L. (8 Vr.) 184. N. Y.—Lambert v. People, 9 Cow. 578; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122. N. C.—State v. Brady, 107 N. C. 822, 12 S. E. 325. PA.—Twitchell v. Com., 9 Pa. St. 211; Hazen v. Com., 23 Pa. St. 355; Com. v. McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; Com. v. McGowan, 2 Pars. Eq. Cas. 341; Com. v. Quay, 7 Pa. Dist. Rep. 723; Com. v. Hadley, 13 Pa. Co. Ct. Rep. 188; Com. v. Haun, 27 Pa. Sup. Ct. 33. R. I.—State v. Bacon, 27 R. I. 252, 61 Atl. 653. S. C.—State v. DeWitt, 2 Hill 287, 27 Am. Dec. 371; State

because, in such a case, the means forms no part of the offense;[3] in those cases where neither the combination nor the act to be done is unlawful, but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth in the indictment or information,[4] and as set out must be such as to

v. Cardoza, 11 S. C. 235. VT.—State v. Noyes, 25 Vt. 415, 422; State v. Keach, 40 Vt. 113; State v. Stewart, 59 Vt. 273, 59 **Am. Rep.** 710, 9 Atl. 559. VA.—Crump v. Com., 84 Va. 927, 10 **Am. St. Rep.** 895, 6 S. E. 620. WASH.—State v. Messner, 43 Wash. 206, 86 Pac. 636; State v. Erickson, 54 Wash. 472, 103 Pac. 796. WIS.—State v. Crowley, 41 Wis. 271; 22 **Am. Rep.** 719, 2 **Am. Cr. Rep.** 33. FED.—United States v. Dustin, 2 Bond 332, Fed. Cas. No. 15011; United States v. Goldman, 3 Woods 187, Fed. Cas. No. 15225; United States v. Dinnee, 3 Woods 47, Fed. Cas. No. 14948; United States v. Sanche, 7 Fed. 715; United States v. Gordon, 22 Fed. 250; United States v. Gardner, 42 Fed. 831; United States v. Adler, 49 Fed. 736; United States v. Benson, 17 C. C. A. 293, 70 Fed. 591; Perrin v. United States, 94 C. C. A. 385, 169 Fed. 17; Benson v. United States, 94 C. C. A. 399, 169 Fed. 31; United States v. Shevlin, 212 Fed. 343; Tillinghast v. Richards, 225 Fed. 226; United States v. Dahl, 225 Fed. 909. ENG.—R. v. Seward, 1 Ad. & E. 706, 28 Eng. C. L. 185; R. v. Blake, 6 Ad. & E. N. S. (6 Q. B.) 126, 51 Eng. C. L. 126; R. v. Rex, 7 Ad. & E. N. S. (7 Q. B.) 782, 53 Eng. C. L. 780; Sydserff v. R., 11 Ad. & E. N. S. (11 Q. B.) 245, 63 Eng. C. L. 245; Wright v. R., 14 Ad. & E. N. S. (14 Q. B.) 148, 68 Eng. C. L. 148; R. v. Gill, 2 Barn. & Ald. 204, 20 **Rev. Rep.** 407; R. v. Hollingberry, 4 Barn. & C. 329, 10 Eng. C. L. 601, 6 Dow. & R. 345, 16 Eng. C. L. 262; Latham v. R., 5 Best & S. 635, 117 Eng. C. L. 635; O'Connell v. R., 11 Cl. & F. 155, 8 Eng. Repr. 1061; R. v. Best, 2 Ld. Raym. 1167, 92 Eng. Repr. 272; R. v. Stapylton, 8 Cox C. C. 69.

[3] State v. Soper, 118 Iowa 1, 91 N. W. 774; State v. Ripley, 31 Me. 386; People v. Richards, 1 Mich. 216, 51 **Am. Dec.** 75; United States v. Goldman, 3 Woods 187, Fed. Cas. No. 15225; Perrin v. United States, 94 C. C. A. 385, 169 Fed. 17; Benson v. United States, 94 C. C. A. 399, 169 Fed. 31; United States v. Dahl, 225 Fed. 909; Rex v. Gill, 2 Barn. & Ald. 204, 70 **Rev. Rep.** 407.

[4] ILL.—People v. Smith, 239 Ill. 91, 87 N. E. 885; People v. Darr, 179 Ill. App. 130. IOWA—State v. Potter, 28 Iowa 554; State v. Stevens, 30 Iowa 391; State v. Harris, 38 Iowa 242; State v. Eno, 131 Iowa 619, 9 **Ann. Cas.** 856, 109 N. W. 119. ME.—State v. Bartlett, 30 Me. 132; State v. Hewett, 31 Me. 396; State v. Roberts, 34 Me. 320; State v. Mayberry, 48 Me. 218. MASS.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 **Am. Dec.** 596; Com. v. Shedd, 61 Mass. (7 Cush.) 514; Com. v.

constitute an offense, either at common law or under the statute.[5] The reason for this rule has been said to be to enable the court to see the character of the act or acts pro-

O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Prius, 75 Mass. (9 Gray) 127. N. H.—State v. Burnham, 15 N. H. 396. N. J.—State v. Nugent, 77 N. J. L. 84, 71 Atl. 485. N. Y.—People v. Everest, 51 Hun 25, 3 N. Y. Supp. 612. N. C.—State v. Van Pelt, 136 N. C. 633, 1 Ann. Cas. 495, 68 L. R. A. 760, 49 S. E. 177. PA.—Com. v. Haun, 27 Pa. Sup. Ct. 33. VT.—State v. Keach, 40 Vt. 113. VA.—Harris v. Com., 113 Va. 746, Ann. Cas. 1913E, 597, 38 L. R. A. (N. S.) 458, 73 S. E. 561. WIS.—State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719, 2 Am. Cr. Rep. 33. FED.—Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Watson, 17 Fed. 145; United States v. Gardner, 42 Fed. 831; United States v. Moore, 173 Fed. 122; Hedderly v. United States, 193 Fed. 561. ENG.—Rex v. Seward, 1 Ad. & El. 706, 28 Eng. C. L. 185.

Compare, however, Com. v. Waterman, 122 Mass. 43, where an indictment for conspiracy to place on record a false marriage certificate to the injury of one of the parties to the marriage was held to be sufficient.

5 ILL.—Smith v. People, 25 Ill. 17, 76 Am. Dec. 780. IOWA—State v. Jones, 13 Iowa 269; State v. Potter, 28 Iowa 554; State v. Stevens, 30 Iowa 391; State v. Harris, 38 Iowa 242; State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Soper, 118 Iowa 1, 91 N. W. 774. ME.—State v. Bartlett, 30 Me. 132; State v. Hewett, 31 Me. 396; State v. Roberts, 34 Me. 320; State v. Mayberry, 48 Me. 218. MASS.—Com. v. Davis, 9 Mass. 415, note; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Shedd, 61 Mass. (7 Cush.) 514; Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Prius, 75 Mass. (9 Gray) 127; Com. v. Wallace, 82 Mass. (16 Gray) 221; Com. v. Waterman, 122 Mass. 43; Com. v. Barnes, 132 Mass. 242; Com. v. McParland, 148 Mass. 127, 19 N. E. 25; Com. v. Meserve, 154 Mass. 67, 27 N. E. 997. MICH.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Clark, 10 Mich. 310; People v. Saunders, 25 Mich. 119, note; People v. Barkelow, 37 Mich. 445; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Schwab v. Mabley, 47 Mich. 573; People v. Petheram, 64 Mich. 258, 31 N. W. 188; People v. Summers, 115 Mich. 537, 73 N. W. 818; People v. Bird, 126 Mich. 631, 86 N. W. 127. MONT.—Territory v. Carland, 6 Mont. 14, 9 Pac. 578. N. H.—State v. Burnham, 15 N. H. 396; State v. Straw, 42 N. H. 393; State v. Parker, 43 N. H. 83. N. Y.—Lambert v. People, 9 Cow. 578; March v. People, 7 Barb. 393; People v. Everest, 51 Hun 19, 3 N. Y. Supp. 612; People v. Olson, 39 N. Y. St. Rep. 295, 15 N. Y. Supp. 778; In re Cromwell, 3 City Hall Rec. 34. PA.—Hartman v. Com., 5 Pa. St. 60; Com. v. Gold-

posed to be done[6] and what crime, if any, they would constitute if perpetrated;[7] and also to apprise the accused of the facts relied upon to establish the offense charged.[8]

Homestead entry, the means adopted in a conspiracy to defraud the United States of public lands, it need not be alleged in the indictment that the lands were public lands and subject of homestead entry;[9] and the particular lands intended to be secured need not be set out.[10]

smith, 12 Phila. 635, 35 Leg. Int. 420; Com. v. Wilson, 1 Chester Co. Rep. 538. S. C.—State v. Cardoza, 11 S. C. 195. VT.—State v. Noyes, 25 Vt. 415; State v. Keach, 40 Vt. 113; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559. WIS.—State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719, 2 Am. Cr. Rep. 33. FED.—United States v. Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588, 591; Pettibone v. United States, 143 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Dustin, 2 Bond 332, Fed. Cas. No. 15011; United States v. Goldman, 3 Woods 187, Fed. Cas. No. 15225; United States v. Gardner, 42 Fed. 829. ENG.—R. v. Seward, 1 Ad. & E. 706, 28 Eng. C. L. 330; R. v. Gompertz, 9 Ad. & E. N. S. (9 Q. B.) 824, 58 Eng. C. L. 824; Sydserff v. R., 11 Ad. & E. N. S. (11 Q. B.) 245, 63 Eng. C. L. 245; R. v. Jones, 4 Barn. & Ad. 345, 24 Eng. C. L. 156; R. v. Gill, 2 Barn. & Ald. 204, 20 Rev. Rep. 407; Latham v. R., 5 Best & S. 635, 117 Eng. C. L. 633, 122 Eng. Repr. 968; R. v. Fower, 4 Carr. & P. 592, 19 Eng. C. L. 664; O'Connell v. R., 11 Cl. & F. 155, 8 Eng. Repr. 1061; R. v. Eccles, 3 Doug. 337, 26 Eng. C. L. 224; R. v. Fowler, 1 East P. C. 461; R. v. Richardson, 1 M. & R. 402.

6 Com. v. Wallace, 82 Mass. (16 Gray) 221; Com. v. Meserve, 154 Mass. 64, 27 N. E. 997.

7 People v. Barkelow, 37 Mich. 455.

8 Com. v. Wallace, 82 Mass. (16 Gray) 221; Com. v. Meserve, 154 Mass. 64, 27 N. E. 997.

The means need be set forth in such a manner as to enable the accused to make his defense and so that his conviction or acquittal will be a bar to further prosecution.—United States v. Raley, 173 Fed. 159.

9 Gantt v. United States, 47 C. C. A. 210, 108 Fed. 61; United States v. McKinley, 126 Fed. 242; Stearns v. United States, 82 C. C. A. 48, 152 Fed. 900.

10 Hyde v. United States, 27 App. Cas. D. C. 362; Dealy v. United States, 152 U. S. 539, 38 L. Ed. 545, 9 Am. Cr. Rep. 161, 14 Sup. Ct. Rep. 680; United States v. McKinley, 126 Fed. 242; United States v. Raley, 173 Fed. 159; Mays v. United States, 103 C. C. A. 168, 179 Fed. 610.

§ 517. KNOWLEDGE AND INTENT. A conspiracy being unlawful, and every citizen being presumed to know the law, it is unnecessary in an indictment or information charging conspiracy to allege knowledge on the part of the accused of the wrongful character of the act of conspiring and combining;[1] when the combination and the object to be accomplished thereby are alike lawful, but the end is to be attained by unlawful means,[2] it is unnecessary to allege that the accused knew the means to be used to be criminal, because where an act is in its characteristics and quality wrongful, knowledge of its wrongful character is presumed and need not therefore be alleged,[3] except in those cases where the act becomes wrongful and criminal by reason of the presence of accidental or fortuitous features not necessarily attendant upon it,[4] in which case knowledge must be alleged.[5] A person is presumed to intend the natural consequences of his act;[6] yet where intent is or becomes a necessary element in a conspiracy charged, or in the means adopted to carry it out, intent should be alleged,[7] but this may be done either in the language of the statute or in language of equivalent import.[8] Where an intent to defraud is alleged, the facts showing the intent need not be alleged;[9]

1 See, supra, § 514; also, Com. v. Goldsmith, 12 Phila. (Pa.) 635; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

2 See, supra, § 516.

3 Com. v. Goldsmith, 12 Phila. (Pa.) 635, 35 Leg. Int. 420; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; R. v. Merwberry, 6 T. R. 619, 3 Rev. Rep. 282.

4 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 719, 9 Atl. 559.

5 United States v. Reichert, 12 Sawy. 643, 32 Fed. 142; United States v. Adler, 49 Fed. 736; United States v. Peuschel, 116 Fed. 642; Conrad v. United States, 62 C. C. A. 478, 127 Fed. 798.

6 1 Kerr's Whart. Crim. Law, p. 182 note, and pp. 185 et seq.

7 United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Ex parte Coy, 127 U. S. 731, 32 L. Ed. 274, 8 Sup. Ct. Rep. 1263.

8 See, supra, § 509. See, also, State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Locklin, 81 Me. 251, 16 Atl. 895; Elkin v. People, 28 N. Y. 177; People v. Goslin, 67 App. Div. (N. Y.) 16, 16 N. Y. Cr. Rep. 255, 73 N. Y. Supp. 520, affirmed 171 N. Y. 627, 63 N. E. 1120.

9 United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16594.

but in those cases where the allegation is of a conspiracy to conceal property from a trustee in bankruptcy, the indictment must aver that the offense was committed "knowingly and fraudulently," because these words are an essential part of the statute describing an essential ingredient of the offense.[10]

"*Feloniously entered into,*" are not necessary words in averring a conspiracy,[11] and the words "malice aforethought" are also unnecessary.[12]

§ 518. NAME OF PERSON INTENDED TO BE INJURED. An indictment or information may charge a conspiracy to have been against the public generally or against a designated class of the general public, where such is the fact; and where the object or purpose of the conspiracy was to injure—e. g., cheat and defraud—the public generally or a particular class of the general public, the name or names of persons intended to be injured need not be set out,[1] but the averment should be of an intent to injure the general public or the particular class of the general public.[2] In like manner, and on the same general principle, it has been said that where the object of the con-

10 United States v. Comstock, 162 Fed. 415.

11 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 9 Am. Cr. Rep. 338, 15 Sup. Ct. Rep. 680.

12 State v. Bacon, 27 R. I. 252, 61 Atl. 653.

1 Lowell v. People, 229 Ill. 227, 87 N. E. 226; State v. Mardesich, 79 Wash. 204, 140 Pac. 573; R. v. Rex, 7 Ad. & E. N. S. (7 Q. B.) 782, 53 Eng. C. L. 782; R. v. Peck, 9 Ad. & E. 686, 36 Eng. C. L. 362; R. v. De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415.

Conspiracy to cheat and defraud the public generally, with no special aim at any particular individual or individuals, the name or names of the person or persons to be defrauded need not be set out. —Lowell v. People, 229 Ill. 227, 87 N. E. 226.

2 ILL.—Lowell v. People, 229 Ill. 227, 82 N. E. 226; People v. Smith, 239 Ill. 91, 87 N. E. 885, affirming 144 Ill. App. 129; Johnson v. People, 124 Ill. App. 213. IND.—People v. McKee, 111 Ind. 378, 12 N. E. 510. MASS.—Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Harley, 48 Mass. (7 Met.) 506. MICH.—People v. Arnold, 46 Mich. 268, 9 N. W. 416. N. Y.—People v. Wieches, 94 App. Div. 19, 87 N. Y. Supp. 897. PA.—Clary v. Com., 4 Pa. St. 210; Collins v. Com., 3 Serg. & R. 220. WASH.—

spiracy is to injure the general public by bringing into the United States a designated class of undesirable aliens, who are not entitled to admission under the law, it is not necessary to set out the name or names of any particular individual or individuals whom it was intended to bring in.[3]

Particular individual or individuals being intended to be affected and injured, the name or names of such individual or individuals should be alleged in the indictment or information,[4] although it is sufficient to aver that the name or names is or are to the grand jury unknown, where such is the fact;[5] and where the particular individual or individuals had not been selected and determined upon at the time of the conspiracy and combination, the indictment or information should allege that the person or persons to be affected were unascertained at that time.[6] In those cases where the accomplished purpose of the conspiracy discloses the name or names of some of the individuals actually injured, the indictment or information may allege that the purpose of the conspiracy and combination was to injure such persons, naming them, "and divers other persons, to the grand jury unknown."[7]

State v. Mardesich, 79 Wash. 204, 140 Pac. 573. ENG.—R. v. Peck, 9 Ad. & El. 686, 36 Eng. C. L. 240; R. v. DeBerenger, 3 Maule & S. 67, 105 Eng. Rep. 563.

3 Wong Din v. United States, 68 C. C. A. 340, 135 Fed. 702; United States v. Dahl, 225 Fed. 909.

4 McKee v. State, 111 Ind. 378, 12 N. E. 510; People v. Arnold, 46 Mich. 268, 9 N. W. 406; State v. Mardesich, 79 Wash. 204, 140 Pac. 573; King v. R., 7 Ad. & E. N. S. (7 Q. B.) 795, 53 Eng. C. L. 795, reversing 7 Ad. & E. N. S. (7 Q. B.) 782, 53 Eng. C. L. 782; Horseman v. R., 16 Up. Can. Q. B. 543.

5 People v. Smith, 239 Ill. 91, 87 N. E. 885, affirming 144 Ill. App. 129; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Miller v. United States, 66 C. C. A. 399, 133 Fed. 337.

6 R. v. Peck, 9 Ad. & E. 686, 36 Eng. C. L. 362; R. v. Rex, 7 Ad. & E. N. S. (7 Q. B.) 795, 53 Eng. C. L. 795; R. v. DeBerenger, 3 Maule & S. 67, 15 Rev. Rep. 415.

7 State v. Grant, 86 Iowa 216, 53 N. W. 120.

§ 519. JOINDER OF DEFENDANTS. We have already seen[1] that an indictment or information charging conspiracy need not set out the names of all the conspirators, except in the case of an indictment or information charging a conspiracy in restraint of trade;[2] neither is it necessary to join all the conspirators as parties in the indictment or information,[3] for they may be indicted and prosecuted either jointly[4] or separately,[5] in the absence of anything peculiar to the particular case requiring a joint prosecution.[6] The usual, and probably the better, practice is to indict and prosecute jointly.[7] Where there is a conspiracy to defraud the United States, in which a federal officer is a party to the corrupt combination, the officer may be joined with the private persons in the indictment and prosecution.[8]

1 See, supra, § 512.

2 Id., footnote 5.

3 People v. Smith, 239 Ill. 91, 87 N. E. 885; State v. Dreany, 65 Kan. 292, 12 Am. Cr. Rep. 626, 69 Pac. 182.

4 Rutland v. Com., 160 Ky. 77, 169 S. W. 584; Cohen v. United States, 157 Fed. 651.

Demurrer will not lie because of non-joinder of the conspirators, inasmuch as it is within the discretion of the prosecutor how many he will include in the indictment.—Com. v. Demain, 3 Clark (Pa.) 487, 6 Pa. Law J. 29.

Judgment against one may be pronounced before conviction of others on joint indictment.—Eacock v. State, 169 Ind. 488, 80 N. E. 1039.

5 People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 6 Am. Cr. Rep. 112, 7 Pac. 828; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Rutland v. Com., 160 Ky. 77, 169 S. W. 584; Heine v. Com., 91 Pa. St. 145; United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774; Cohen v. United States, 85 C. C. A. 113, 157 Fed. 651.

Corporation need not be indicted, if indictable, in connection with individuals, for fraudulently concealing its property from its trustee in bankruptcy.—Cohen v. United States, 85 C. C. A. 113, 157 Fed. 651.

6 United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774.

7 See People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 6 Am. Cr. Rep. 112, 7 Pac. 828; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Heine v. Com., 91 Pa. St. 145; Com. v. Demain, 3 Pa. L. J. Rep. 487; United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774.

8 United States v. Boyden, 1 Low. C. C. 266, Fed. Cas. No. 14632; United States v. Van Leuven, 62 Fed. 62.

§ 520. JOINDER OF COUNTS. The joinder of counts in an indictment or information, and the general rules governing the same, have been already sufficiently discussed.[1] We have also seen[2] that the judicious pleader will insert counts to meet and provide for every contingency of the evidence. These general rules govern in an indictment or information charging a criminal conspiracy, and the pleader may set forth the offense in all the various ways thought prudent to meet the possible phases of the evidence,[3] even though the counts may involve transactions constituting offenses of different grades,[4] some of which may not attain to the degree of felonies, and not include a charge of conspiracy;[5] and where all the counts in an indictment or information are manifestly based on the same transaction, the court will assume that the intention was to charge one offense, only.[6] Thus, it has been said that the indictment or information may contain a count charging the criminal conspiracy, and another count charging the criminal act committed in pursuance of such conspiracy,[7] in those cases in which the two offenses are similar in nature and mode of trial and in punishment to be inflicted on conviction.[8] Each count in such an indictment or information should directly and fully charge the conspiracy, and not plead the same by reference to a former count in which the charge of conspiracy is set out.[9]

1 See, supra, §§ 335 et seq.

2 See, supra, § 347.

3 See State v. Kennedy, 63 Iowa 197, 18 N. W. 885; State v. Howard, 129 N. C. 584, 40 S. E. 71.

4 State v. Stewart, 59 Vt. 273, 284, 9 Atl. 559.

5 See R. v. Murphy, 8 Car. & P. 297, 34 Eng. C. L. 397; R. v. Johnson, 3 M. & S. 550.

6 State v. Glidden, 55 Conn. 46, 68, 8 Atl. 890; Hyde v. United States, 27 App. D. C. 362, cited, infra, § 523, footnote 9.

Jury may convict on one count and acquit on others.—Wilson v. Com., 96 Pa. St. 56.

7 Limitations as to duplicity discussed in § 521.

8 See Thomas v. People, 113 Ill. 531, 5 Am. Cr. Rep. 127; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421; United States v. Lancaster, 44 Fed. 885, 10 L. R. A. 317.

9 State v. Norton, 23 N. J. L. (3 Zab.) 48.

Defective count or counts joined to a good count or counts will not affect the validity and sufficiency of the indictment or information, for the reason that if any one of the counts is sufficient to charge all the ingredients of the offense, the indictment will be sufficient and a conviction upheld.[10]

§ 521. —— Duplicity. An indictment or information charging a conspiracy which is in and of itself criminal or is to compass the commission of acts which are criminal, is not open to the objection that it is duplicitous because it charges the overt act or acts done in pursuance of such criminal conspiracy,[1] and especially is this the case where no conviction is sought on account of such overt act or acts;[2] neither will an indictment or infor-

10 ILL.—Lyons v. People, 68 Ill. 276; Thomas v. People, 113 Ill. 531, 5 Am. Cr. Rep. 127. ME.—State v. Mayberry, 48 Me. 218. MASS. — Com. v. Nichols, 134 Mass. 531. N. J. — Johnson v. State, 26 N. J. L. (2 Dutch.) 321. N. Y.—People v. Goslin, 67 App. Div. 16, 16 N. Y. Cr. Rep. 255, 73 N. Y. Supp. 520, affirmed 171 N. Y. 627, 63 N. E. 1120. N. C.—State v. Brady, 107 N. C. 822, 12 S. E. 325. PA.—Hazen v. Com., 23 Pa. St. 355. FED. — United States v. Nunnemacher, 7 Biss. 121, 124, Fed. Cas. No. 15902; United States v. Dustin, 2 Bond 332, Fed. Cas. No. 15011; Haynes v. United States, 42 C. C. A. 34, 101 Fed. 817. ENG.—R. v. Gompertz, 9 Ad. & E. (9 Q. B.) 824, 58 Eng. C. L. 824; Latham v. R., 5 Best & S. 635, 117 Eng. C. L. 635; R. v. Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

1 People v. Darr, 262 Ill. 202, 104 N. E. 389, affirming 179 Ill. App. 130; State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370; State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Madden, (Iowa, Oct. 6, 1914) 148 N. W. 995; Lisle v. Com. 82 Ky. 250; United States v. Rogers, 226 Fed. 512.

Thus, it has been held that an indictment charging a conspiracy to burn property and to commit arson is not bad for duplicity, because it alleges overt acts constituting arson.—State v. Madden, (Iowa, Oct. 6, 1914) 148 N. W. 995.

"A conspiracy count in an indictment is not bad for the reason that, in charging overt acts, it appears that the crime which the defendants conspired to commit was actually committed by them." — United States v. Rogers, 226 Fed. 512, citing McConkey v. United States, 96 C. C. A. 501, 171 Fed. 829, and Stanley v. United States, 115 C. C. A. 584, 195 Fed. 896.

2 State v. Grant, 86 Iowa 216, 53 N. W. 120.

"If the indictment should be so drawn as to show a design to

mation be open to the objection that it is duplicitous where the offense is described therein under different names;[3] or where it charges more than one unlawful act to be accomplished by a single conspiracy, and sets out the facts relating to each unlawful act;[4] or that the carrying out of the alleged conspiracy would require the commission of several distinct crimes,[5] and these specific crimes are distinctly stated;[6] or there is a charge that the different crimes were committed at different times by different parties, in pursuance of the criminal conspiracy.[7]

The reason for this rule is the fact that the conspiracy may be complete without any overt act in pursuance thereof;[8] and although the offense of criminal conspiracy —even where the overt act is committed, and the object or purpose of the conspiracy accomplished—is complete before the overt act, in the sense that nothing more is necessary to be done to constitute the act of combining and agreeing to a crime, yet the conspiracy must be deemed to continue during the commission of the overt

claim a conviction for the injury committed, though the evidence should fail to satisfy the charge of conspiracy, such indictment manifestly could not be sustained, unless the offense could be regarded as a compound offense."—State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370.

3 State v. Sterling, 34 Iowa 443.

4 State v. Kennedy, 63 Iowa 197, 18 N. W. 885.

5 State v. Sterling, 34 Iowa 443.

6 State v. Kennedy, 63 Iowa 197, 18 N. W. 885.

7 State v. Grant, 86 Iowa 216, 53 N. W. 120.

8 As to overt act and accomplishment of purpose of conspiracy, see, infra, § 523. See Kerr's Whart. Crim. Law, § 1649, and authorities there cited; also, Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, affirming 114 Ill. App. 75; O'Donnell v. State, 110 Ill. App. 250; State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370; State v. Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; Com. v. Ward, 1 Mass. 473; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Tibbetts, 2 Mass. 536; Com. v. Warren, 6 Mass. 74; State v. Pulle, 12 Minn. 164; State v. Noyes, 25 Vt. 415; Elder v. Whitesides, 72 Fed. 724 (enjoining conspiracy to prevent loading or unloading vessel, except by laborers acceptable to defendant, without allegation or proof of any overt act against the particular vessel).

act or acts.[9] Charging the overt act or acts in pursuance of the conspiracy does not necessarily make the design of the pleader, or the effect of the instrument, charge anything more than the conspiracy;[10] the fact that the conspirators carried out the object of the conspiracy may be alleged by way of aggravation of the offense,[11] and given in evidence to prove the conspiracy.[12]

Where the statute provides the definition and punishment of a felonious conspiracy, and also further provides punishment of an additional character for the overt act of a higher criminal nature where the latter is committed in pursuance of the conspiracy, it being one transaction, the description of the crime as an entirety in the indictment is not only proper but necessary.[13]

Instances. Accordingly, it has been held that a count charging a single conspiracy or combination to commit several crimes is not multifarious or duplicitous;[14] that an indictment charging defendants "did wickedly and maliciously conspire together to injure the person and character" of a designated individual, and to assault him "with the felonious intent[15] to inflict upon him a great bodily injury, in violation of law; and in pursuance of said conspiracy together said defendants did in the night-time feloniously decoy said" named person

9 Com. v. Corlies, 3 Brewst. (Pa.) 575.

10 State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370.

11 State v. Mayberry, 48 Me. 218.

12 See State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370; State v. Mayberry, 48 Me. 218. See, also, Kerr's Whart. Crim. Law, § 1650, and cases cited.

13 United States v. Lancaster, 44 Fed. 885, 10 L. R. A. 317.

14 United States v. Aczel, 219 Fed. 917.

15 "Intent to intend to commit a felonious assault," it was objected to this particular indictment, does not constitute an offense, because "a person can not have an intent to intend," and that the Iowa "statute does not punish a conspiracy with the intent to intend something, if that were possible." But the refinements of the objection did not appeal to the court; the indictment was held to be good and to state the statutory offense of conspiracy. — State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370.

"away from his home and family and into the public highway, and did then and there feloniously assault, ill-treat, and tar and feather" said person, is not bad on the ground of duplicity,[16] the charge being the criminal conspiracy only and not a charge of the subsequent felonious acts, which were recited by way of aggravation;[17] that a charge of a conspiracy to do an unlawful act in the night-time, while wearing white caps, masks, etc., does not make the indictment duplicitous;[18] that an indictment charging a conspiracy to injure, oppress, threaten, and intimidate a citizen in the free exercise of his constitutional right, and in the carrying out of which conspiracy a murder is charged to have been committed, is not bad for duplicity;[19] that an indictment charging conjunctively a conspiracy to commit acts which are described and prohibited disjunctively in the statute, is not bad for duplicity.[20]

It is duplicitous, however, to charge in one count a conspiracy to commit a designated crime, and in another count charge the commission of the same crime.[21]

§ 522. SURPLUSAGE. We have already seen that anything not necessary to a full and adequate statement of the ingredients of the offense sought to be charged, need not be incorporated in an indictment or information; and where included in a proper and sufficient statement of the alleged offense, may be treated as surplusage.[1] This rule is applicable to an indictment or information charging a

16 State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370.

17 Id.

18 Hobbs v. State, 133 Ind. 404, 18 L. R. A. 774, 32 N. E. 1019.

19 United States v. Lancaster, 44 Fed. 885, 10 L. R. A. 317.

As a charge of conspiracy to rob and steal.—State v. Sterling, 34 Iowa 443.

20 State v. Fidler, 148 Ind. 222, 47 N. E. 464; Selby v. State, 161 Ind. 672, 69 N. E. Rep. 463; State v. Dawson, 38 Ind. App. 485, 78 N. E. 352; Koetting v. State, 88 Wis. 510, 60 N. W. 822.

See, also, supra, § 207.

21 State v. Kennedy, 63 Iowa 197, 18 N. W. 885.

1 See, supra, § 200.

conspiracy; and where unnecessary words not descriptive of the charge or anything connected therewith are included, or words are misplaced,[2] if they can be omitted without destroying the sufficiency of the indictment or information, and without jeopardizing the rights of the defendant, they may be treated as surplusage and omitted.[3] Thus, where the county in which the conspiracy was entered into is not required by statute[4] to be set out, being set out, it may be treated as surplusage;[5] where the charge is of conspiracy by accused with A and B to commit a designated crime, and the evidence shows that the confederating was with A alone, the allegations as to B will be treated as surplusage;[6] where the charge is that the accused conspired to extort money from A and cheat him thereof "by false pretenses and subtle means and devices," but the evidence fails to show that accused made use of any false pretenses in their attempt to obtain the money from A, that portion of the indictment charging false pretense will be treated as surplusage;[7] where the charge was a conspiracy to utter forged notes on a foreign bank with the intent to cheat and defraud such foreign bank and divers citizens of the commonwealth, the allegation as to the intent to cheat and defraud the foreign bank was treated as surplusage;[8] and where an

2 As to misplaced words which are immaterial, see Elkin v. People, 24 How. Pr. (N. Y.) 272, affirmed 28 N. Y. 177.

3 IND.—Musgrave v. State, 133 Ind. 297, 32 N. E. 885. ME.—State v. Mayberry, 48 Me. 218. N. H.—State v. Hadley, 54 N. H. 224. N. Y.—Elkin v. People, 24 How. Pr. 272, affirmed 28 N. Y. 177. PA.—Clary v. Com., 4 Pa. St. 210. TEX.—Woodworth v. State, 20 Tex. App. 305. FED.—United States v. Smith, 2 Bond 323, Fed. Cas. No. 16322. ENG.—R. v. Hollingberry, 4 Barn. & C. 329, 10 Eng. C. L. 601; R. v. Yates, 6 Cox C. C. 441.

4 As in indictment under Act March 2, 1867, 14 U. S. Stats. at L. 484.

5 United States v. Smith, 2 Bond 323, Fed. Cas. No. 16322.

6 Woodworth v. State, 20 Tex. App. 375.

7 R. v. Yates, 6 Cox C. C. 441.

8 Clary v. Com., 4 Pa. St. 210.

indictment at common law concluded "contrary to the form of the statute," etc., the allegation as to the statute was treated as surplusage.[9]

§ 523. OVERT ACT—COMMON LAW RULE. At common law an overt act, in pursuance of an alleged conspiracy, need not be alleged in the indictment or information,[1] or proved on the trial;[2] and the same rule applies under statute, unless an overt act is therein required to complete the criminal conspiracy,[3] even where overt acts have been committed in pursuance of the corrupt com-

9 State v. Straw, 42 N. H. 393.

1 MASS.—Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Fuller, 132 Mass. 563. MICH.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Arnold, 46 Mich. 268. N. H.—State v. Straw, 42 N. H. 393. N. Y.—People v. Mather, 4 Wend. 264, 21 Am. Dec. 122. PA.—Com. v. McKisson, 8 Serg. & R. 420. FED.—Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; Harrison v. Mayer, 224 Fed. 224.

2 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 15 Sup. Ct. Rep. 680, 9 Am. Cr. Rep. 338.

3 IOWA—State v. Grant, 86 Iowa 216, 53 N. W. 120. MD.—State v. Buchanan, 3 Harr. & J. 317, 9 Am. Dec. 534. MASS.—Com. v. Ward, 1 Mass. 473; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Warren, 6 Mass. 72; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 436; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Shedd, 61 Mass. (7 Cush.) 514; Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Fuller, 132 Mass. 563. MICH.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Clark, 10 Mich. 310; People v. Arnold, 46 Mich. 268, 9 N. W. 406; People v. Petheram, 46 Mich. 252, 31 N. W. 188; People v. Dyer, 79 Mich. 480, 44 N. W. 937. MO.—State v. Nell, 79 Mo. App. 243. N. H.—State v. Straw, 42 N. H. 393. N. Y.—Hartung v. People, 26 N. Y. 154; Lambert v. People, 9 Cow. 578; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; People v. Chase, 16 Barb. 495. PA.—Clary v. Com., 4 Pa. St. 210; Com. v. Bartilson, 85 Pa. St. 482; Heine v. Com., 91 Pa. St. 145; Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808; Com. v. McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630. VT.—State v. Noyes, 25 Vt. 415; State v. Keach, 40 Vt. 113. FED.—Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 15 Sup. Ct. Rep. 467; United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636; United States v. Watson, 17 Fed. 145; United States v. Gardner, 42 Fed. 829; United States v. Cassidy, 67 Fed. 698.

bination.[4] The reason for this rule is the fact that the offense consists in the unlawful combination and agreement, not in the acts following in pursuance thereof, such overt acts being merely evidence of the agreement.[5] However, an overt act or acts may be charged by way of aggravation;[6] and it is usual to set out the overt act or acts done or committed in order to effect the common purpose of the conspiracy.[7]

Overt act alleged, it need not be charged that all the accused, or all the conspirators, participated therein. The fact of conspiracy must be alleged as to all the accused, but the overt act or acts done in furtherance of such conspiracy may be charged against those who committed them, only.[8] More than one overt act may be charged in the same indictment or information, without laying the instrument open to the objection of duplicity.[9] While the

4 State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370.

5 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

6 See, supra, § 521, footnote 11. See, also: CONN.—State v. Bradley, 48 Conn. 535. IOWA—State v. Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, 23 N. W. 370; State v. Grant, 86 Iowa 216, 53 N. W. 120. KY.—Com. v. Ward, 92 Ky. 158, 17 S. W. 283. ME.—State v. Murray, 15 Me. 100; State v. Ripley, 31 Me. 386; State v. Mayberry, 48 Me. 218. MASS.—Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Tibbetts, 2 Mass. 536; Com. v. Davis, 9 Mass. 415; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Shedd, 61 Mass. (7 Cush.) 514. MICH.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Arnold, 46 Mich. 268. N. Y.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; People v. Chase, 16 Barb. 495. VT.—State v. Keach, 40 Vt. 113.

7 People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

Where the conspiracy has not been executed no overt acts need be alleged. — State v. Bacon, 27 R. I. 252, 61 Atl. 653.

8 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 15 Sup. Ct. Rep. 680, 9 Am. Cr. Rep. 338; United States v. Donnan, 11 Blatchf. 168, 25 Fed. Cas. No. 14983; United States v. Benson, 17 C. C. A. 293, 70 Fed. 391; United States v. Greene, 115 Fed. 343.

9 United States v. Eccles, 181 Fed. 906. See, also, supra, § 520, footnote 6.

Forty-two different and independent charges of conspiracy to

time[10] and place[11] of the conspiracy are required to be set out, the time of an overt act, or of the last overt act, need not be alleged.[12]

Remoteness of overt act will not, in and of itself, vitiate an indictment charging a conspiracy. Thus, where the conspiracy alleged was to store away goods with the intent thereafter to go into bankruptcy and conceal the goods from the trustee appointed in the bankruptcy proceedings to be subsequently commenced, not only the subsequent filing of a petition in voluntary bankruptcy, but also the concealing of the goods before the petition was filed, being alleged as overt acts, the indictment was upheld, notwithstanding the fact that at the time when the goods were stored away the act was not criminal;[13] and where the charge was that there was a conspiracy to bring Chinese into the United States who were not entitled to admission, by means of a named vessel, it was said that the provisioning of the vessel, the sailing of the vessel from a named port in Mexico in order to accomplish a return voyage, and the sending of a telegram giving instructions regarding such return voyage, were overt acts which were not too remote under the statute,[14] and the indictment alleging them as such was upheld.[15]

§ 524. —— Under statute or court rule. The common law form of indictment charging a conspiracy has not met with the approval of many of the courts of this country, and in the most of the states of the Union an

defraud the United States out of public lands may be joined in the same indictment.—Hyde v. United States, 27 App. D. C. 362.

10 See, supra, § 510.

11 See, supra, § 511.

12 State v. Unsworth, 85 N. J. L. 399, 88 Atl. 1097, affirming 84 N. J. L. 22, 86 Atl. 64.

13 Alkon v. United States, 90 C. C. A. 116, 163 Fed. 810.

Charging fraudulent concealment of property from a trustee in bankruptcy by a corporation may charge that the property was removed and concealed prior to the bankruptcy.—Cohen v. United States, 157 Fed. 651.

14 U. S. Rev. Stats., § 5440, 2 Fed. Stats. Ann., 1st ed., p. 247.

15 Daly v. United States, 95 C. C. A. 107, 170 Fed. 321.

overt act done in pursuance of the conspiracy is required to be alleged, although the gist of the offense still remains the unlawful combination,[1] which must be proved against all the accused, each one of whom then becomes responsible for the act of any other of the co-conspirators,[2] where done in pursuance of the conspiracy and the reasonable and natural result of an attempt to carry it into effect.[3]

The reason for the rule requiring an overt act in pursuance of the conspiracy to be alleged has been said to be merely to furnish a locus pœnitentiæ, something before the act done; either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute;[4] for if such were not the law, indictments for conspiracy would stand upon a different footing than indictments for any other crime, as it is a general principle that a party can not be punished for an evil design, unless he has taken some step toward carrying it out.[5] While it is true that an overt act is regarded as evidence of, and admissible in evidence to show, a conspiracy, and that matters of evidence need not be set forth in an indictment,[6] this is manifestly an exception to the rule in so far as the requirement that an overt act shall be alleged is concerned; the requirement, however, is not for the purpose of showing that the cor-

1 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 9 Am. Cr. Rep. 338, 15 Sup. Ct. Rep. 680.

2 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 9 Am. Cr. Rep. 338, 15 Sup. Ct. Rep. 680, citing American Fur Co. v. United States, 27 U. S. (2 Pet.) 358, sub nom. Sundry Goods, Wares and Merchandise v. United States, 7 L. Ed. 450; Nudd v. Burrows, 91 U. S. 426, 428, 23 L. Ed. 286.

3 United States v. Britton, 108 U. S. 204, 27 L. Ed. 703, 2 Sup. Ct. Rep. 526; United States v. Lancaster, 49 Fed. 896, 10 L. R. A. 333.

4 United States v. Britton, 108 U. S. 199, 204, 27 L. Ed. 703, 2 Sup. Ct. Rep. 526.

5 Bannon v. United States, 156 U. S. 464, 39 L. Ed. 494, 9 Am. Cr. Rep. 338, 15 Sup. Ct. Rep. 680.

6 See Evans v. United States, 153 U. S. 584, 594, 38 L. Ed. 830, 834, 14 Sup. Ct. Rep. 934, 939; Bannon v. United States, 156 U. S. 464, 38 L. Ed. 494, 9 Am. Cr. Rep. 338, 15 Sup. Ct. Rep. 680.

rupt design was carried out,[7] but rather for the purpose of establishing the fact that the conspiracy was not abandoned.

Statutory requirement of overt act to constitute the crime of conspiracy, the overt act must be set out in the indictment or information.[8] And where the jurisdiction of the court depends wholly upon the alleged overt act, it must be alleged with all the definiteness and certainty of any other jurisdictional fact.[9]

§ 525. ACCOMPLISHMENT AND ADVANTAGE. It need not be alleged in an indictment or information that the object or purpose of a conspiracy was accomplished,[1] or that

7 As to accomplishment, see, infra, § 525.

8 CAL.—People v. Daniels, 105 Cal. 262, 38 Pac. 720. DAK.—United States v. Carpenter, 6 Dak. 294, 50 N. W. 123. ME.—State v. Clary, 64 Me. 369. MO.—State v. Dalton, 134 Mo. App. 517, 114 S. W. 1132. N. J.—State v. Hickling, 41 N. J. L. 208, 32 Am. Rep. 198; Wood v. State, 47 N. J. L. 461, 1 Atl. 509; State v. Barr, (N. J. L.) 40 Atl. 772. N. Y.—People v. Sheldon, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785; People v. Willis, 158 N. Y. 392, 53 N. E. 29, reversing 4 Misc. 537, 54 N. Y. Supp. 129; People v. Goslin, 171 N. Y. 627, 63 N. E. 1120; People v. Coney Island Jockey Club, 68 Misc. 302, 123 N. Y. Supp. 669.

There can be no conviction unless overt acts are charged and one or more thereof are proved as laid.—People v. Coney Island Jockey Club, 68 Misc. (N. Y.) 302, 123 N. Y. Supp. 669; Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, 32 Sup. Ct. Rep. 793; United States v. Burkett, 150 Fed. 208; Thomas v. United States, 88 C. C. A. 447, 156 Fed. 897, 17 L. R. A. (N. S.) 720; Arnold v. Well, 157 Fed. 429; United States v. Atlantic Journal Company, 185 Fed. 656; United States v. McClarty, 191 Fed. 318; United States v. Rogers, 226 Fed. 512.

9 Tillinghast v. Richards, 225 Fed. 226.

1 IND.—Muller v. State, 79 Ind. 198; Shercliff v. State, 96 Ind. 369; State v. Bruner, 135 Ind. 419, 35 N. E. 22. KY.—Com. v. Bryant, 10 Ky. Law Rep. 426, 12 S. W. 276. MASS.—Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346. N. H.—State v. Straw, 42 N. H. 395. VT.—State v. Noyes, 25 Vt. 415; State v. Keach, 40 Vt. 113. FED.—United States v. Burkett, 150 Fed. 208; United States v. Stamatopoulos, 164 Fed. 524; United States v. Wupperman, 215 Fed. 135.

accused received or was to derive any pecuniary or other advantage therefrom.[2]

§ 526. Specific instances. The limits of this treatise will not permit of a systematic treatment of the requisites and sufficiency of an indictment or information charging a conspiracy to commit each and every crime and offense in relation to which a criminal conspiracy may be entered into; attention is necessarily confined to the main groups or classes of crimes and offenses to accomplish which criminal conspiracies are entered into most frequently. The discussion already given and rules laid down in this title, together with what follows herein, are thought to be sufficient to guide the pleader in any particular instance which may arise in practice. It is sufficient to state in this place that in each particular crime or offense the purpose or object of the corrupt combination must be set forth by alleging the particular crime or offense that was to be accomplished or committed under and in pursuance of the agreement;[1] a statute dispensing with such allegation has been held to be unconstitutional,[2] for the reason that the accused would have no means of knowing

2 State v. Bacon, 27 R. I. 252, 61 Atl. 653; United States v. Allen, Fed. Cas. No. 14442; United States v. Newton, 52 Fed. 275; R. v. Esdaile, 1 Fost. & F. 213.

1 COLO. — Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111. ILL.— Towne v. People, 89 Ill. App. 258. IND.—Landringham v. State, 49 Ind. 186; State v. McKinstry, 50 Ind. 465; Miller v. State, 79 Ind. 198. IOWA—State v. Savoye, 48 Iowa 562. MD.—State v. Buchanan, 5 Harr. & J. 217, 9 Am. Dec. 534. MASS.—Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Kellogg, 61 Mass. (7 Cush.) 473; Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Barnes, 132 Mass. 242. MICH.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321. N. C.—State v. Trammell, 24 N. C. (2 Ired. L.) 379. WIS.— State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719. FED.—Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Taffee, 86 Fed. 113; United States v. Melfi, 118 Fed. 899.

2 See Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105; State v. McKinstry, 50 Ind. 465; Scudder v. State, 62 Ind. 13; Miller v. State, 79 Ind. 198.

before the trial with what crime or offense he stood charged, and for that reason would not be able to prepare his defense.[3] Where the crime is known to the common law, a designation by its common law name will be sufficient; otherwise the indictment or information must charge every element of the crime as fully as if it were an indictment for its perpetration.[4]

§ 527. —— CONSPIRACY TO COMMIT CRIME.[1] Where a criminal conspiracy consists in an unlawful agreement or combination of two or more persons to compass or promote a criminal purpose,[2] that purpose must be fully and clearly set forth in the indictment or information,[3] and, under statute,[4] facts and circumstances constituting the intended crime should be alleged.[5] Where the criminality of the offense consists in an agreement to compass or promote some purpose not in itself criminal by the use of criminal and unlawful means, such means must be

3 Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105.

4 COLO. — Lipschitz v. People, 25 Colo. 261, 53 Pac. 1111. ILL.— West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254. IND.—Scudder v. State, 62 Ind. 13. IOWA— State v. Carroll, 85 Iowa 1, 51 N. W. 1159. MASS. — Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596. N. H.—State v. Parker, 43 N. H. 83. PA.—Hartmann v. Com., 5 Pa. St. 60.

1 As to forms in conspiracy to commit crime, see Forms Nos. 667-685.

2 Combination of fire insurance companies to injure public by raising rates is an indictable offense. —Fire Ins. Cos. v. State, 75 Miss. 24, 22 So. 99.

3 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, overruling Thatch. Cr. Cas. 609; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.

Compare: People v. Arnold, 46 Mich. 268, 9 N. W. 406; State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

4 N. Y. Code Crim. Proc., § 275.

5 People v. Willis, 24 Misc. (N. Y.) 537, 13 N. Y. Cr. Rep. 346, 54 N. Y. Supp. 129, affirmed on this point but reversed on others, 34 App. Div. 203, 14 N. Y. Cr. Rep. 414, 54 N. Y. Supp. 642, 158 N. Y. 392, 53 N. E. 29.

Charging conspiracy to remove and secrete another's goods so that he might falsely and fraudulently obtain insurance, does not sufficiently allege intent to assist in committing felony. — Com. v. Barnes, 132 Mass. 242.

set out in the indictment or information;[6] however, it seems that the specific means to be employed need be alleged in those cases only where the conspiracy is to do a lawful act in an unlawful manner.[7]

A criminal act[8] must be shown by the indictment or information to have been the purpose of the agreement or combination,[9] and it must be alleged that the act was wilful and corrupt,[10] except in those cases where the facts alleged necessarily import wilfulness.[11]

Criminal act or offense is required to be set forth in general terms, only,[12] it not being necessary to describe

6 See authorities cited in footnotes 1 and 7, this section.

7 People v. Petheram, 64 Mich. 252, 31 N. W. 188.

8 **Not every conspiracy or combination** is criminal, and punishable as a criminal conspiracy. Thus:

Agreement among carpenters that no union carpenter would use and work up material coming from a designated shop after a given date for the reason that the proprietor employed non-union men, is not a conspiracy.—State v. Van Pelt, 136 N. C. 633, 1 Ann. Cas. 495, 68 L. R. A. 760, 49 S. E. 177.

Combination of merchants to compel another dealing in certain goods to sell at prices fixed by them, and upon his refusal so to do to prevent its members from selling goods to him is, upon general legal principles, contrary to public policy, but not criminal.—Brown v. Jacobs Pharmacy, 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 141 S. E. 553.

Combination of members of labor union to maintain wages or limit number of apprentices is not criminal. See, infra, § 537.

Combination to injure business of another may be unlawful, and even tortious, without being criminal. See, infra, § 532.

9 State v. Stevens, 30 Iowa 391; Com. v. Wallace, 82 Mass. (16 Gray) 221; United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636; United States v. Watson, 17 Fed. 145.

10 Woods v. State, 47 N. J. L. 461, 5 Am. Cr. Rep. 123, 1 Atl. 509; Madden v. State, 57 N. J. L. 324, 30 Atl. 541.

11 Van Gesner v. United States, 82 C. C. A. 180, 153 Fed. 46.

12 ALA.—Thompson v. State, 106 Ala. 67, 17 So. 512. ARK.—Bundy v. State, 95 Ark. 460, 130 S. W. 522. D. C.—Geist v. United States, 26 App. Cas. 594; Hyde v. United States, 27 App. Cas. 362. IND.—See Reinhold v. State, 130 Ind. 467, 30 N. E. 306. IOWA—State v. Potter, 28 Iowa 554; State v. Savoye, 48 Iowa 562; State v. Soper, 118 Iowa 1, 91 N. W. 774; State v. Clemenson, 123 Iowa 524, 99 N. W. 139; State v. Poder, 154 Iowa 686, 135 N. W. 421. KY.—Lane v. Com., 134 Ky. 519, 121 S. W. 486. LA.—State v. Slutz, 106 La. 182, 30 So. 298. ME.—

the act with the same precision as in an indictment or information charging the criminal act itself,[13] except in those states in which a conspiracy to commit a crime is made a felony and an indictment or information charging the same is required to set out the essential elements of the felony as fully as they must be alleged in an indictment charging the commission of the felony.[14] Where the crime or offense intended to be committed is not designated by its legal name, the facts necessary to constitute

State v. Ripley, 31 Me. 386. MASS. — Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421. MICH.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Dyer, 79 Mich. 480, 44 N. W. 937. N. Y.—People v. Willis, 158 N. Y. 392, 14 N. Y. Cr. Rep. 72, 53 N. E. 29, affirming 34 App. Div. 203, 14 N. Y. Cr. Rep. 414, 54 N. Y. Supp. 642. PA.—Hartman v. Com., 5 Pa. St. 60; Hazen v. Com., 23 Pa. St. 355. TEX.—Brown v. State, 2 Tex. App. 115. FED.—Williamson v. United States, 207 U. S. 425, 52 L. Ed. 278, 28 Sup. Ct. Rep. 163; United States v. Adler, 49 Fed. 736; Haynes v. United States, 42 C. C. A. 34, 101 Fed. 817; Ching v. United States, 55 C. C. A. 304, 118 Fed. 538; Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, 17 L. R. A. (N. S.) 720; McConkey v. United States, 96 C. C. A. 501, 171 Fed. 829.

It is sufficient to charge a conspiracy to perpetrate a confidence game, the confidence game being a felony.—People v. Bush, 150 Ill. App. 48.

[13] Id. See, also, Van Gesner v. United States, 82 C. C. A. 180, 153 Fed. 46; Taggart v. United States, 84 C. C. A. 477, 156 Fed. 897; United States v. White, 171 Fed. 775; United States v. Dahl, 225 Fed. 909; Aczel v. United States, 232 Fed. 652.

The particularity with which the overt act is set forth can not vitiate the indictment where the conspiracy charged was a plan to defraud and not to commit the offense named.—United States v. Stamatopoulos, 164 Fed. 524.

Conspiracy to bring about the receipt of a rebate or concession being charged, the indictment or information need not allege the particular device or method by which it was to be accomplished with all the particularity required in pleading the commission of the substantive offense.—Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, 17 L. R. A. (N. S.) 720. See Armour Packing Co. v. United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400, holding that the device or means need not be pleaded at all.

[14] Landringham v. State, 49 Ind. 186, 1 Am. Cr. Rep. 105; Scudder v. State, 62 Ind. 13; Smith v. State, 93 Ind. 67; Green v. State, 157 Ind. 101, 60 N. E. 941; Eacock v. State, 169 Ind. 488, 82 N. E. 1039.

every essential element thereof must be alleged as fully as though the charge was the commission of the offense or crime itself.[15]

Crime against United States being charged as the object of the conspiracy, such conspiracy must be sufficiently alleged in the charging part; any defect in such allegation can not be aided by an averment of an act done under or in pursuance of the conspiracy;[16] but it has been held that it is not necessary to show in the indictment why or how the overt act could or did aid in carrying out the conspiracy,[17] though other cases hold that the indictment must show a connection between the act done and the plan or method of the conspiracy,[18] on the ground that it is for the court and not for the pleader to determine relevancy.[19]

Merger of conspiracy to commit crime in the consummated crime, there can be no punishment for the conspiracy.[20] It has been held by a line of well-reasoned cases that where the conspiracy is to commit a felony

15 Imboden v. People, 40 Colo. 142, 90 Pac. 608.

16 United States v. Britton, 108 U. S. 199, 27 L. Ed. 698, 2 Sup. Ct. Rep. 531.

17 United States v. Wupperman, 215 Fed. 135.

In an indictment charging a conspiracy to conceal property from a trustee in bankruptcy it is not necessary to allege the appointment of the trustee.—Steigman v. United States, 220 Fed. 63.

18 Tillinghast v. Richards, 225 Fed. 226.

19 In the above case, Brown, J., says: "The case of United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14983, decided June 2, 1873, has many times been cited as justifying the proposition that it need not appear upon the face of the indictment in what manner the act described would tend to effect the object of the conspiracy, and there is considerable authority to the effect that if any act is set forth and is alleged by the pleader to have been done pursuant to the conspiracy or to effect its object, this is enough, though there is no apparent connection between the overt act and the object. This seems unsound in principle, for relevancy is for the court and not for the pleader. If the act must be qualified by circumstances to make it relevant it should be pleaded, not simpliciter, but with the circumstances which make it relevant." See, also, United States v. Ruroede, 220 Fed. 211.

20 Com. v. Kingsbury, 5 Mass. 106, 15 Am. Cr. Rep. 86.

which is a higher crime than the conspiracy, and the felony is actually accomplished, the conspiracy thereupon becomes immediately merged in the executed felony,[21] where the accused is charged with both the conspiracy and the felony, otherwise there will be no merger.[22] But the doctrine of merger does not apply in those cases where the conspiracy and the crime to be committed are both of the same degree or grade,[23] whether of misde-

21 ALA. — State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. ARK.— Elsey v. State, 47 Ark. 572. ME.— State v. Mayberry, 48 Me. 218. MASS. — Com. v. Kingsbury, 5 Mass. 106, 15 Am. Cr. Rep. 86; Com. v. Goodhue, 43 Mass. (2 Metc.) 193. MICH. — People v. Richards, 1 Mich. 216, 51 Am. Dec. 75. N. Y.—Elkin v. People, 28 N. Y. 177; People v. Mather, 4 Wend. 215, 21 Am. Dec. 122; People v. McKane, 7 Misc. 478, 31 Abb. N. C. 176, 9 N. Y. Cr. Rep. 140, 28 N. Y. Supp. 397; People v. Willis, 24 Misc. 537, 13 N. Y. Cr. Rep. 346, 54 N. Y. Supp. 129. PA.—Hartman v. Com., 5 Pa. St. 60. VT.—State v. Noyes, 25 Vt. 415, 421. VA.—Anthony v. Com., 88 Va. 847, 14 S. E. 834.

Conspiracy to defraud insurance company punishable though no felony perpetrated. — Graff v. People, 208 Ill. 312, 70 N. E. 299, affirming 108 Ill. App. 168.

Conspiracy to commit theft is not merged in the theft, and may be punished as a distinct offense. —State v. Setter, 57 Conn. 461, 14 Am. St. Rep. 121, 18 Atl. 782; R. v. Button, 11 Ad. & E. N. S. (11 Q. B.) 929, 63 Eng. C. L. 927; R. v. Neale, 1 Den. C. C. 36.

22 United States v. Gardner, 42 Fed. 829.

"Question of merger applies only when the same act constitutes both offenses. But when the indictment charges that the defendants at one time were guilty of conspiracy, and at another time were guilty of perjury, there is no merger."—Johnson v. State, 29 N. J. L. (Dutch.) 453.

23 ALA. — State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. KY.— Com. v. Blackburn, 62 Ky. (1 Duv.) 4. ME.—State v. Murray, 15 Me. 100. MASS.—Com. v. Kingsbury, 5 Mass. 108; Com. v. Bakeman, 105 Mass. 53; Com. v. Walker, 108 Mass. 309; Com. v. Dean, 109 Mass. 349. MICH. — People v. Richards, 1 Mich. 216, 51 Am. Dec. 75. N. Y.—People v. Mather, 4 Wend. 215, 21 Am. Dec. 122. PA.— Hartman v. Com., 5 Pa. St. 60; Com. v. Parr, 5 Watts & S. 345; Com. v. Delany, 1 Grant Cas. 224. VT.—State v. Noyes, 25 Vt. 415. FED.—United States v. Martin, 4 Cliff. 156, Fed. Cas. No. 15728.

Burglary and larceny are crimes of the same magnitude, being distinct felonies of the same grade, and for that reason are not subject to the doctrine of merger.— Bell v. State, 48 Ala. 684, 17 Am. Rep. 40, 2 Am. Cr. Rep. 627; Howard v. State, 8 Tex. App. 447; Smith v. State, 22 Tex. App. 350.

Trespass a felony by statute does not merge in a felony com-

meanor[24] or felony.[25] In those cases where a conspiracy to commit a felony is regarded as an attempt to commit the felony, the authorities very largely predominate which hold that there is no merger in the accomplished felony;[26] and where, under the statute, some overt act is necessary to constitute the crime of conspiracy, the conspiracy is not merged in the executed crime.[27]

§ 528. —— Conspiracy to cheat and defraud generally.[1] It has been said that cheating and defrauding a person of property or money, though never right, was not necessarily an offense at common law; the transaction might be dishonest and immoral, and still not be unlawful in the sense in which that term is used in criminal law.[2] The general rule in this country, however, is that a conspiracy to cheat and defraud another out of his

mitted in connection with the trespass.—White v. Fort, 10 N. C. (3 Hawks.) 251.

24 People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Mather, 4 Wend. (N. Y.) 265, 21 Am. Dec. 122. See, also, State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Murray, 15 Me. 100; Com. v. Gillispie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Com. v. Delany, 1 Grant Cas. 224; Com. v. McGowan, 2 Pars. Sel. Eq. Cas. 341.

25 Thus, it has been held that a conspiracy to cheat and defraud by false pretenses and devices is not merged in the actual cheating and defrauding thereby (State v. Mayberry, 48 Me. 218); that a conspiracy to impede an officer in the discharge of his official duties is not merged in the crime of actually impeding him in those duties (State v. Noyes, 25 Vt. 415), and the like.

26 CONN.—State v. Shepard, 7 Conn. 54; State v. Setter, 57 Conn. 461, 14 Am. St. Rep. 461, 18 Atl. 782. ILL.—Barnett v. People, 54 Ill. 325. IND.—Bonsall v. State, 35 Ind. 460. MASS.—Com. v. McPike, 57 Mass. (3 Cush.) 181, 50 Am. Dec. 727; Com. v. Walker, 108 Mass. 309; Com. v. Dean, 109 Mass. 349. MICH. — People v. Bristol, 23 Mich. 118. N. Y.—People v. Smith, 57 Barb. 46.

27 People v. Rathbun, 44 Misc. (N. Y.) 88, 18 N. Y. Cr. Rep. 454, 89 N. Y. Supp. 746.

1 As to forms in conspiracy to cheat and defraud, see Forms Nos. 656-665.

2 State v. Hewett, 31 Me. 396. In this case the indictment charged the defendants with "devising and intending to injure and defraud, and did unlawfully conspire, combine, confederate and agree together the said A to injure, cheat and defraud of a certain horse, the property of the said A," etc.; which was held in-

money or property is an indictable offense,[3] whether the object or means to be employed in its consummation is punishable as a crime or not.[4]

At common law an indictment or information charging a conspiracy to cheat and defraud need not set out the means to be used in effecting the object,[5] a general charge being sufficient—e. g., by means of divers false and fraudulent devices.[6] This doctrine has been followed by some of the courts in this country,[7] but the better doc-

sufficient because it stated the purpose only, without setting out the means to be used.

3 State v. Gannon, 75 Conn. 206, 52 Atl. 727; State v. Howard, 129 N. C. 684, 40 S. E. 71.

4 State v. Gannon, 75 Conn. 206, 52 Atl. 727.

5 R. v. Gompertz, 9 Ad. & E. (9 Q. B.) 824, 58 Eng. C. L. 824; Sydserff v. R., 11 Ad. & E. (11 Q. B.) 245, 63 Eng. C. L. 245; R. v. Gill, 2 Barn. & Ald. 204; Latham v. R., 2 Best & S. 635.

Compare: R. v. Parker, 3 Ad. & E. N. S. (3 Q. B.) 290, 43 Eng. C. L. 744; R. v. Kenrick, 5 Ad. & E. N. S. (5 Q. B.) 61, 48 Eng. C. L. 60.

6 Charging accused unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud prosecutor out of his goods and chattels, or moneys, held to be sufficient.—R. v. Gompertz, 9 Ad. & E. N. S. (9 Q. B.) 824, 58 Eng. C. L. 823; Sydserff v. R., 11 Ad. & E. N. S. (11 Q. B.) 245, 63 Eng. C. L. 245.

7 See: COLO.—Moore v. People, 31 Colo. 336, 73 Pac. 30; Imboden v. People, 40 Colo. 142, 90 Pac. 608. ILL.—Thomas v. People, 113 Ill. 531; People v. Smith, 239 Ill. 91, 87 N. E. 885, affirming 144 Ill. App. 129; People v. Nall, 242 Ill. 284, 89 N. E. 1012; People v. Poindexter, 243 Ill. 68, 90 N. E. 261; People v. Bush, 150 Ill. App. 48. MD.—State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534; Blum v. State, 94 Md. 375, 56 L. R. A. 322, 51 Atl. 26. MASS.—Com. v. Wallace, 82 Mass. (16 Gray) 221; Com. v. Meserve, 154 Mass. 64, 27 N. E. 997. MICH.—People v. Richards, 1 Mich. 216, 57 Am. Dec. 75; People v. Clark, 10 Mich. 310; People v. Arnold, 46 Mich. 268, 9 N. W. 406; People v. Butler, 111 Mich. 483, 69 N. W. 734; People v. Summers, 115 Mich. 537, 73 N. W. 889. N. J.—State v. Young, 37 N. J. L. (8 Vr.) 184; Wood v. State, 47 N. J. L. 180, 184. N. C.—State v. Brady, 107 N. C. 822, 12 S. E. 325; State v. Howard, 129 N. C. 584, 40 S. E. 71. PA.—Com. v. McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; Com. v. Goldsmith, 12 Phila. 632. R. I.—State v. Bacon, 27 R. I. 252, 61 Atl. 653. WASH.—State v. Messner, 43 Wash. 206, 86 Pac. 636. WIS.—State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719, 2 Am. Cr. Rep. 33. FED.—United States v. Dennee, 3 Woods 47, Fed. Cas. No. 14948. ENG.—R. v. Gill, 2 Barn. & Ald.

trine is thought to be that the indictment or information must set out the false pretenses, tokens, and devices agreed to be used to accomplish the purpose or effect the end,[8] and it must show that the conspiracy was to cheat and defraud in some of the modes made criminal by statute.[9]

204; R. v. Hamilton, 7 Car. & P. 448, 32 Eng. C. L. 579; R. v. Stapylton, 8 Cox C. C. 69, 6 W. R. 60; Latham v. R., 9 Cox C. C. 516.

Conspiracy to cheat and defraud by false pretenses being charged, indictment or information need not specify pretenses used.—People v. Arnold, 46 Mich. 268, 9 N. W. 406.

Conspiracy to defraud being charged, indictment need not set out the means agreed upon to carry the conspiracy into effect.—People v. Butler, 111 Mich. 483, 69 N. W. 734; United States v. Dennee, 3 Woods 47, Fed. Cas. No. 14948.

8 See: KY.—Com. v. Ward, 92 Ky. 158, 17 S. W. 283. ME.—State v. Roberts, 34 Me. 320; State v. Mayberry, 48 Me. 218. MASS.—Com. v. Prius, 75 Mass. (9 Gray) 127; Com. v. Wallace, 82 Mass. (16 Gray) 221. MICH.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321. N. H.—State v. Parker, 43 N. H. 83. N. Y.—Lambert v. People, 9 Cow. 578; People v. Brady, 56 N. Y. 182; People v. Olson, 15 N. Y. Supp. 778. VT.—State v. Keach, 40 Vt. 113.

Where means enters into a conspiracy to defraud, though not themselves within the legal definition of crime, indictment or information must show what they are.—People v. Barkelow, 37 Mich. 455.

9 State v. Ripley, 31 Me. 386; State v. Hewett, 31 Me. 396; State v. Roberts, 34 Me. 320; Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, reversing Thatch. Cr. Cas. 609; Com. v. Eastman, 55 Mass. (1 Cush.) 190, 48 Am. Dec. 596; Com. v. Shedd, 51 Mass. (7 Cush.) 514; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Lambert v. People, 9 Cow. (N. Y.) 578; Hartmann v. Com., 5 Pa. St. 60.

Indictment charging conspiracy to cheat A out of his property by false pretenses by accused, where the acts charged as done were a representation to A that he was about to be prosecuted by B for an assault upon B's infant daughter with intent to rape; that by the testimony of the daughter he would be convicted and sent to state's prison, and that he must leave the state, whereas accused well knew that B had no intention of prosecuting A; the charges not being of existing facts, but simply as to things alleged a third person had threatened to do, the indictment was insufficient, as an indictment for false pretenses can not be predicated upon representations as to what a third person has threatened to do.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

Particular rights, property, goods, money, and so forth, to obtain which, or the injury or destruction of which, was the object of the conspiracy, need not be set forth and particularly described, where a conspiracy to cheat and defraud is alleged.[10]

Ownership of the property to be obtained, it seems, should be alleged.[11]

Object of the conspiracy need not be alleged as specifically and with as much particularity as in those cases where the indictment or information is for the offense of defrauding,[12] but it must be made to appear that the conspiracy was in fact fraudulent.[13]

Person to be cheated. It has been said that an indictment or information charging conspiracy to cheat and defraud will be insufficient where it does not set out the person to be cheated or defrauded;[14] but other cases hold that an allegation to cheat and defraud divers citizens and the public generally is sufficient without naming any particular person or persons.[15]

Using mails to defraud being charged, the exact scheme agreed upon to defraud or obtain money by false repre-

10 COLO. — Imboden v. People, 40 Colo. 142, 90 Pac. 608. IND.— Reinhold v. State, 130 Ind. 467, 30 N. E. 306. MD.—State v. Dent, 3 Gill & J. 8; Lanasa v. State, 109 Md. 602, 71 Atl. 1058. MASS.— Com. v. Ward, 1 Mass. 473. N. H.— State v. Straw, 42 N. H. 393. PA.—Rogers v. Com., 5 Serg. & R. 463; Com. v. Goldsmith, 12 Phila. 622. ENG.—R. v. Blake, 6 Ad. & E. (6 Q. B.) 126, 51 Eng. C. L. 701; Rex v. Hamilton, 7 Car. & P. 448, 32 Eng. C. L. 701.

11 R. v. Parker, 3 Ad. & E. (3 Q. B.) 292, 43 Eng. C. L. 741; R. v. Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

12 Lorenz v. United States, 24 App. Cas. D. C. 337; Geist v. United States, 26 App. Cas. D. C. 594; Com. v. Meserve, 154 Mass. 64, 27 N. E. 997; Latham v. R., 5 Best & S. 635, 117 Eng. C. L. 635, 9 Cox C. C. 516.

13 Tyner v. United States, 23 App. Cas. D. C. 324.

14 Bulfer v. People, 141 Ill. App. 70; State v. Jones, 13 Iowa 269; Wood v. State, 47 N. J. L. 461, 1 Atl. 509; United States v. Green, 199 U. S. 601, 50 L. Ed. 328, 26 Sup. Ct. Rep. 748, affirming 136 Fed. 618; United States v. Milner, 36 Fed. 890; Pereles v. Weil, 157 Fed. 419; United States v. Moore, 173 Fed. 122.

15 People v. Arnold, 46 Mich. 268, 9 N. W. 406; McKee v. State, 111 Ind. 378, 12 N. E. 510.

sentations must be set out, and it must be alleged that a letter or postal card was deposited in the mail in furtherance of and for the purpose of executing such scheme.[16] Such an indictment must charge acts which, if committed, would constitute an offense under the statute; but it need not be alleged that the accused specifically conspired to commit each element of the offense.[17]

§ 529. —— Conspiracy to defraud the government. Under a statute making it criminal to conspire to commit a crime[1] or to cheat and defraud[2] there may be a conspiracy to cheat and defraud the government of city,[3]

16 United States v. Wupperman, 215 Fed. 135.

An indictment for a conspiracy to misuse the mails in a scheme to defraud is sufficient where it alleges the conspiracy to defraud by using the post office and that in carrying out the scheme they did the acts subsequently charged, and where it further sets out that they deposited a letter in the post office, setting out the letter.—Ex parte King, 200 Fed. 622.

Letter should be set out if possible or sufficiently identified or described, but it is not necessary to allege how the letter would or was intended to aid in the scheme. —United States v. Wupperman, 215 Fed. 135.

Under U. S. Rev. Stats., § 5480 (5 Fed. Stats. Ann., 1st ed., p. 973), there must be alleged in the indictment and proved on the trial: (1) That the accused had devised a scheme or artifice to defraud; (2) that they intended to effect this scheme by opening, or intending to open, correspondence with persons through the post office; (3) that in carrying out such scheme such persons must either have deposited a letter or packet in the post office or taken or received one therefrom. And the indictment must allege a combination between the accused to do the things required to constitute the offense denounced by the statute. — Stokes v. United States, 157 U. S. 187, 39 L. Ed. 667, 15 Sup. Ct. Rep. 617.

The above ruling is considered in McConkey v. United States, 96 C. C. A. 501, 171 Fed. 829, and the language construed to mean simply that the acts which the indictment charges the accused to have conspired to commit must, if committed, constitute an offense under Rev. Stats., § 5480; that it does not mean that it must be distinctly and separately charged that the accused conspired to commit each separate element of the offense, such elements being separately stated.

17 McConkey v. United States, 96 C. C. A. 501, 171 Fed. 829.

1 See, supra, § 527.

2 See, supra, § 528.

3 Municipal board combining to purchase city supplies at excessive prices, or to pay salaries to

county[4] or state.[5] Thus, a conspiracy to issue a pay certificate on the state treasury for the purpose of getting money out of the state treasury without an equivalent rendered therefor is a criminal conspiracy which is complete on the corrupt combination, and the indictment or information charging the same need not set forth specifically the date, number, amount, and so forth, of the pay certificate issued in pursuance of such conspiracy.[6]

§ 530. —— CONSPIRACY TO DEFRAUD THE UNITED STATES GOVERNMENT.[1] It being the settled doctrine of our jurisprudence that there are no common law crimes against the government of the United States, an act or omission, to be criminally punishable in the federal courts, must have been declared to be an offense by an act of congress.[2] This fact materially modifies the common law rule as to conspiracies to defraud the government.[3] Such offense, being purely a matter of statute, the offense, as well as the form and sufficiency of the indictment charging the same, is controlled entirely by the federal statute relating to and denouncing the crime,[4] and the require-

persons not rendering any services. — Madden v. State, 57 N. J. L. (28 Vr.) 324, 30 Atl. 541.

Combination of individuals to cause municipality to pay largely in excess of actual value of work of constructing a public works, and divide the excess among themselves, by means of predetermined bids, all in excess of what they should be, held not to charge a criminal conspiracy to cheat and defraud under Indiana statute. — State v. Brunner, 135 Ind. 419, 35 N. E. 22. See, also, Com. v. Ward, 92 Ky. 158, 17 S. W. 283.

4 **As to defrauding county by false bills** for supplies, see Ochs v. People, 124 Ill. 399, 16 N. E. 662; McDonald v. People, 126 Ill. 150, 18 N. E. 817.

5 **As to form in conspiracy to defraud state,** see Form No. 666.

6 State v. Cardoza, 11 S. C. 195.

1 **As to form of indictment in conspiracy to defraud United States,** see Forms Nos. 696, 697.

2 United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636.

3 United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636.

4 **Existing act** necessary; a conspiracy to defraud depending upon a future act of congress to make it effective is not punishable as a criminal conspiracy. — United States v. Crafton, 4 Dill. 145, 17 Am. Law Rep. (N. S.) 127, 23 Int. Rev. Rec. 186, 4 Cut. L. J. 441, Fed. Cas. No. 14881.

ments of that statute must be fully met and complied with in every essential regard. It is sufficient to follow the language of the statute,[5] where that statute contains a definition of the crime and sets out all the essential elements going to constitute such crime; but the offense must be sufficiently set forth in the charging part of the indictment, for it can not be aided[6] by a subsequent averment of an overt act done by any one of the conspirators in pursuance of the alleged conspiracy.[7] The federal statute[8] not containing a definition, and not setting forth the constituent elements of the crime of conspiracy to defraud or injure the United States government, an indictment following the language of that statute, simply, will be wholly insufficient; it must, in addition, set forth fully and clearly all the acts and elements necessary to constitute the crime sought to be charged.[9]

An overt act by one or more of the conspirators, while the conspiracy is still existent,[10] is necessary to the vital-

5 Technical term or phrase used, or word or words of double significance used, the language of the statute will not be sufficient. — United States v. Martin, 4 Cliff. 163, Fed. Cas. No. 15728.

6 As to order of insufficient charge by other averments, see, supra, § 513; also, Joplin Mercantile Co. v. United States, 236 U. S. 531, 59 L. Ed. 705, 35 Sup. Ct. Rep. 291.

7 United States v. Britton, 108 U. S. 199, 27 L. Ed. 608, 2 Sup. Ct. Rep. 531; In re Benson, 58 Fed. 971.

Indictment must be tested by the averments concerning the conspiracy unaided by those in respect to overt acts committed thereunder. — Dwinnell v. United States, 108 C. C. A. 624, 186 Fed. 754.

8 § 37 U. S. Crim. Code (3 Kerr's Whart. Crim. Law, p. 2440), former § 5440 U. S. Rev. Stats., 2 Fed. Stats. Ann., 1st ed., p. 247.

9 United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 528; United States v. Simmonds, 96 U. S. 360, 24 L. Ed. 819; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 Sup. Ct. Rep. 512; United States v. Britton, 108 U. S. 199, 27 L. Ed. 703, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Martin, 4 Cliff. 156, Fed. Cas. No. 15728; United States v. Walsh, 5 Dill. 58, 60, Fed. Cas. No. 16636; In re Wolf, 27 Fed. 613; United States v. Trumbull, 46 Fed. 755; In re Benson, 58 Fed. 971.

10 "The conspiracy alone is not sufficient under this section (§37

izing of the crime,[11] and that fact must be distinctly alleged in the indictment;[12] but it is not necessary to allege that the contemplated fraud was actually committed,[13] or that it should appear on the face of the indictment that the object of the conspiracy would be accomplished by the overt acts alleged.[14] The overt act must be alleged to have been committed within the jurisdiction of the court to which the indictment is presented, but it is not necessary to allege that the conspiracy was formed or entered into in that jurisdiction, because the overt act, as above pointed out,[15] is the essential thing to vitalize the offense, and an overt act having been committed, in pursuance of the conspiracy or confederation,

U. S. Crim. Code), but requires the overt act to give it vitality. The overt act, then, becomes a necessary element of the offense, and a part of it. . . . The unlawful confederation of conspiracy of the parties must continue the performance of an overt act to effect the object of the conspiracy, to be an offense. If either of the parties should withdraw from the conspiracy during the locus pœnitentiæ, or before the overt act, such party would be released from the consequences of such act and the prior agreement." — United States v. Linton, 223 Fed. 677, 679.

11 Hyde v. Shine, 199 U. S. 62, 50 L. Ed. 90, 25 Sup. Ct. Rep. 760; Dimond v. Shine, 199 U. S. 88, 50 L. Ed. 90, 25 Sup. Ct. Rep. 760; Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; Ex parte Black, 147 Fed. 837.

12 Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; Dealy v. United States, 152 U. S. 539, 38 L. Ed. 545, 14 Sup. Ct. Rep. 680; United States v. Nunnemacher, 7 Biss. 111, 120, Fed. Cas. No. 15902; United States v. Goldberg, 7 Biss. 175, Fed. Cas. No. 15223; United States v. Martin, 4 Cliff. 156, Fed. Cas. No. 15728; United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636; United States v. Boyden, 1 Low. 266, Fed. Cas. No. 14632; United States v. Dennee, 3 Woods 47, 50, Fed. Cas. No. 14948; United States v. Sacia, 2 Fed. 754; United States v. Sanche, 7 Fed. 715; United States v. Watson, 17 Fed. 148; United States v. Gordon, 22 Fed. 250; In re Wolf, 27 Fed. 606; United States v. Reichert, 32 Fed. 142.

13 United States v. Newton, 48 Fed. 218; Gantt v. United States, 47 C. C. A. 210, 108 Fed. 61.

14 United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14983; United States v. Graff, 14 Blatchf. 381, 391, Fed. Cas. No. 15244; United States v. Bouden, 1 Low. 266, Fed. Cas. No. 14622; United States v. Sanche, 7 Fed. 719.

15 See, supra, footnote 11 and text going therewith.

within the jurisdiction of the court, vitalizes the crime within that jurisdiction as fully as though the conspiracy had been originally entered into therein.[16]

Instances of sufficient and insufficient indictments, under court rulings, may be of practical utility; but space will not permit of an exhaustive citation or discussion. A charge of conspiracy to defraud the United States by "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of" a named public building in the course of erection in a designated city, "and for labor performed on said building, were true, genuine, and correct," held to be bad for uncertainty.[17] Charging conspiracy to defraud by presenting false, fictitious and fraudulent claims to the United States surveyor-general for allowance and payment, must further allege that the surveyor-general was authorized and empowered to allow and approve such claims;[18] but a charge of conspiracy to defraud by bribing a board of examining surgeons to make a false report, on an application for a pension, to the commissioner of pensions, need not allege that such commissioner had power to grant the pension, because that power is conferred by federal statute, of which statute the court must take judicial notice;[19] and a charge is sufficient which alleges accused conspired to procure a pension for one of them in the name of a dead soldier, and in pursuance thereof knowingly made and presented to the commissioner of pensions a false affidavit in support of such claim to a pension, such false affidavit and the pre-

16 Hyde v. United States, 225 U. S. 347, 367, 5 L. Ed. 1114, 1126, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, p. 614; Brown v. Elliott, 225 U. S. 392, 401, 56 L. Ed. 1136, 1140, 32 Sup. Ct. Rep. 812; United States v. Linton, 22 Fed. 677.

17 United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16636.

18 United States v. Reichert, 32 Fed. 142.

19 United States v. Van Leuven, 62 Fed. 62, distinguishing United States v. Reichert, 32 Fed. 142.

sentment thereof being, by statute,[20] both made a criminal offense.[21] A charge of conspiracy to defraud the United States of duties, to which it was entitled by law, by destroying certain papers for the purpose of suppressing evidence of the fraud, in violation of the provisions of statute,[22] need not set out facts showing the fraud, of the commission of which the destroyed papers would be evidence; nor set forth the contents of such papers so that the court should be enabled to see whether they contained evidence of the alleged fraud.[23] A charge that accused tendered an agreement to pay money to "certain United States officials, to-wit, the officers of court of the United States, acting under the authority of the government of the United States in and for" a designated division of a named state, is insufficient as a description of an overt act to effect the object of the conspiracy to defraud the United States, not being sufficiently definite to identify either the agreement or the tender or to determine whether the tender was made to an official or to some one else.[24] Charging a conspiracy in the formal manner between accused and an officer of the government, whereby accused was to pay to the officer a commission on the purchase price of each and every one of certain articles purchased by the government through the influence of said officer, is sufficient, notwithstanding the fact that the officer's assent is not directly averred.[25] Charging a conspiracy to commit the offense of introducing intoxicating liquors into Indian country need not allege that the intention was to import from without the state of Oklahoma.[26] It is sufficient to charge a con-

20 U. S. Rev. Stats., § 4746, 5 Fed. Stats. Ann., 1st ed., p. 665.

21 United States v. Adler, 49 Fed. 736.

22 U. S. Rev. Stats., § 5443, 2 Fed. Stats. Ann., 1st ed., p. 773.

23 United States v. De Grieff, 16 Blatchf. 20, Fed. Cas. No. 14936.

24 United States v. Milner, 36 Fed. 890.

25 United States v. Green, 136 Fed. 618, affirmed, Green v. McDougall, 199 U. S. 601, 50 L. Ed. 328, 26 Sup. Ct. Rep. 748.

26 Joplin Mercantile Co. v. United States, 131 C. C. A. 160,

spiracy to defraud the United States by procuring a stated number of persons to enter at a land office, under color of the pre-emption laws, certain public lands of the United States, solely for the purpose of selling the same on speculation to the accused and other persons to the grand jury unknown;[27] and it is not necessary to allege that the land was subject to homestead or other entry, because the conspiracy constitutes the offense, and it need not appear that the overt act tended to effect the purpose of the conspiracy, or that it was successful.[28] It has also been held that a charge of conspiracy to defraud by making false entries of tracts of desert land, and to obtain title thereto fraudulently, need not allege that the accused ever caused any fraudulent entries to be made, or took any steps to that end; nor need it be alleged that accused agreed to procure any person to do all the things essential to the making of entries under the Desert Land Law.[29] But charging a conspiracy to defraud the United States by procuring the dismissal of certain suits brought by the United States to recover certain lands "alleged to have been fraudulently and unlawfully obtained," is insufficient to charge a conspiracy to defraud, by reason of the use of the word "alleged," leaving the question of fraud an open one.[30] Charging a confederated effort to deprive the federal government of the right and privilege of proper service in any governmental department, is sufficient.[31] Charging railway officials with conspiracy to defraud the United States by deceiving the postal authorities through sending over the line large quantities of old newspapers, and so forth, in order to increase the

213 Fed. 926, affirmed, 236 U. S. 531, 59 L. Ed. 705, 35 Sup. Ct. Rep. 291.

27 United States v. Gordon, 22 Fed. 250.

28 Gantt v. United States, 47 C. C. A. 210, 108 Fed. 61. See, also, footnote 13, this section.

29 Chaplin v. United States, 193 Fed. 879, certiorari denied, 225 U. S. 705, 56 L. Ed. 1266, 32 Sup. Ct. Rep. 838.

30 United States v. Milner, 36 Fed. 890.

31 United States v. Haas, 163 Fed. 908.

weight of the mail-matter at the time of weighing the mails for the purpose of fixing the compensation for carrying the mails by such line, is a sufficient description of the offense charged, and of a conspiracy to defraud; it is not necessary to allege accomplishment of the conspiracy, or what particular officers of the United States it was the intent to deceive.[32] The subject-matter of a conspiracy to defraud described in the indictment as "the taxes arising from, and imposed by law upon, certain divers proof gallons and quantities of distilled spirits, distilled in the United States, then and there situate in certain bonded warehouses, to-wit," specifically describing the warehouses, held to be sufficient; it not being necessary to set out the precise kinds, quantities, and qualities of the liquors, the general description being sufficient to show that the liquors in question were liable to taxes.[33]

§ 531. —— Conspiracy to injure person or reputation. A corrupt combination of persons to injure another without just cause, is a conspiracy to inflict malicious injury under the statute;[1] and an indictment charging a conspiracy to accuse of, or to have prosecuted for, crime,[2] charges a criminal offense, and will be sufficient where regular in form and meets the requirements of the statute.[3] Thus, charging substantially in the language of the statute a conspiracy "with intent falsely, fraudulently and maliciously" to cause a designated person to be

32 United States v. Newton, 48 Fed. 218. See, also, footnote 13, this section.

Increased weight sufficient to entitle the railroad to increased compensation, need not be averred. —Id.

33 United States v. Boyden, 1 Low. 266, Fed. Cas. No. 14632.

1 State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046.

2 As to forms for conspiracy to falsely charge one with crime, see Forms Nos. 651-655.

3 People v. Dyer, 79 Mich. 480, 44 N. W. 937.

Charging substantially in the language of the statute a conspiracy to procure another to be arrested for the offense of larceny, "well knowing that he was not guilty of said offense" is sufficient.—Elkin v. People, 28 N. Y. 177.

prosecuted for an attempt to kill, "of which said crime the said" person named "was innocent," is sufficient without an allegation that the accused knew, or had reasonable ground to believe, that he was innocent,[4] for the reason that it is not necessary to allege the innocence of the person against whom the conspiracy is directed.[5] Charging an officer making the arrest, the person prosecuting, and other persons concerned in the proceeding, with conspiracy by criminal process to cause the false imprisonment of a named person for an improper purpose, is good;[6] but the indictment must allege and the proof show an actual conspiracy, because of the fact that if each of the accused acted illegally and maliciously in the premises, but without previous concert and combination, it will not be sufficient.[7]

Common slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, and be as pernicious in its dissemination as any of the other crimes mentioned in this section, but though contra bonos mores is not indictable;[8] however, a charge of a conspiracy to slander another by accusing him of an indictable offense, charges a crime, and is good.[9]

4 State v. Locklin, 81 Me. 251, 16 Atl. 895.

5 Johnson v. State, 26 N. J. L. (2 Dutch.) 313.

6 Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786. See O'Donnell v. People, 110 Ill. App. 250 (conspiracy to pervert justice indictable).

Arresting officer not joining in the conspiracy, it is otherwise, and he will be protected, where the writ is regular upon its face and shows jurisdiction of the court or officer issuing, even though the officer had knowledge that the prosecutor's object was illegal.—State v. Weed, 21 N. H. 262, 53 Am. Dec. 188.

7 Newall v. Jenkins, 26 Pa. St. 159.

8 Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

9 State v. Hickling, 41 N. J. L. (12 Vr.) 208, 32 Am. Rep. 198; R. v. Kimberley, 1 Lev. 62; R. v. Best, 2 Ld. Raym. 1167, 92 Eng. Repr. 272, 1 Salk. 174, 91 Eng. Repr. 160.

Charging conspiracy to slander without sufficiently pleading the slander as against either of the accused is insufficient.—Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 930.

Thus, charging a conspiracy to bring a named person into disrepute by spreading the accusation that he is the father of a bastard child[10] or of a child likely to become a bastard,[11] or with keeping a bastard,[12] has been upheld as charging a crime; but a charge of conspiracy in prosecuting another in bastardy proceedings, can not be sustained where the prosecution was on behalf of the woman interested, and the accused honestly believed from her statements that the accusation was true, and were thereby induced to act in the matter.[13]

Seduction of a female being an indictable offense,[14] an indictment which charges a conspiracy to seduce a named female from her virtue and to enable one of the accused to carnally know her, by effecting a pretended marriage with her and thus gaining her own and her parents' consent thereto, in the belief that the marriage was legal, and in furtherance of such conspiracy with procuring and presenting a false and forged marriage license, representing it to be true and genuine, and falsely and fraudulently representing that one of the accused was a justice of the peace and authorized by law to solemnize marriages, who actually performed a pretended marriage ceremony, in consequence of all of which the said female and her parents were deceived, etc., is a good indictment, both in matter and form.[15]

Marriage relation is one of the most sacred rights protected by our laws, and an indictment charging a conspiracy to cause it to falsely appear of record that a cer-

10 R. v. Best, 2 Ld. Raym. 1167, 92 Eng. Repr. 272; 6 Mod. 137. See Lewis v. Lentall, 1 Sid. 68.

11 Johnson v. State, 26 N. J. L. (2 Dutch.) 313; R. v. Best, 2 Ld. Raym. 1167, 92 Eng. Repr. 272, 1 Salk. 174, 91 Eng. Repr. 160.

As to form of indictment, see Form No. 653.

12 R. v. Armstrong, 1 Ventr. 304.

13 Heapes v. Dunham, 95 Ill. 583.

14 Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Anderson v. Com., 5 Rand. 627, 16 Am. Dec. 776; R. v. Delaval, 3 Burr. 1434, 97 Eng. Repr. 913; R. v. Mears, 2 Den. C. C. 79; R. v. Howell, 4 Fost. & F. 160.

15 State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79.

tain man was married to one of the accused, and thus to prevent him from contracting another marriage, is sufficient where it sets out overt acts to carry the conspiracy into effect by one of the accused personating the party to be injured, another performing the alleged ceremony and certifying the same for record, and the woman supposed to be married causing the false certificate to be recorded, and publicly assuming to be the wife of such person.[16]

§ 532. —— Conspiracy to injure property or business. A combination and confederation of persons to ruin the business of another is unlawful,[1] even though it may not be criminal.[2] Thus, a combination in business,

16 Com. v. Waterman, 122 Mass. 43.

1 Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

Combination of persons to injure another's business is not rendered lawful by the fact that the acts contemplated might lawfully be done by an individual.—Loewe v. California State Federation of Labor, 137 Fed. 7.

Combination of employees to compel railroad to stop using cars manufactured by certain corporation, unlawful.—Thomas v. Cincinnati, N. O. & T. P. R. Co., 62 Fed. 803, 4 Inters. Com. Rep. 788.

Combination of persons to induce carrier not to handle freight from another carrier is unlawful. —Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. 730, 5 Inters. Com. Rep. 522, 19 L. R. A. 387.

Combination of persons to procure employees to quit employment or services, unlawful.—Arthur v. Oaks, 11 C. C. A. 209, 24 U. S. App. 293, 63 Fed. 310, 4 Inters. Com. Rep. 744, 25 L. R. A. 414.

Combination of printers to interfere with another printer's business and induce his employees to leave him in order to compel him to do printing at their price is unlawful. — Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 512, 106 Am. St. Rep. 137, 2 Ann. Cas. 604, 69 L. R. A. 93, 50 S. E. 353.

2 **Injunction lies to restrain** conspiracy to injure a person's business, though act is not criminal.—Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997; Longshore Printing Co. v. Howell, 26 Ore. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

Injunction lies to prevent combination of persons from injuring another's business by intimidating employees. — American Steel & Wire Co. v. Wire Drawers & Die

by corporations or individuals, to operate a certain class of business in a particular manner and to draw business from other and competing corporations or individuals, is not an actionable or a criminal conspiracy;[3] however, such a combination not in free competition of trade, nor for the sole benefit of the business, but to induce the withdrawal of custom from another, solely for the purpose of wantonly injuring such other, is entirely a different proposition.[4] Charging that two or more named persons concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, is good.[5] Charging accused did conspire, confederate, and agree together to prevent and deter, by violence and threats and intimidation, certain named persons from continuing in or further engaging in the manufacture of a named article or commodity, is sufficient.[6] Charging an agreement between several independent concerns, each publishing a newspaper and furnishing thereby a means of advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, states a malicious purpose to injure another in his business within the inhibition of the statute.[7] Information charging conspiracy to prevent named persons from fishing in the waters of Puget Sound, because they did not belong to a certain association, is sufficient without alleging that the persons against whom

Makers' Union, 90 Fed. 608; Union Pac. R. Co. v. Reuf, 120 Fed. 102.

3 West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591.

4 Id.

5 State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046.

6 State v. Duncan, 78 Vt. 264, 112 Am. St. Rep. 922, 6 Ann. Cas. 602, 4 L. R. A. (N. S.) 1144, 63 Atl. 225.

7 State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046; Aikens v. Wisconsin, 195 U. S. 194, 49 L. Ed. 154, 25 Sup. Ct. Rep. 3, affirming 113 Wis. 419, 89 N. W. 1135. See Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 550, 55 L. R. A. 831, 87 N. W. 472.

the conspiracy was directed had a lawful right to engage in the fishing business.[8]

Corporations are within the protection of the rule of law treated in this section, and an indictment charging a conspiracy to injure business and property through causing a decline in the market-value of named stocks by spreading divers false and injurious rumors, "well knowing the premises, and that the said false and injurious rumors would occasion a decline of the stock," sufficiently states a criminal conspiracy and offense under a statute[9] denouncing and prohibiting the circulation of such false and injurious rumors and statements;[10] charging conspiracy to falsely represent to the members and shareholders of a corporation named that it was insolvent, for the purpose of securing a sufficient number of members to petition for a receiver, with the fraudulent intent to injure the business and property of the corporation, sufficiently charges a criminal conspiracy to injure business and property.[11] A charge of conspiracy to obstruct the business of a corporation, and so forth, under statute,[12] need not allege specific overt acts done in pursuance of the conspiracy;[13] and an allegation of conspiracy to prevent a corporation from taking into its employment certain designated persons or class of persons, need not set out the terms of the intended employment.[14]

Employees and workmen, it has been said, may lawfully associate themselves together, combine and agree not to work for or deal with certain men or classes of men, or work under certain wages, or without specified condi-

8 State v. Mardesich, 79 Wash. 204, 140 Pac. 573.

9 As N. Y. Pen. Code, § 435.

10 People v. Goslin, 67 App. Div. (N. Y.) 16, 16 N. Y. Cr. Rep. 255, 73 N. Y. Supp. 520, affirmed, 171 N. Y. 627, 63 N. E. 1120.

11 Towne v. People, 89 Ill. App. 258.

12 As Mich. Stats. 1887, § 9275.

13 People v. Petheram, 64 Mich. 252, 31 N. W. 188.

14 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

tions,[15] because a combination of men to advance their own good is not unlawful unless they use improper means, even if their union prevents other men from taking their places;[16] consequently, members of a labor union may lawfully agree not to work for an employer who employs nonunion men, or uses materials supplied by a person employing nonunion men;[17] or seamen may combine and agree not to ship at less than a specified rate of wages;[18] but a conspiracy by workmen to injure a man's business by strikes, boycotts, and so forth, is criminal,[19] because any combination of persons to injure another without any just or legal cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combination, is a conspiracy to inflict a malicious injury upon another at common law, and is such an injury under statute where it relates to such other's reputation, business, trade or profession.[20]

Indictment or information alleging a conspiracy to prevent an employer from carrying on his business, charges a crime both at common law and under the statute;[21] so also does an indictment charging a combination of two or more persons to constrain an employer to discharge particular workmen, by threatening to prevent his ob-

15 Carew v. Rutherford, 106 Mass. 1, 14, 8 Am. Rep. 287.

16 Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 171.

17 J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 608, 16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 564, 98 Pac. 1027.

18 Brown v. Matherson, 96 Mass. (14 Allen) 503.

19 See, infra, § 537.

20 State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046.

21 State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

An indictment charging that defendants "did then and there unlawfully combine, conspire, confederate, and agree together to prevent, hinder, and deter by violence and threats and intimidation the said (the company against whom conspiracy was entered) from further engaging and continuing in the business of manufacturing granite, to the great damage of said" company, is good.—State v. Duncan, 78 Vt. 364, 6 Ann. Cas. 602, 112 Am. St. Rep. 922, 4 L. R. A. (N. S.) 1144, 63 Atl. 225.

taining others;[22] or charging a combination to prevent, by violence and intimidation, an employer from retaining in his employment certain persons, or other employees from entering his service.[23] The indictment need not set out the means by which the conspiracy was to be accomplished,[24] or allege knowledge on the part of the accused of the wrongful character of the matters and things charged against them.[25] An indictment was held good and sufficient which charged that the accused, with divers others unknown, on the day and at the place named, being workmen and journeymen in the art and occupation of bootmakers, unlawfully, perniciously, and deceitfully designing and intending to continue, keep up, form, and unite themselves into an unlawful club, society, and combination, and make unlawful by-laws, rules, and orders among themselves, and thereby govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate, and agree together that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery, and occupation, who should employ any workman or journeyman, or other person in the said art, who was not a member of said club, society, or combination, after notice given him to discharge such workman from the employment of such master; to the great damage and oppression, etc.[26]

22 See Purvis v. Local No. 500, U. B. C. & J., 214 Pa. St. 438, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, 12 L. R. A. (N. S.) 642, 63 Atl. 585.

23 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

Compare: State v. Van Pelt, 136 N. C. 633, 1 Ann. Cas. 495, 68 L. R. A. 700, 49 S. E. 177.

24 State v. Noyes, 25 Vt. 415, 422; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

25 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

26 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, overruling Thatch. Cr. Cas. 609. We are inclined to agree with Mr.

§ 533. —— CONSPIRACY TO BLACKMAIL AND TO EXTORT MONEY. An indictment or information charging a conspiracy to blackmail and to extort money, charges an offense at common law, and need not set out the unlawful means to be used in carrying the conspiracy into effect;[1] but an allegation as to the means employed will not render bad an indictment or information otherwise sufficient.[2] The allegation should be that two or more accused conspired to extort money from a named person[3] by false charges;[4] it is unnecessary to aver that the intended victim was innocent or in terms that he was falsely charged.[5] Thus, an indictment charging a conspiracy between a man and a woman to extort money from a named person by "charging and accusing" that he had committed adultery with the woman, "with the intent thereby then and there unjustly and unlawfully to obtain and acquire to them divers sums of money from" the named individual "for compounding the said pretended adultery so falsely and maliciously charged on him as aforesaid,"

Chief Justice Shaw in the view that the preamble and introduction to this indictment, being mere recitals, are not traversable, and therefore could not be looked to in aid of an imperfect averment of the facts constituting the description of the offense sought to be charged; but that, stripped of the introductory recitals and unnecessary qualifying epithets attached to the facts, the averment is good. The manifest intention of the association as set out was an unlawful purpose.

1 Johnson v. State, 26 N. J. L. (2 Dutch.) 323; R. v. Hollinberry, 4 Barn. & C. 329, 10 Eng. C. L. 323.

2 See State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890.

3 No person named from whom money, etc., to be extorted, the indictment or information can not be sustained.—Com. v. Andrews, 132 Mass. 263.

Criminality of charge not necessary, because the offense consists in the corrupt combination to injure the designated person by false charges.—R. v. Respal, 1 Wm. Bl. 368, 96 Eng. Rev. Repr. 206, 3 Burr. 1320, 97 Eng. Repr. 852.

4 Com. v. O'Brien, 66 Mass. (12 Cush.) 84; Com. v. Andrews, 132 Mass. 264.

5 Johnson v. State, 26 N. J. L. (2 Dutch.) 323; R. v. Spragg, 2 Burr. 993, 97 Eng. Repr. 669; R. v. Best, 1 Salk. 174, 91 Eng. Repr. 160, 2 Ld. Raym. 1167, 92 Eng. Repr. 272.

was held to sufficiently charge the offense of conspiracy to extort money.[6]

Surplusage[7] in an indictment charging a conspiracy to extort money will be disregarded. Thus where the allegation charged accused conspired "by false pretenses and subtle means and devices, to extort from" a named person designated moneys, and the proof failed to show that accused employed any false pretenses in the attempt to obtain the money, the court held that the allegation as to the use of false pretenses should be rejected as surplusage.[8]

Conspiracy to extort money under cover of office being charged in an indictment, by taking from certain named persons and others unknown, "as and for fees and rewards, emoluments, and pay for obtaining and procuring the electing of them," naming the persons, "to the position of school teachers" in a designated public school or schools, is sufficient without an allegation that the payment and payments was and were not made voluntarily, or stating that the money was exacted and taken as and for a fee for official services.[9]

§ 534. —— Conspiracy to interfere with civil rights. An indictment charging a conspiracy to "injure, oppress, threaten, or intimidate" a named person in the free exercise of any right or privilege secured by the constitution or laws of the United States, must allege that the person or persons conspired against were citizens of the United States;[1] and the indictment must show on its face such acts that, if proved as alleged, will support a conviction for the offense charged.[2]

6 Com. v. Andrews, 132 Mass. 263.

7 As to surplusage generally, see, suprn, § 200.

8 R. v. Yates, 6 Cox C. C. 441.

9 Com. v. Brown, 23 Pa. Sup. Ct. 470.

1 United States v. Patrick, 53 Fed. 356.

2 United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Elective franchise.[3] An indictment under federal statute, sec. 5520,[4] charging a conspiracy to prevent a named voter from giving his advocacy and support in favor of a named candidate, need not set out the acts of advocacy and support which were to be prevented by the conspiracy;[5] and it is not necessary either to allege or prove that the conspiracy was against the named voter alone, it being sufficient if he was among the voters actually conspired against;[6] and an indictment under section 5508 of the same statute,[7] charging that accused conspired to injure, and so forth, certain designated male citizens over the age of twenty-one years "in the free exercise and enjoyment of a right and privilege secured to them," is insufficient by reason of its failure to designate the particular right and privilege in which they were to be injured;[8] but a charge, under this statute, of a conspiracy "to injure, oppress, threaten and intimidate" designated "colored men in the exercise of their right to vote, to which right they were entitled by law, on account of race and color," was held to be sufficient without charging in terms the right injured was the right to vote.[9]

Rights on public domain.[10] An indictment under federal statutes, sec. 5508,[11] charging conspiracy to prevent a named citizen from enjoying his right to prospect for minerals and perfect his title to a mining claim upon the public lands, under the laws of the United States,

3 As to forms of indictment for conspiracy to prevent enjoyment of elective franchise, see Forms Nos. 701, 702.

4 U. S. Rev. Stats., § 5520, 2 Fed. Stats. Ann., 1st ed., p. 871.

5 United States v. Goldman, 3 Woods 187, Fed. Cas. No. 15225.

6 United States v. Butler, 1 Hughes 457, Fed. Cas. No. 14700.

7 U. S. Rev. Stats., § 5508, 1 Fed. Stats. Ann., 1st ed., p. 802, now U. S. Crim. Code, § 19, 3 Kerr's Whart. Crim. Law, p. 2429.

8 McKenna v. United States, 62 C. C. A. 88, 127 Fed. 88. See United States v. Cruikshank, 92 U. S. 542, 28 L. Ed. 588.

9 United States v. Lackey, 99 Fed. 952.

10 As to form of indictment for conspiracy to prevent homestead entry, see Form No. 700.

11 See footnote 6, this section.

must set out the acts constituting the conspiracy;[12] but an indictment charging a conspiracy to prevent a named person from exercising his right to secure a homestead upon the public domain, by accused who went disguised upon the land upon which he had made a homestead entry, and with force and arms drove him from the same, was held to sufficiently charge the offense under this statute.[13]

§ 535. —— Conspiracy in restraint of trade or commerce.[1] Agreements or combinations in restraint of trade, or contrary to public policy, though invalid, are not necessarily illegal in the sense of giving a right to an injunction or a right to an action for damages by a third party for injury,[2] or laying the parties liable to a criminal prosecution for conspiracy. The test of legality, under the federal anti-trust law of 1890,[3] is whether it is the necessary effect of such agreement and combination to stifle, or directly and substantially restrict, free competition in commerce among the states;[4] undue restraints

12 Haynes v. United States, 42 C. C. A. 43, 101 Fed. 817.

13 United States v. Waddell, 112 U. S. 76, 28 L. Ed. 673, 5 Sup. Ct. Rep. 35.

1 As to forms for indictments, see Forms Nos. 686-689.

2 National Fireproofing Co. v. Mason Builders' Assn., 94 C. C. A. 535, 169 Fed. 263, 26 L. R. A. (N. S.) 154.

3 Act July 2, 1890, ch. 647, 26 Stats. at L. 209, 7 Fed. Stats. Ann., 1st ed., p. 340.

This act condemns combinations in restraint of interstate or foreign trade or commerce, or the monopolization, or any attempt to monopolize, any part of such interstate or foreign trade or commerce; but the court's judicial interpretation goes far to nullify the wholesome provisions of the act by declaring and giving a meaning which does not destroy the individual's right to contract to the injury and restraint of free competition in interstate and foreign trade and commerce. See United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632, and Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502, 34 L. R. A. (N. S.) 834.

4 Whitwell v. Continental Tobacco Co., 60 C. C. A. 290, 125 Fed. 458, 64 L. R. A. 694. See Yazoo & M. Valley R. Co. v. Searles, 85 Miss. 539, 68 L. R. A. 715, 37 So. 939; Cumberland T. & T. Co. v.

upon competition or upon interstate commerce, only, under the interpretation of the federal supreme court, are inhibited by this statute.[5] Thus it has been held that a rule of a board of trade requiring the members thereof to charge a uniform commission for services in making sales does not violate the statute denouncing and punishing trusts and monopolies.[6]

In indictment or information charging a criminal conspiracy in the entering into an agreement in restraint of trade, and in pooling and fixing the price of an article of trade or commerce, it is necessary to aver the names of all the parties to such a conspiracy known to the prosecution;[7] but it is not essential to the sufficiency of such indictment or information that all of such parties be jointly charged with the commission of the offense.[8] An indictment or information framed under the federal statute above named should contain a distinct averment, in the words of the statute or in equivalent language, that

State, 100 Miss. 112, 39 L. R. A. (N. S.) 281, 54 So. 670.

Reasonable restraint of trade permissible where such only as affords fair protection to interest of party in favor of whom given, and not so large as to interfere with public interest.—Cumberland T. & T. Co. v. State, 100 Miss. 112, 39 L. R. A. (N. S.) 281, 54 So. 670.

5 Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502, 34 L. R. A. (N. S.) 834; United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632.

These cases severely criticized because the Supreme Court, by judicial construction, wrote into the statute words congress had on two different occasions refused to insert therein. The dissenting opinion of Mr. Justice Harlan is a monument of legal learning, and fully lays down the rules as to judicial prerogative and power in interpreting and applying statutes, and shows plainly the majority opinion overstepped this judicial power and usurped the prerogative of another department of the government—that of the legislative department.

6 State v. Duluth Board of Trade, 107 Minn. 539, 23 L. R. A. (N. S.) 1277, 121 N. W. 395.

7 State v. Dreany, 65 Kan. 292, 12 Am. Cr. Rep. 626, 69 Pac. 182.

8 State v. Dreany, 65 Kan. 292, 12 Am. Cr. Rep. 626, 69 Pac. 182. See People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 725, 7 Pac. 828; Heine v. Com., 91 Pa. St. 145; United States v. Miller, 3 Hughes 553, Fed. Cas. No. 15774.

See, also, supra, § 519.

by means of the act or acts charged the accused had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states and with foreign nations, where such is the fact.[9]

"Elkins Act"[10] *charged to have been violated,* the indictment will be good where it is so framed as to show a conspiracy among the accused, or the accused and other persons or corporations named though not made parties to the prosecution, to defeat the provisions of the interstate commerce law;[11] and where the charge is of a conspiracy to induce a named party or firm or corporation to receive rebates in violation of the act, it will be sufficient without setting out the name of the party who it was proposed should give the rebate, where the giver or givers are described as the railroads and their connecting lines engaged in interstate commerce between the point or points of shipment and the point of destination at which the rebate or rebates was or were to be paid.[12]

§ 536. —— Conspiracy to impede due administration of laws or to obstruct justice.[1] An indictment or information charging a conspiracy to impede the due administration of the laws, or to obstruct or defeat justice, need not allege the consummation of the corrupt agreement,[2] because the conspiracy is the gist of the offense;[3] neither

9 United States v. Greenhut, 50 Fed. 469.

10 Act Feb. 19, 1903, ch. 708, 32 Stats. at L. 847, 10 Fed. Stats. Ann. 1st ed., p. 170.

11 Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, 17 L. R. A. (N. S.) 720. See Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387, 5 Inters. Com. Rep. 522; Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403, 5 Inters. Com. Rep. 564; United States v. Howell, 56 Fed. 21, 4 Inters. Com. Rep. 818; United States v. Cassidy, 67 Fed. 698; Wabash R. Co. v. Hannahan, 121 Fed. 563.

12 Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, 17 L. R. A. (N. S.) 720.

1 **As to forms of indictment or information on a charge of a conspiracy to impede due administration of the laws or to obstruct or defeat justice, see Forms Nos. 690-694.**

2 **As to accomplishment of object,** see, supra, § 525.

3 State v. Noyes, 25 Vt. 415; United States v. Hirsch, 100 U. S. 33, 25 L. Ed. 539 (although to

is it necessary to allege the means[4] by which the conspiracy was to be carried into effect,[5] or any overt act or acts[6] in pursuance of the conspiracy—in the absence of such a requirement in the statute under which the indictment or information is drawn;[7] but in those cases in which guilty knowledge and intent[8] form an ingredient of the offense, the scienter must be alleged.[9] Thus, where the charge is a conspiracy to interfere with an officer in the due discharge of his official duty—e. g., resisting an officer—the indictment must allege that the accused knew that the person was a public officer and the nature of the duties he was called upon to discharge.[10]

complete the conspiracy some act to effect the object is necessary); Pettibone v. United States, 148 U. S. 197, 202, 37 L. Ed. 419, 422, 13 Sup. Ct. Rep. 542.

4 **As to allegation of means by which conspiracy to be effected,** see, supra, § 516.

5 State v. Bartlett, 30 Me. 132; State v. Ripley, 31 Me. 386; State v. Noyes, 25 Vt. 415, 422.

6 State v. Ripley, 31 Me. 389.

See, also, supra, §§ 523, 524.

Suppressing testimony — Sufficiency of indictment charging conspiracy to induce witness to suppress his testimony alleging that accused "did unlawfully, wilfully, and corruptly, hire, persuade," and so forth, "the said witness to withdraw himself" from the jurisdiction, state and county, and withhold his testimony from the grand jury, was upheld, the court saying that the overt acts required by the statute to be alleged in the indictment were clearly and distinctly alleged.—People v. Chase, 16 Barb. (N. Y.) 498.

7 People v. Chase, 16 Barb. (N. Y.) 498; Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; Mussel Slough Case, 6 Sawy. 612, 5 Fed. 680.

8 **As to knowledge and intent,** see, supra, § 517.

9 Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542.

10 See State v. Perry, 109 Iowa 353, 80 N. W. 401; Com. v. Kirby, 56 Mass. (2 Cush.) 577; State v. Hilton, 26 Mo. 199; State v. Phipps, 34 Mo. App. 400; State v. Beason, 40 N. H. 367; Yates v. People, 32 N. Y. 509; State v. Smith, 11 Ore. 205, 8 Pac. 343; State v. Maloney, 12 R. I. 251; State v. Hailey, 2 Strobh. L. (S. C.) 73; Duncan v. State, 26 Tenn. (7 Humph.) 148; Horan v. State, 7 Tex. App. 183; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373; State v. Carpenter, 54 Vt. 551; Com. v. Isreal, 4 Leigh (Va.) 675; Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Bittinger, 21 Int. Rev. Rec. 342, 15 Am. L. Reg. (N. S.) 49, Fed.

Instances—impeding administration of the laws: Charging a conspiracy to defraud the devisees of a named person by destroying the last will and testament of such person, is sufficient to charge acts the tendency of which is to corrupt or impede the course of justice.[11] Charging accused with entering into an agreement by the terms of which A was to secure a public office for B on the terms and conditions that B should make no appointment of subordinates in such office without A's approval, and should dismiss such subordinates as A should direct, and that B should place his resignation from such office in A's hands whenever the latter should so demand, is a sufficient charge of a conspiracy to impede the due administration of the law.[12] Charging a conspiracy to violate the election laws by procuring the concealment of the list of voters from the public until after an election, is sufficient without charging a conspiracy to fraudulently procure designated results at such election, as the election or defeat of specified candidates, of which such concealment was a part;[13] evidence of the latter fact being admissible on the trial without such an allegation.[14]

—— *Obstructing or defeating justice.* Charging a conspiracy to obtain a certain counterfeit bill from the hands of one to whom it had been uttered, to the end that it might be secreted or destroyed and not be available as evidence upon a criminal prosecution in relation to making, having or passing such counterfeit bill, is sufficient to charge a conspiracy to obstruct the administration of public justice.[15] Charging accused with having conspired

Cas. No. 14598; United States v. Kee, 39 Fed. 603; R. v. Osmer, 5 East 304.

11 State v. DeWitt, 2 Hill L. (S. C.) 282, 27 Am. Dec. 371; O'Hanlon v. Myers, 10 Rich. L. (S. C.) 128.

12 People v. Squire, 20 Abb. N. C. 368, 6 N. Y. Cr. Rep. 262.

As to conspiracy to secure appointment to public office, see Form No. 694.

13 People v. McKane, 143 N. Y. 455, 9 N. Y. Cr. Rep. 377, 38 N. E. 950.

14 Id.

15 State v. Bartlett, 30 Me. 132.

As to indictment for suppression of evidence, see Form No. 691.

to induce named persons to secrete themselves or to leave the state so that they could not be secured as witnesses at the trial of a named person or persons then under indictment and soon to be tried in the criminal court, sufficiently charges a criminal conspiracy to obstruct the administration of justice.[16] Charging a conspiracy to destroy a criminal warrant and a recognizance thereunder for the appearance of a defendant in a criminal proceeding, the indictment referring to the warrant and recognizance by way of recital, only, without stating by whom the warrant was issued, or before whom the recognizance was taken, and without setting forth the substance of the warrant and recognizance, is insufficient.[17] Charging that, before a trial was had before a jury in a justice's court, accused unlawfully conspired and agreed with others named or declared to be unknown, for a promised consideration, to enable others to be selected and sworn as jurors to try the cause, and to procure to be rendered a verdict for the defendant in said action, setting out the means by which the conspiracy was consummated, held sufficient;[18] such an indictment or information need not allege that the justice of the peace had jurisdiction to try the cause.[19]

§ 537. —— CONSPIRACY TO BOYCOTT, CONTROL WAGES OR WORKMEN, STRIKE, AND THE LIKE. The criminal character of a boycott has been discussed and the authorities cited elsewhere;[1] suffice it to say in this place that a conspiracy by means of a boycott[2] to intimidate and force another to

16 Tedford v. People, 219 Ill. 23, 76 N. E. 60; People v. Chase, 16 Barb. (N. Y.) 495.

17 State v. Enloe, 20 N. C. (4 Dev. & B.) 373.

18 O'Donnell v. People, 110 Ill. App. 250, affirmed in Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

19 Id.

1 See 2 Kerr's Whart. Crim. Law, p. 1787.

2 Boycott is a combination of persons to cause loss to another unless he complies with their demands.—Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663.

Boycott by member of a trades union is unlawful, and may be restrained by court of equity.—American Federation of Labor v.

do an act he has a legal right to abstain from doing, or to abstain from doing an act he has a legal right to do,[3] is an indictable offense.[4] An indictment or information charging such a conspiracy is governed by the ordinary rules governing indictments and informations, already fully discussed in this title, and need not specifically set out the kind of threats made or the method of intimidation employed;[5] but it must be alleged in the indictment or information, and proved on the trial, that the actual object of the association was criminal, whether that was the avowed object or not.[6]

Combination to control wages, by workmen, was a criminal conspiracy indictable at common law;[7] but it is now the well established law in this country that trades unions and labor organizations may combine to maintain wages, or to limit the number of apprentices, without becoming liable to a charge of criminal conspiracy;[8] that is to say agreements and combinations among workmen, for the

Buck's Stove & Range Co., 33 App. D. C. 83, 33 L. R. A. 748; Longshore Printing Co. v. Howell, 26 Ore. 527, 46 Am. St. Rep. 640, 38 Pac. 547; Hopkins v. Oxley Stave Co., 28 C. C. A. 40, U. S. App. 709, 83 Fed. 912.

3 State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; State v. Donaldson, 32 N. J. L. (3 Vr.) 151, 90 Am. Dec. 649; People v. Wilzig, 4 N. Y. Cr. Rep. 403; People v. Trequier, 1 Wheel. Cr. Cas. (N. Y.) 142; Com. v. Sheriff, 15 Phila. (Pa.) 393; Old Dominion Steamship Co. v. McKenna, 30 Fed. 89, 18 Abb. N. C. 262; Wright on Crim. Consp., p. 145.

4 Funk v. Farmers Elevator Co., 142 Iowa 621, 24 L. R. A. (N. S.) 108, 121 N. W. 53; Branson v. Industrial Workers, 30 Nev. 270, 95 Pac. 354.

Conspiracy to boycott by threatening customers, whereby a person's business is greatly injured, is an indictable offense.—Crump v. Com., 84 Va. 940, 10 Am. St. Rep. 896, 6 S. E. 620.

5 State v. Stewart, 59 Vt. 273, 291, 59 Am. Rep. 710, 719, 9 Atl. 559; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 895, sub nom. Crump's Case, 6 S. E. 620.

6 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, reversing Thatch. Cr. Cas. 609.

7 People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

See, also, discussion and authorities cited in 2 Kerr's Whart. Crim. Law, § 1633.

8 Longshore Printing Co. v. Howell, 26 Ore. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

purpose of controlling the wages they shall receive, are not unlawful in the sense that they are criminal combinations, unless they are for the purpose of acts or omissions, either as ends to be attained or as means to be used, which would be unlawful apart from the agreement or combination;[9] and particularly is this true so long as the workmen are free from engagement, and have an option to enter an employment or not as they see fit,[10] although the case may be different when they are already under an engagement and the contract wage is sought to be forced up by them. The purpose of the association must be promoted and accomplished in an orderly and peaceful manner within their rights as citizens, and without trampling upon or infringing upon the rights of any other citizen or class of citizens; whenever they overstep these boundaries their acts become unlawful, and an agreement or combination to maintain or advance wages, to be accomplished by unlawful means, becomes a criminal conspiracy amenable to the criminal courts.

Combination to control workmen may or may not be unlawful and render the members of the organization liable to indictment and prosecution for a criminal con-

[9] Cole v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686, 28 Atl. 190.

[10] See Com. v. Hunt, 45 Mass. (4 Metc.) 111, 130, 38 Am. Dec. 346, reversing Thatch. Cr. Cas. 609; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; State v. Donaldson, 32 N. J. L. (3 Vr.) 151, 90 Am. Dec. 649; Master Stevedores' Assn. v. Walsh, 2 Daly (N. Y.) 1; R. v. Rowlands, 17 Ad. & E. N. S. (17 Q. B.) 671, 79 Eng. C. L. 670, 5 Cox C. C. 436, 460; R. v. Duffield, 5 Cox C. C. 404, 431; R. v. Hibbert, 13 Cox C. C. 82.

"The law is clear that workmen have a right to combine for their own protection and to obtain such wages as they choose to agree to demand." — R. v. Rowlands, 17 Ad. & E. N. S. (17 Q. B.) 671, 79 Eng. C. L. 670, 5 Cox C. C. 436, 460.

"With respect to the law, relating to combination of workmen, nothing can be more clearly established in point of law than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering an employment or not, have a right to agree among themselves not to go into employment unless they get a certain rate of wages."—R. v. Duffield, 5 Cox C. C. 404, 431.

spiracy.[11] The objects of labor organizations and trades unions can not be promoted by making war upon non-union laboring men, or by illegal interference with the rights and privileges of such non-union men;[12] they must depend for their membership upon the free choice of each member, and his perfect freedom of action, and not resort to any violence, threats, intimidation, or other compulsory methods in matters concerning membership or the enforcement and observance of their rules and regulations.[13] Thus, a combination of workmen to compel an employer to discharge another workman or workmen because they are non-union men, or for any other reason, and to employ such workmen, only, as the combination shall direct or approve, renders them liable to prosecution on the charge of a criminal conspiracy;[14] and a combination of two or more to hinder and prevent the employment of certain persons by intimidation, threats, or violence, is an indictable criminal conspiracy.[15]

—— *Indictment or information* charging conspiracy to cause employment of members of a certain organization

11 **Cessation of work by two or more employees,** under agreement, upon employer's refusal to discharge another employee, whereby the work was stopped, held not to be a conspiracy.—Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367.

Labor union forbidding members to work with members of a rival organization, and to procure discharge of such other employees by threat to strike, held not to be a criminal conspiracy.—National Protective Assn. v. Cumming, 170 N. Y. 315, 88 **Am. St. Rep.** 648, 58 **L. R. A.** 135, 63 N. E. 369.

12 Lucks v. Clothing Cutters & T. Assn., 77 Md. 396, 39 **Am. St. Rep.** 421, 19 **L. R. A.** 408, 26 Atl. 505; Erdman v. Mitchell, 207 Pa. St. 79, 99 **Am. St. Rep.** 783, 63 **L. R. A.** 534, 56 Atl. 327.

13 Longshore Printing Co. v. Howell, 26 Ore. 527, 46 **Am. St. Rep.** 640, 28 **L. R. A.** 464, 38 Pac. 547.

14 State v. Glidden, 55 Conn. 45, 3 **Am. St. Rep.** 23, 8 Atl. 890.

Conspiracy to obtain from employer money which he is under no obligation to pay, by inducing his workmen to leave him, and deterring others from entering his employment, or by threatening to do so, is unlawful.—Carew v. Rutherford, 106 Mass. 1, 8 **Am. Rep.** 287.

15 State v. Stewart, 59 Vt. 273, 59 **Am. Rep.** 710, 9 Atl. 559.

only, must set forth the means intended to be used;[16] but an indictment or information under a statute punishing a conspiracy to obstruct individuals in the regular operation of their business, by interfering with employees and the like, need not set out the means to be used to accomplish the object or end of the conspiracy.[17] An indictment charging a conspiracy to prevent an employer from retaining or employing certain persons, or to deter employees from entering his services, need not allege the means to be employed;[18] and where the charge is a conspiracy to force workmen to quit employment by the use of threats and intimidation, the indictment need not allege the nature of the threats and intimidation.[19] The reason in both the foregoing cases is the fact that such acts in themselves constitute a common-law conspiracy.[20]

Conspiracy to keep operative out of employment, or to drive him out of present employment, it has elsewhere been pointed out,[21] is criminal.[22] An indictment or information charging conspiracy to drive a named mechanic or other employee out of present employment, and to prevent his securing future employment, because of his failure or refusal to join a labor-union organization, may charge the object or purpose of the conspiracy in the alternative to be to prevent such mechanic or other employee "from obtaining work or employment or continuing in such work or employment" with a designated

16 Com. v. Hunt, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, reversing Thatcher Cr. Cas. 609.

17 People v. Petheram, 64 Mich. 252, 31 N. W. 188.

18 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

19 R. v. Rowlands, 17 Ad. & El. N. S. (17 Q. B.) 671, 79 Eng. C. L. 670, 5 Cox C. C. 466.

20 State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; R. v. Rowlands, 17 Ad. & El. N. S. (17 Q. B.) 671, 79 Eng. C. L. 670, 5 Cox C. C. 466.

21 See 2 Kerr's Whart. Crim. Law, § 1635.

22 Conspiracy by members of trades union to injure non-unionist workman by depriving him of employment, held an indictable misdemeanor.—E. v. Gibson, 16 Ont. Rep. 704.

person or corporation, "or in any other shops or works";[23] and it is not necessary to set out the contemplated means to be used.[24]

Conspiracy to strike and injure an employer in his property and business by leaving his employment in a body, to compel such employer to do or refrain from doing an act which he has the legal right to do or to refrain from doing, it has been pointed out elsewhere,[25] is an indictable offense. This was the common-law doctrine, and is still the law in many jurisdictions of the Union; but it may be said now to be the general rule of law in this country that strikes among workmen are not necessarily either unlawful or criminal,[26] though they may become both illegal and criminal by reason of the means employed to enforce or attain their object.[27] But a conspiracy of the members of a labor union to compel the members of another union to join the former in a strike and boycott is unlawful,[28] and a combination and conspiracy to cause a strike to be declared for the purpose of destroying the business or property[29] of another without

23 State v. Dyer, 67 Vt. 690, 10 Am. Cr. Rep. 227, 32 Atl. 814.

24 State v. Van Pelt, 136 N. C. 633, 1 Ann. Cas. 495, 68 L. R. A. 760, 49 S. E. 177; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 895, sub nom. Crump's Case, 6 S. E. 620; Reg. v. Selsby, 5 Cox C. C. 495; Rex v. Eccles, 1 Leach C. C. 277.

25 See 2 Kerr's Whart. Crim. Law, § 1633.

26 Strike to procure economic advantage or other rights to the strikers, under orders, to be carried out, and actually carried out, in a peaceable manner, is not unlawful.—See Karges Furniture Co. v. Amalgamated Woodworkers' Union, 165 Ind. 429, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 795, 75 N. E. 877; Pickett v. Walsh, 192 Mass. 580, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1077, 78 N. E. 753; Morris Run Coal Co. v. Guy, 50 Pa. Co. Ct. 648, 14 Pa. Dist. Rep. 604; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 179.

27 Longshore Printing Co. v. Howell, 26 Ore. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

28 Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 51 L. R. A. 339, 57 N. E. 1011.

29 As to conspiracy to injure the property or business of another, see, supra, § 532.

just cause is both unlawful and criminal;[30] and it is an indictable offense for employees to combine and notify their employer that they will leave his services in a body unless certain other employees are discharged.[31]

—— *Indictment or information* charging a conspiracy to strike must allege facts and acts showing the object and purpose of the combination were unlawful and criminal, or that the object was to be or was attained by means unlawful and criminal.[32]

I. W. W. organizations are criminal conspiracies ab initio, because of the objects and purposes of the organization; they can and should be suppressed under existing laws in every state in the Union. The object and purpose of the organization are not for the betterment and uplift of laboring men or the improvement of labor conditions, but for the purpose of sowing the seeds of dissension and discord throughout the land, for attacking the established order of things, insulting the flag of the country, and denouncing the government and the laws of the land. The members of the organization claim allegiance to no country, adherence to no established form of government, respect neither the laws nor the rights of others, abuse the constitutional guaranty of the freedom of speech for the purpose of vilification of and vituperation against governments and laws. "Freedom of speech" carries with it a corresponding obligation in the exercise of the right to keep within the law of the land; it does not mean a license to attack, and an attempt to overthrow, laws and institutions, and organized society itself. The organization is, in the very purpose and object of its existence, a social and national menace, for the suppres-

30 State v. Stockford, 77 Conn. 236, 107 Am. St. Rep. 28, 58 Atl. 769.

31 State v. Donaldson, 32 N. J. L. (3 Vr.) 151, 90 Am. Dec. 649.

32 See Wright's Crim. Consp., passim.

sion of which there are abundant law-powers in every state in the Union; all that is required is prosecuting officers who will vigorously and conscientiously perform their statutory and sworn duties to the community in which they are elected.

CHAPTER XXXIV.

INDICTMENT—SPECIFIC CRIMES.

Counterfeiting.

§ 538. In general.[1] Making counterfeit money, having counterfeit money in possession with intent to pass the same, passing or selling counterfeit money, and having in possession tools adapted to and intended to be used in the manufacture of counterfeit money, are distinct offenses classified under the general head of counterfeiting, and treated as branches or phases of that offense.

An infamous crime: There are some circuit and district court decisions to the effect that counterfeiting, in any of its branches or phases, is not an "infamous crime"[2]

1 As to forms of indictment for counterfeiting in all its branches or phases, see Forms Nos. 703-741.

2 As to what are infamous crimes, see, supra, § 126.

within the meaning of the federal constitution,[3] and for that reason can be prosecuted in the federal courts on information instead of by indictment;[4] and these cases have misled some editors[5] and text writers[6] into the error of declaring such doctrine to be the law. This precise question having been presented to the federal supreme court in 1884, that court discussed and rejected the doctrine of the circuit and district court cases, specifically holding that (1) a charge of counterfeiting is a charge with an infamous crime, and (2) the charge can be prosecuted on presentment by indictment only.[7]

Offense against whom: It has been said that an indictment in a state court for the crime of counterfeiting may charge the offense to have been committed against the sovereignty of the people of the state instead of against the sovereignty of the United States.[8]

§ 539. Joinder of defendants. The general rules of law, already discussed,[1] governing joining defendants in criminal cases, apply in a charge of counterfeiting; and two or more persons may be jointly indicted on a charge of making counterfeit money,[2] or on the charge of utter-

3 U. S. Const., Amendment V, 9 Fed. Stats. Ann., 1st ed., p. 256.

4 See United States v. Field, 21 Blatchf. 330, 16 Fed. 778; United States v. Coppersmith, 2 Flipp. 546, 4 Fed. 198; United States v. Baugh, 4 Hughes 501, 1 Fed. 784; United States v. Burgess, 3 McC. 278, 9 Fed. 896; United States v. Yates, 6 Fed. 861; United States v. Petit, 11 Fed. 58; In re Wilson, 18 Fed. 33.

5 See 9 Fed. Stats. Ann., 1st ed., p. 260.

6 11 Cyc. 311.

7 Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89, 5 Sup. Ct. Rep. 935; United States v. Petit, 114 U. S. 429, 29 L. Ed. 93, 5 Sup. Ct. Rep. 1190.

8 Harlan v. People, 1 Doug. (Mich.) 207.

1 See, supra, §§ 351-359.

Joint indictment and arraignment shown by record, which then recites that the trial proceeded against one of them, court will presume that an order for separate trials was made.—State v. Hess, 5 Ohio 5, 22 Am. Dec. 767.

2 State v. Calvin, 1 R. M. Charlt. (Ga.) 151; Rosnick v. Com., 2 Va. Cas. 356; United States v. Addatte, 6 Blatchf. 76, Fed. Cas. No. 14422; United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691;

ing[3] or passing[4] counterfeit money, or on the charge of having counterfeit money in possession with intent to pass the same,[5] or with making or having in possession instruments or tools adapted to and used for the purpose of counterfeiting,[6] whether indicted as principal[7] or as accessory.[8] Thus, where there is a joint and several possession of counterfeit bank bills or bank notes, two or more persons may be jointly indicted for having the same in such possession;[9] and where two persons jointly make counterfeit coins, and utter them in different shops, and apart from each other, intending to share in the proceeds, they may be jointly indicted for all utterings and passings;[10] but it seems that where two persons in possession of counterfeit money jointly pass some of the coin in a shop, then separate and individually pass and utter and pass other of the counterfeit coins, they can not be jointly indicted for the

United States v. White, 25 Fed. 716.

3 R. v. Skerrit, 2 Car. & P. 427, 12 Eng. C. L. 203; R. v. Jones, 9 Car. & P. 761, 38 Eng. C. L. 325; R. v. West, 2 Cox C. C. 237; R. v. Greenwood, 2 Den. C. C. 453, 5 Cox C. C. 521; R. v. Hurse, 2 Mac. & Rob. 360; R. v. Else, Rus. & Ry. C. C. 142.

4 State v. Calvin, 1 R. M. Charlt. (Ga.) 151; State v. Mix, 15 Mo. 156; R. v. Jones, 9 Car. & P. 761, 38 Eng. C. L. 325.

5 People v. Ah Sam, 41 Cal. 645, 649; People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767.

Possession of counterfeit bond, not signed and executed, not an offense. See United States v. Sprague, 11 Biss. 381, 48 Fed. 831; United States v. Williams, 14 Fed. 550, 554.

6 Sutton v. State, 9 Ohio 133.

7 People v. Ah Sam, 41 Cal. 645; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; Sutton v. State, 9 Ohio 133; State v. Bowman, 6 Vt. 596; United States v. Addatte, 6 Blatchf. 76, Fed. Cas. No. 14422.

8 State v. Calvin, 1 R. M. Charlt. (Ga.) 151; State v. Mix, 15 Mo. 153; Com. v. Bradley, 16 Pa. Sup. Ct. 561; United States v. White, 25 Fed. 716.

Joinder of accessory with principal in same indictment, but in a separate count, is not prejudicial to him where he has had a separate trial; the indictment will not be quashed and the judgment will not be arrested. — Com. v. Bradley, 16 Pa. Sup. Ct. 561.

9 Hess v. State, 5 Ohio 5, 22 Am. Dec. 767.

10 R. v. Hurse, 2 Mac. & Rob. 360.

separate utterings and passings, for the reason that their previous concert in the joint uttering and passing in the first instance will not be extended to the utterings and passings separately.[11]

§ 540. Form and sufficiency of the indictment—In general. In an indictment charging counterfeiting in any of its branches or phases, as in an indictment charging any other common-law or statutory offense, certainty and clearness are essential to sufficiency;[1] all the elements[2] of the particular branch or phase of counterfeiting sought to be charged must be set forth[3] so plainly that the accused will understand[4] and the court will judicially know with what particular offense he stands charged[5] and the jury will not be misled.[6] The offense must be charged by direct averment and not by way of recital.[7]

Amendments and corrections before returned into court will not vitiate an indictment charging couterfeiting in any of its branches.[8] Thus, where the indictment charged accused with uttering and publishing a counterfeit $10 bank note purporting to be issued by the Lafayette Bank of Cincinnati, and before the indictment was returned into court the prosecuting attorney added, in pencil, an "s" to the word "promise" in "promise to pay," the amendment was held to be immaterial.[9]

11 R. v. West, 2 Cox C. C. 237.

1 See Com. v. Bailey, 1 Mass. 7, 2 Am. Dec. 3; Rosen v. United States, 161 U. S. 29, 40 L. Ed. 606, 16 Sup. Ct. Rep. 480.

2 See, supra, § 194.

3 Swain v. People, 5 Ill. 178; State v. McKenzie, 42 Me. 392; Benson v. State, 5 Minn. 19; Scott v. Com., 14 Gratt. (Va.) 687.

4 The indictment must be sufficiently certain to enable the accused to prepare for trial and to protect him from future prosecution for the same offense.—State v. Halder, 2 McC. L. (S. C.) 377, 13 Am. Dec. 738; United States v. Howell, 64 Fed. 110; Hanger v. United States, 97 C. C. A. 372, 173 Fed. 54.

5 See, supra, § 193, footnote 1.

6 See authorities in footnote 3.

7 State v. Newland, 7 Iowa 242, 71 Am. Dec. 444; Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; State v. Halder, 2 McC. L. (S. C.) 377, 13 Am. Dec. 738; State v. Perry, 2 Bail. L. (S. C.) 17.

8 As to amendments and interlineations, see, supra, § 326.

9 May v. State, 14 Ohio 461, 45 Am. Dec. 548. In this case the

"Feloniously" need not be used in the description of the act complained of in any of the branches of counterfeiting,[10] where not made an element of the offense charged by the statute under which the indictment is drawn;[11] and in those cases in which the word is needlessly inserted it may be treated as surplusage.[12]

Second and subsequent offenses being made more heavily punishable than first offenses of the character charged, the indictment should specifically allege the former conviction or convictions on charge of a similar offense committed by the accused, where it is sought to secure an imposition of the heavier penalty.[13]

court say: "With the letter 's,' in pencil marks, there is variance, if the letter is held to form a part of the indictment, and we are inclined to think that it does. But if not, the sound and sense are, in substance, still the same. Indeed the grammatical construction of the sentence is the same. Bank is a collective noun; its verb may be singular or plural; promise, or promises, is all the same in substance, sense, and sound; and the note is sufficiently, in our opinion, described, to give in evidence to the jury," citing Quigley v. People, 3 Ill. 302; Stevens v. Stebbins, 4 Ill. 26.

10 Perdue v. State, 21 Tenn. (2 Humph.) 494; Wilson v. State, 1 Wis. 184.

Compare: Dictum in Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168.

11 Miller v. People, 3 Ill. 233; Quigley v. People, 3 Ill. 301.

"Did" omitted before the words "feloniously utter and publish" is fatal and judgment will be arrested therefor. The omission of the positive averment that he "did" the act is not supplied by the concluding averment "that at the time of the uttering etc. the prisoner well knew, etc."—State v. Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738.

Compare: May v. State, 14 Ohio 461, 45 Am. Dec. 548, "the" omitted before "Lafayette Bank of Cincinnati."

As to omission of formal and other words, see, supra, § 324.

12 See State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892.

13 See, as bearing on question of procedure in case of former conviction: People v. Carlton, 57 Cal. 559; Maguire v. State, 47 Md. 485; Plumbly v. Com., 43 Mass. (2 Metc.) 413; Garvey v. Com., 74 Mass. (8 Gray) 382; Larney v. Cleveland, 34 Ohio St. 599; Rauch v. Com., 78 Pa. St. 490; State v. Freeman, 27 Vt. 523; Rand v. Com., 9 Gratt. (Va.) 938; R. v. Page, 9 Car. & P. 756, 38 Eng. C. L. 437; R. v. Jones, 9 Car. & P. 761, 38 Eng. C. L. 441; R. v. Tandy, 2 Leach C. C. 833; R. v. Michael, 2 Leach C. C. 938, Russ.

• *Conclusion,* in those cases in which the counterfeiting charged was created by statute, must be contrary to the form of the statute,[14] but it is otherwise where the offense was indictable in the state at common law prior to the passage of the statute;[15] and where the indictment is in the state court it may charge the offense to have been against the sovereignty of the people of the state.[16]

§ 541. —— FOLLOWING LANGUAGE OF STATUTE. The general rule is that an indictment charging a statutory offense may do so in the words—or substantially in the words, or in words of the same legal import[1]—of the statute describing and denouncing the offense;[2] and an indictment is good which follows the form prescribed by code or

& Ry. 29; R. v. Turner, 1 Moo. 47; R. v. Booth, Russ. & Ry. 7; R. v. Allen, Russ. & Ry. 513; R. v. Willis, L. R. 1 C. C. 363; R. v. Thomas, L. R. 2 C. C. 141.

14 **The general rule regarding statutory offenses,** and not peculiar to counterfeiting. See People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Chipman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565; Warner v. Com., 1 Pa. St. 154, 44 Am. Dec. 114.

Compare: State v. Toadvine, 1 Brev. (S. C.) 16 (a conclusion contrary to the statute is insufficient).

"Against the form of the statute" sufficient, although the offense charged is inhibited by several statutes.—State v. Wilbor, 36 Am. Dec. 245.

More than one statute, conclusion need not be in the plural, "against the statutes."—State v. Dayton, 23 N. J. L. (3 Zabr.) 43, 53 Am. Dec. 270.

15 Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

Where a statute creates or prohibits an offense and inflicts a punishment therefor, the indictment must conclude "against the form of the statute." But where the statute only inflicts a punishment on what was an offense before, there is no necessity of mentioning the statute.—Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

16 See, supra, § 538, footnote 8.

1 See Buckley v. State, 2 G. Greene (Ia.) 163; People v. Stewart, 4 Mich. 658; State v. Bowman, 6 Vt. 594; United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

2 People v. White, 34 Cal. 183; Hopkins v. Com., 44 Mass. (3 Metc.) 460; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; Long v. State, 10 Tex. App. 186.

See, supra, §§ 269, 280.

statute.[3] An indictment charging counterfeiting, in any of its branches, may follow the language of the statute under which drawn in those cases where such statute sets forth clearly and fully all the essential elements of the particular crime sought to be charged;[4] but in those cases in which such statute does not clearly and fully, directly and explicitly, set forth all the essential elements of the offense sought to be charged, an indictment in the language of the statute will be insufficient, unless it further sets forth and properly charges those essential elements.[5] Where the language of the statute sufficiently describes the offense, but contains a proviso or exception—e. g., possession without "lawful authority,"[6] or passing "ignorantly, innocently," and the like—such proviso or exception must be expressly and properly negatived.[7]

§ 542. —— INTENT TO DEFRAUD. In the absence of a statutory provision or requirement, an indictment charging counterfeiting in any of its branches or phases need not allege the act complained of was done "with intent to defraud";[1] but in those cases where the statute makes an intent to defraud an element of the particular branch or phase of the crime charged, such intent must of course be alleged.[2] In the latter case, it is thought, an allegation that the particular act complained of was done "with the

3 Johnson v. State, 35 Ala. 370.

4 Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; State v. Brown, 4 R. I. 528, 70 Am. Dec. 168.

5 Bell v. State, 10 Ark. 536; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

6 "Without excuse" held sufficient pleading under such a statute.—R. v. Harney, 11 Cox C. C. 662.

7 Matthews v. State, 10 Tenn. (2 Yerg.) 233.

As to provisos and exceptions and when should be negatived, see, supra, §§ 288-291.

1 Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; United States v. Peters, 2 Abb. (U. S.) 494, Fed. Cas. No. 16035; United States v. Otey, 12 Sawy. 416, 31 Fed. 68.

2 Mattison v. State, 3 Mo. 421; State v. Seran, 28 N. J. L. (4 Dutch.) 519; Williams v. State, 28 Tenn. (9 Humph.) 80; Owen v. State, 37 Tenn. (5 Sneed) 493; State v. O'Neil, 1 Tenn. Cas. 39, Thomp. Tenn. Cas. 62.

intent to defraud" will be sufficient;[3] and that neither the facts to prove the intent, nor the means by which the intent was, or was to be, executed, need be set forth.[4]

Person intended to be defrauded: Some particular person must be named,[5] where the charge is of uttering and passing counterfeit money, as the person to whom the counterfeit was, or was intended to be passed—i. e., the name of the person who was to be or was defrauded—and where the name of that person is unknown the indictment should so state,[6] except in those cases where the intent is not made an essential part of the offense by the statute under which the indictment is drawn, in which case the name of the person need not be alleged.[7]

§ 543. —— DESCRIPTION OF SUBJECT-MATTER OF COUNTERFEITING. An indictment charging counterfeiting in any of its branches or phases must contain a description of the alleged counterfeit instrument,[1] unless the instru-

3 "Falsely" or "falsely and fraudulently" making of a counterfeit being alleged, held to imply intent to defraud. See State v. Calvin, 1 R. M. Charlt. (Ga.) 151; United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691; United States v. King, 5 McL. 208, 211, Fed. Cas. No. 15535; United States v. Otey, 12 Sawy. 416, 31 Fed. 68; United States v. Abrams, 18 Fed. 823; United States v. Russell, 22 Fed. 300.

4 United States v. Ulrici, 3 Dill. 532, 535, Fed. Cas. No. 16594; McCarty v. United States, 41 C. C. A. 242, 101 Fed. 113.

5 Buckley v. State, 2 G. Greene (Ia.) 162; State v. Odel, 3 Brev. (S. C.) 552.

Compare: State v. Barrett, 8 Iowa 536.

Whether intent to defraud must be towards person named or another quære. See Wilkinson v. State, 10 Ind. 372; Brown v. Com., 2 Leigh (Va.) 769.

6 State v. Weller, 20 N. J. L. (Spenc.) 521; State v. Odel, 3 Brev. (S. C.) 552; United States v. Shellmire, Baldw. 370, Fed. Cas. No. 16271; United States v. Bejando, 1 Woods 294, Fed. Cas. No. 14561.

7 Hess v. State, 5 Ohio 2, 22 Am. Dec. 767; United States v. Peters, 2 Abb. (U. S.) 494, Fed. Cas. No. 16035; United States v. Otey, 12 Sawy. 416, 31 Fed. 68.

1 See: ARK.—Gabe v. State, 6 Ark. 519. IND.—State v. Atkins, 5 Blackf. 458; Hampton v. State, 8 Ind. 228; Wilkinson v. State, 10 Ind. 372; Armitage v. State, 13 Ind. 442; McGregor v. State, 16 Ind. 9. IOWA—State v. Barrett, 8 Iowa 536. KY.—Clark v. Com., 55 Ky. (16 B. Mon.) 206; Mount v.

ment is destroyed, lost, or in the possession of the accused, in either of which instances the special fact must be averred to excuse want of description and setting out of same.[2] The description of the instrument must be such as will enable the accused to know with reasonable certainty the specific offense with which he is charged—i. e., the particular thing he is charged with making, having, uttering, passing, selling, and the like—and sufficiently specific and certain that an acquittal or a conviction will be a bar to another prosecution for the same act and offense.[3]

Com., 62 Ky. (1 Duv.) 90. MASS.—Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stevens, 1 Mass. 203; Com. v. Houghton, 8 Mass. 107; Com. v. Stearns, 51 Mass. (10 Metc.) 256; Com. v. Taylor, 59 Mass. (5 Cush.) 605; Com. v. Clancy, 89 Mass. (7 Allen) 537; Com. v. Hall, 97 Mass. 570. MO.—Hobbs v. State, 9 Mo. 859; State v. Smith, 31 Mo. 120. N. H.—State v. Carr, 5 N. H. 367. N. J.—State v. Robinson, 16 N. J. L. (1 Har.) 510; Stone v. State, 20 N. J. L. (Spenc.) 406. N. C.—State v. Dourdon, 13 N. C. (2 Dev. L.) 443. OHIO—McMillen v. State, 5 Ohio 269; Griffin v. State, 14 Ohio St. 61. TENN. — State v. Shelton, 26 Tenn. (7 Humph.) 31; Hooper v. State, 27 Tenn. (8 Humph.) 100. VT.—State v. Wilkins, 17 Vt. 151. VA.—Com. v. Ervin, 2 Va. Cas. 337; Brown v. Com., 2 Leigh 773; Hendricks v. Com., 5 Leigh 707; Buckland v. Com., 8 Leigh 753.

2 See Armitage v. State, 13 Ind. 442; Com. v. Houghton, 8 Mass. 107; Hooper v. State, 27 Tenn. (8 Humph.) 101; Kirk v. Com., 9 Leigh (Va.) 627.

3 See Mount v. Com., 62 Ky. (1 Duv.) 90; Waller v. Com., 97 Ky. 509, 30 S. W. 1023; Com. v. Fields, 5 Ky. Law Rep. 610; Com. v. Stevens, 1 Mass. 203; State v. Keneston, 59 N. H. 36.

Insufficient description simply to charge accused feloniously tendered in payment to a designated person an "altered bank-bill" of a designated bank, alleging scienter and intent to defraud the person named, but containing no other or further description of the subject-matter of the alleged offense, omitting to give the date, denomination or number of the bill, or any other description as would distinguish the bill in question from any other bill of the same bank.—Mount v. Com., 62 Ky. (1 Duv.) 90.

Sufficient description: Where the money was described as "certain pieces of false and counterfeit coin, in imitation of the silver coin current within the state by law and usage, to wit, five pieces called 25-cent pieces, and five pieces called dimes," it was sufficient.—State v. Keneston, 59 N. H. 36.

—**"United States notes"** of a designated denomination, held to

Bank-bill or bank-note being the subject-matter of the indictment, it must be set forth in the indictment either by tenor[4] or in hæc verba,[5] or the omission excused by proper averment;[6] and the indictment should allege it to be "a certain false, forged and counterfeit paper, purporting to be a bank-bill[7] of the United States for," giving the denomination, "and purporting to be signed by," designating the president and cashier of the particular bank, "as president" and "as cashier," otherwise the indictment will be insufficient.[8]

be a sufficient description of the subject-matter.—United States v. Howell, 64 Fed. 110.

4 **Setting forth according to tenor** a bank-bill or bank-note, the indictment need not allege its destruction or loss.—State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449.

"Tenor" implies merely setting out the material parts of the contract as expressed on the face of the bill, and does not include the immaterial parts.—State v. Dourdon, 13 N. C. (2 Dev. L.) 443.

5 **Altered bill** should be set out in the indictment in the exact condition it was in when uttered or passed.—Townsend v. People, 4 Ill. 326.

Facsimile or copy should be set forth.—State v. Bonney, 34 Me. 383.

"Purport and effect" not sufficient. An exact copy must be set out, or want of it excused.—State v. Atkins, 5 Blackf. (Ind.) 458; United States v. Fisher, 4 Biss. 59, Fed. Cas. No. 15105.

Pasting counterfeited instrument in indictment and its sufficiency or insufficiency as a pleading. See United States v. Fisher, 4 Biss. 59, Fed. Cas. No. 15105.

6 State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449.

Where the grand jury have no knowledge or information as to where or in whose possession or under whose control the counterfeited bank notes now are and have been since they were in the possession of the accused is a sufficient excuse why a fuller and better description could not be given.—United States v. Howell, 64 Fed. 110.

7 **Describing as a "promissory note"** a bank-bill or bank-note alleged to be counterfeit is sufficient in a charge of passing same. See Brown v. Com., 8 Mass. 64; Com. v. Carey, 19 Mass. (2 Pick.) 47; Com. v. Woods, 76 Mass. (10 Gray) 477; Com. v. Thomas, 76 Mass. (10 Gray) 484; Com. v. Paulus, 77 Mass. (11 Gray) 305; Com. v. Ashton, 125 Mass. 384; Com. v. Gallagher, 126 Mass. 54; Hobbs v. State, 9 Mo. 855; State v. Ward, 6 N. H. 529; Stone v. State, 20 N. J. L. (Spenc.) 407; State v. Twitty, 9 N. C. (2 Hawks.) 449; R. v. Palmer, 1 Bos. & P. N. R. 96, 127 Eng. Repr. 395; R. v. Holden, 2 Taunt. 334, 127 Eng. Repr. 1107.

8 Com. v. Clancy, 89 Mass. (7

—— *Material parts* of bank-bill or bank-note are all that are required to be set out;[9] the number of the bill, words and figures in the margin, and the like, not being an integral part of the bill, need not be set out in the indictment.[10]

Coin, the subject-matter of the charge of counterfeiting in any of its branches or phases, the coin may be described under its proper denomination as a coin showing value of the genuine coin,[11] stating whether the coin coun-

Allen) 537; United States v. Howell, 78 U. S. (11 Wall.) 432, 20 L. Ed. 195.

"Signed by A, president, and B, secretary," signifies the bank-bill is genuine.—United States v. Cantril, 8 U. S. (4 Cr.) 167, 2 L. Ed. 584.

9 Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3.

10 See: ARK.—Gabe v. State, 6 Ark. 519. DEL.—State v. Tindal, 5 Harr. 488. GA.—Haupt v. State, 108 Ga. 53, 75 Am. St. Rep. 19, 34 S. E. 313 (in forging same). IND.—Hampton v. State, 8 Ind. 336. MASS.—Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stevens, 1 Mass. 203; Com. v. Taylor, 59 Mass. (5 Cush.) 605; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126. N. H.—State v. Carr, 5 N. H. 367. N. Y.—Wilson v. People, 5 Park. Cr. Rep. 178. OHIO—Griffin v. State, 14 Ohio St. 55; State v. Ankrim, Tap. 112; State v. Kinney, Tap. 167. VT.—State v. Wheeler, 35 Vt. 261. FED.—United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572.

Certificate of registration required by law to be indorsed on the bill.—Wilson v. People, 5 Park. Cr. Rep. (N. Y.) 178.

Engraver's name omitted from the bank-note does not vitiate the indictment.—State v. Tindal, 5 Harr. (Del.) 488.

Figures in margin of counterfeit note may be omitted.—State v. Kinney, Tap. (Ohio) 167.

Indorsement on counterfeit bill need not be set out.—Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; State v. Tutt, 2 Bail. L. (S. C.) 44, 21 Am. Dec. 508; Buckland v. Com., 8 Leigh (Va.) 732.

Mottoes on margin need not be set out.—United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572.

Name of state in upper margin must be included.—Com. v. Wilson, 68 Mass. (2 Gray) 70.

Notices required by law to be put upon the bill.—Wilson v. People, 5 Park. Cr. Rep. (N. Y.) 178.

Number of bill not essential, and may be omitted.—Com. v. Stevens, 1 Mass. 205; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126.

Ornamental devices of the notes need not be set out.—Hampton v. State, 8 Ind. 336.

11 Gentry v. State, 6 Ga. 504; State v. Williams, 8 Iowa 536; Com. v. Stearns, 51 Mass. (10 Metc.) 256; State v. Kenester,

terfeited was "gold or silver coin,[12] but it is not necessary to allege the materials out of which the counterfeit coin was made.[13] The date,[14] devices,[15] inscriptions,[16] or place of coinage,[17] need not be set out.

§ 544. —— EXISTENCE AND INCORPORATION OF BANK. The indictment charging counterfeiting, in any of its branches or phases, of a bank-bill or a bank-note, the question whether the existence and incorporation of the bank must be alleged depends entirely upon the provisions of the statute under which the indictment is drawn. Inasmuch

59 N. H. 37; Peck v. State, 21 Tenn. (2 Humph.) 84; State v. Griffin, 18 Vt. 108; United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691; United States v. Bejandio, 1 Woods 294, Fed. Cas. No. 14561.

"Dimes" held a sufficient description, the number of coins being stated.—State v. Keneston, 59 N. H. 37.

"Dollars" held to be a sufficient description of the counterfeit coin, whether the genuine be coins of the United States, Mexico or Spain.—Peck v. State, 21 Tenn. (2 Humph.) 84. See Com. v. Stearns, 51 Mass. (10 Metc.) 257 (Mexican dollar); Fight v. State, 7 Ohio 180, 28 Am. Dec. 626 (Spanish dollars).

—**Repugnant description** as charging the counterfeiting of a genuine coin "of the state of Missouri, called a Mexican dollar," is fatal to the validity of the indictment.—State v. Shoemaker, 7 Mo. 177.

"Fifty cent pieces," designating the number, sufficient description, though the statute designates the coins as "half dollars." — United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

"Half dollars" held to be a sufficient description in State v. Griffin, 18 Vt. 108.

Or "fifty cent pieces," though the statute says half dollars. — United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

"Twenty-five cent pieces" held to be a sufficient description. — State v. Keneston, 59 N. H. 37.

Although the statute designates the coin as "quarters." — United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

12 Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168.

13 State v. Beeler, 1 Brev. (S. C.) 482; State v. Griffin, 18 Vt. 198.

Charging counterfeit silver coin implies that the counterfeit pieces were made in the similitude of silver coin, but not really of silver.—State v. McPherson, 9 Iowa 53.

14 Com. v. Stearns, 51 Mass. (10 Metc.) 256.

15 Com. v. Stearns, 51 Mass. (10 Metc.) 256; Peck v. State, 21 Tenn. (2 Humph.) 84.

16 Id.

17 Com. v. Stearns, 51 Mass. (10 Metc.) 256.

as incorporation of the bank is not an element of the crime,[1] the incorporation of the bank need not be alleged;[2] but where an allegation as to incorporation is made, it seems that incorporation must be proved as laid.[3] Where the statute is so drawn that the incorporation of the bank is an element of the offense, in that case the indictment must allege the fact of incorporation, or it will be insufficient.[4]

Legal existence of the bank need not be alleged unless the wording of the statute under which the indictment is drawn is such as to require such an allegation;[5] the name[6] and existence,[7] however, should be alleged of the bank whose bills are charged to have been counterfeited.

1 People v. Ah Sam, 41 Cal. 645; People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190.

Bank of England bills charged to have been counterfeited, incorporation of that bank need not be alleged, because incorporation is not a part of the offense under the statute.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190.

Equally an offense whether the bank incorporated or not, where it is acting as a corporation, and issues bills which are current anywhere.—People v. Ah Sam, 41 Cal. 645.

2 CAL.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190. ILL.—Quigley v. People, 3 Ill. 301. MO.—Hobbs v. State, 9 Mo. 855. N. H.—State v. Hayden, 15 N. H. 355. N. J.—State v. Van Hart, 17 N. J. L. (2 Har.) 327; State v. Weller, 20 N. J. L. (Spenc.) 521. VA.—Murry v. Com., 5 Leigh 720. FED.—United States v. Williams, 2 Hall L. J. 255, Fed. Cas. No. 16706; Wiggains v. United States, 214 Fed. 970.

Contra: Com. v. Simonds, 77 Mass. (11 Gray) 306.

3 State v. Newland, 7 Iowa 242, 71 Am. Dec. 444.

Where the indictment charged that the bank, purporting to issue the bank bills, was a corporation duly authorized to issue bills, the prosecution must prove the incorporation of the bank as alleged.—State v. Newland, 7 Iowa 242, 71 Am. Dec. 444, citing Com. v. Smith, 6 Serg. & R. (Pa.) 568.

4 State v. Brown, 4 R. I. 528, 70 Am. Dec. 168.

"Then and there being an incorporated bank" is a sufficient averment of incorporation, where the fact of incorporation is necessary to be alleged.—State v. Johnson, 3 Harr. (Del.) 561.

5 State v. Shoemaker, 7 Mo. 177; Kirby v. State, 1 Ohio St. 185.

6 See Johnson v. State, 35 Ala. 377; People v. Stewart, 4 Mich. 656; State v. Waters, 3 Brev. (S. C.) 507.

7 State v. Ward, 9 N. C. (2

§ 545. —— VALUE. An indictment charging counterfeiting need not allege that the counterfeit had any value,[1] and it seems that where the subject-matter counterfeited is a bank-bill, it need not be specifically alleged that it had any value.[2]

§ 546. —— TIME AND PLACE. An indictment charging counterfeiting in any of its branches or phases must add an allegation of time[1] and place[2] to every averment of a material fact.[3] Thus, the time when a coin, bill or treasury note alleged to have been counterfeited was current by law, custom or usage, being made an ingredient of the offense by statute, must be distinctly stated in the indictment.[4] But time and place are properly and sufficiently charged by an allegation that on a designated date at a specified place the accused "then and there" committed the act complained of.[5] Thus, in a case in which the in-

Hawks.) 443; Fergus v. State, 14 Tenn. (6 Yerg.) 353; State v. Wilkins, 17 Vt. 151; State v. Morton, 8 Wis. 352; State v. Cole, 19 Wis. 129, 88 Am. Dec. 678.

1 State v. Williams, 8 Iowa 533.

2 State v. Dourdon, 13 N. C. (2 Dev.) 433.

1 See, supra, §§ 162 et seq.

Time must be stated with certainty, the same as in indictments for all other crimes. See State v. Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168; State v. Thurston, 35 Me. 205, 58 Am. Dec. 695; Com. v. Hutton, 71 Mass. (5 Gray) 89, 66 Am. Dec. 352; State v. Sexton, 10 N. C. (3 Hawks.) 184, 14 Am. Dec. 584; State v. Orrell, 12 N. C. (1 Dev. L.) 137, 17 Am. Dec. 563; Barnes v. State, 42 Tex. Cr. Rep. 297, 96 Am. St. Rep. 801, 59 S. W. 882; Mauzau-mau-ne-kah v. United States, 1 Penn. (Wis.) 124, 39 Am. Dec. 279.

Charging commission of offense "on the third of June instant," held to be insufficient, although complaint sworn to on "June 4, 1855."—Com. v. Hutton, 71 Mass. (5 Gray) 89, 66 Am. Dec. 352.

Time not of essence of offense rule is otherwise by statute in some states. See Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722.

2 See, supra, §§ 181 et seq. Also, Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168; State v. Thurston, 35 Me. 205, 58 Am. Dec. 695.

3 Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168.

4 Id. See, also, post, § 547.

5 State v. Thurston, 35 Me. 205, 58 Am. Dec. 695; see State v. Kelly, 41 Ore. 20, 68 Pac. 1; R. v. Richmond, 1 Car. & K. 240, 47 Eng. C. L. 240.

dictment charged that accused feloniously had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a six pence, the indictment was by the court held to be bad upon demurrer, because not sufficiently showing that the impression was on the mould at the time the prisoner had it in his possession; the court declaring that if the indictment had said "upon which said mould was then and there made and impressed," it would have been good.[6]

§ 547. —— CURRENT ACCORDING TO LAW, CUSTOM OR USAGE. An indictment charging counterfeiting must allege, and the proof must show, that at the time and in the place named the bank-bill, coin or treasury note which is alleged to have been counterfeited was current by law, custom or usage;[1] but where the indictment alleges that the subject-matter was current according to the laws of the United States it need not be averred to be current in the state, because the court takes judicial notice that bank-bills or coin current by the federal laws are current in any particular state of the Union.[2] Charging accused "four pieces of false and counterfeit money and coin,

6 R. v. Richmond, 1 Car. & K. 240, 47 Eng. C. L. 240.

1 ALA.—Nicholson v. State, 18 Ala. 529, 54 Am. Dec. 168; Bostick v. State, 34 Ala. 266. ARK.—Mathena v. State, 20 Ark. 70. IOWA—State v. Williams, 8 Iowa 535. KY.—Waller v. Com., 97 Ky. 509, 30 S. W. 1023. MASS.—Com. v. Stearns, 51 Mass. (10 Metc.) 258. OHIO—Fight v. State, 7 Ohio (pt. I) 180, 28 Am. Dec. 626. TENN.—State v. Shelton, 26 Tenn. (7 Humph.) 31. VT. — State v. Bowman, 6 Vt. 594. FED.—United States v. Gardner, 35 U. S. (10 Pet.) 618, 9 L. Ed. 556.

Compare: Bostick v. State, 34 Ala. 266.

California gold coin not being lawful currency, passing of a counterfeit thereof held not to be an offense under the statute.—Com. v. Bond, 67 Mass. (1 Gray) 564.

California Penal Code, § 480, denouncing counterfeiting "bank-notes and bills," includes both domestic and foreign bank-notes and bills, whether current or not.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190.

2 State v. Griffin, 18 Vt. 198.

made and counterfeited in the likeness and similitude of the good, true, and current money and silver coin, currently passing in this state, called Spanish dollars," "did utter and tender in payment," etc., was held to be a good indictment; the question whether or not such coin was at the time current in the state was one for the jury to determine.[3] But an indictment charging that accused "did feloniously make, forge, and counterfeit one hundred pieces of false and counterfeit coin, each piece thereof in resemblance and similitude of a foreign silver coin, to-wit, a silver coin of Spain, called a head pistareen, which by the law was then, and still is made current in the United States of America," etc., was held to be bad for the reason that the "head pistareen" is not a part of the Spanish milled dollar, and is not made current by law.[4]

§ 548. JOINDER OF COUNTS. An indictment charging the crime of counterfeiting may join any two or all of the branches or phases of the crime in one count, where the indictment pursues the words of the statute,[1] or it may combine in separate counts all the branches or phases of the crime;[2] and where the act complained of constitutes an offense under two or more statutes there may be a count under each statute,[3] even though the punishment under one of the statutes or for the crime charged in one of the counts is imperative and for another it is discretionary.[4] This is on the general prin-

3 Fight v. State, 7 Ohio (pt. I) 180, 28 Am. Dec. 626.

4 United States v. Gardner, 35 U. S. (10 Pet.) 618, 9 L. Ed. 556. See, also, United States v. Bickster, 1 Mack. D. C. 346; McQuesney v. Hiester, 33 Pa. St. 446; Newman v. Keffer, 33 Pa. St. 442, 446, 1 Brun. Col. Cas. 502, Fed. Cas. No. 10177; Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods 257, Fed. Cas. No. 8541.

1 See Rasnick v. Com., 2 Va. Cas. 356.

2 See McGregor v. State, 16 Ind. 9; State v. McPherson, 9 Iowa 53.

3 United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572; Kaye v. United States, 177 Fed. 147.

4 See Stone v. State, 20 N. J. L. (Spenc.) 404; Kane v. People, 8 Wend. (N. Y.) 203; People v. Rynder, 12 Wend. (N. Y.) 425.

ciple that an indictment is not bad because different offenses are charged in different counts where they are all of the same general character,[5] and rise out of the same state of facts.[6]

Instances: Thus indictments have been held good containing two or more counts charging counterfeiting and having counterfeit money in possession[7] with intent to pass the same;[8] charging counterfeiting, having counterfeit money in possession with intent to pass the same, and having in possession divers moulds and patterns adapted to and designed for making counterfeit coin;[9] charging counterfeiting and passing counterfeit money;[10] charging making false coins and aiding and abetting in the making thereof,[11] and with procuring them to be made;[12] charging passing counterfeit money and having counterfeit money in possession;[13] charging passing and attempting to pass counterfeit money;[14] counts joined charging passing counterfeit money at different

5 See: ALA.—Johnson v. State, 35 Ala. 370. IND.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; McGregor v. State, 16 Ind. 9; Griffith v. State, 36 Ind. 407. IOWA—State v. McPherson, 9 Iowa 53. MASS.—Carlton v. Com., 46 Mass. (5 Metc.) 532. N. Y.—Kane v. People, 8 Wend. 203. TENN.—Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599; Ayrs v. State, 45 Tenn. (5 Coldw.) 28. FED.—United States v. Bennett, 17 Blatchf. 357, Fed. Cas. No. 14572; United States v. Dickinson, 2 McL. 325, Fed. Cas. No. 14958; United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691; Kay v. United States, 177 Fed. 147. ENG.—R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 605; R. v. Jones, 8 Car. & P. 776, 34 Eng. C. L. 632.

6 People v. Ah Sam, 41 Cal. 645.

7 State v. Myers, 10 Iowa 449; Stone v. State, 20 N. J. L. (Spenc.) 404; Scott v. Com., 14 Gratt. (Va.) 689.

8 State v. Myers, 10 Iowa 449.

9 Griffin v. State, 14 Ohio St. 61.

10 McGregor v. State, 16 Ind. 9; State v. Beeler, 1 Brev. L. (S. C.) 482; Peck v. State, 21 Tenn. (2 Humph.) 78.

11 United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

12 United States v. Burns, 5 McL. 23, Fed. Cas. No. 14691.

13 State v. Wilkins, 17 Vt. 151; State v. Wheeler, 35 Vt. 261.

14 State v. Shoemaker, 7 Mo. 177.

times and in different places;[15] charging uttering and passing counterfeit money, and having in possession instruments adapted to and used in counterfeiting,[16] and the like.

§ 549. —— Duplicity, repugnancy and uncertainty. An indictment charging counterfeiting in any of its branches or phases which is duplicitous,[1] repugnant,[2] or uncertain,[3] in any of the necessary material allegations, is insufficient.

Repugnancy in criminal pleading,[4] like repugnancy in civil pleading, consists in an inconsistency or disagreement between the statements of material fact or facts[5] in the allegation or charging part. Thus, it has been held that an indictment alleging that a bank-bill was "false, forged, altered and counterfeited" is bad for repugnancy;[6] and a like holding has been made as to an indictment charging "a certain false, forged and counterfeit paper, partly written and partly printed, purporting to be a bank-bill of the United States for ten dollars, signed by A, president, and B, cashier."[7] Charging coun-

15 United States v. O'Callahan, 6 McL. 596, Fed. Cas. No. 15910.

16 Harlan v. People, 1 Dougl. (Mich.) 207.

1 **Duplicity** not chargeable where indictment, in a single count or in separate counts, sets out all the branches or phases of the crime of counterfeiting. See, supra, § 548, and cases there cited.

"Forged or counterfeited," held not to be duplicitous.—Johnson v. State, 35 Ala. 370.

"Selling, exchanging or delivering," held not duplicitous.—State v. Fitzsimmons, 30 Mo. 236.

2 United States v. Cantril, 8 U. S. (4 Cr.) 167, 2 L. Ed. 584.

3 Jones v. State, 11 Ind. 357; State v. Halder, 2 McC. L. (S. C.) 377; 13 Am. Dec. 738.

4 **Repugnancy in statute** under which the indictment drawn has the same effect.—United States v. Cantril, 8 U. S. (4 Cr.) 167, 2 L. Ed. 584.

5 **Repugnancy of immaterial facts,** or redundant and unnecessary matter, not contradicting the allegation as to material facts, will not necessarily vitiate.

6 Kerley v. State, 1 Ohio St. 185.

7 United States v. Cantril, 8 U. S. (4 Cr.) 167, 2 L. Ed. 548.

Criticised in United States v. Howell, 78 U. S. (11 Wall.) 432, 20 L. Ed. 195, in which Mr. Justice Miller says: "In this statement 'signed' and 'purporting' are italicised, and the court may have held the indictment bad because

terfeiting "a good and legal coin of the state of Missouri," "called a Mexican dollar," is too plainly repugnant to require animadversion;[8] but charging the passing of a "base *and* counterfeited" coin, the language of the statute being "base *or* counterfeited," is not repugnant.[9]

Uncertainty that vitiates consists in leaving a material fact or element to be conjectured or surmised or inferred instead of positively stating it specifically and distinctly. Thus, it has been held that the omission of the word "did" from the material allegation "did feloniously utter and publish" a designated counterfeit, vitiates for uncertainty;[10] and the like holding has been made in regard to an allegation that the accused "had in his possession

the former word was used, thus sustaining the objection made in Rex v. Birch, 2 East P. C. 980. Or it may have held that the language of the indictment amounted to an averment that the bill charged to be forged was signed in fact by the president and cashier of the bank, in which case it could not be a forgery" or a counterfeit bill.

8 State v. Shoemaker, 7 Mo. 177.

9 Gabe v. State, 6 Ark. 519.

"Making and having in possession," statute being "making or having."—State v. Myers, 10 Iowa 448.

"Uttering and passing," the statute being "uttering or passing."—McGregor v. State, 16 Ind. 9; Com. v. Hall, 86 Mass. (4 Allen) 305.

10 State v. Halder, 2 McC. L. (S. C.) 377, 13 Am. Dec. 738. The court say: "You are left to conjecture what is intended. If you state to a special pleader that the prisoner is indicted for passing a counterfeit bank-note, his learning will readily supply all the averments as to time, place and manner, necessary to a perfect indictment; and according to this course of reasoning no formal indictment is necessary. But the ignorant, as well as the learned, are sometimes, and indeed more frequently, the subjects of criminal prosecutions; and it is as important that they should be apprised of the charge against them. Nothing ought, therefore, to be left to conjecture. It might be conjectured from what appears in the indictment that the charge intended was that the prisoner was present when another did the act; that he heard what he did; that the prisoner did not do the act, and fancy might conjecture a thousand other things equally appropriate and innocent in themselves. Omission of the positive averment that the prisoner did the act is not supplied by the concluding averments in the indictment, and is fatal."

divers counterfeit bills purporting to be five-dollar bills" of a named bank, "of which the following is a copy of one."[11]

§ 550. HAVING COUNTERFEIT MONEY IN POSSESSION. An indictment charging accused with having in his possession a counterfeit bank-bill or bank-note,[1] must be drawn in conformity with the particular statute; must describe the bill or note, and some authorities are to the effect that this description need not be with the same minuteness required in a charge of passing such a bill or note,[2] while other cases hold that it should be set out in the indictment,[3] the latter doctrine being probably the better one, as it is surely the safer practice. Guilty knowledge, being an ingredient of the offense, must be distinctly averred in the indictment.[4] Intent to defraud must also

11 Jones v. State, 11 Ind. 357.

"Sundry" counterfeit bank-bills, which are set out, is good.—Com. v. Thomas, 76 Mass. (10 Gray) 483.

1 **Form of indictment** for having counterfeit paper money in one's possession. See Forms Nos. 735, 736.

2 Jones v. State, 11 Ind. 359.

3 See Townsend v. People, 4 Ill. 327; State v. Callendine, 8 Iowa 296; Com. v. Carey, 19 Mass. (2 Pick.) 47; State v. Ward, 9 N. C. (2 Hawks.) 443; Revington v. State, 2 Ohio St. 161; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; McMillen v. State, 5 Ohio 269; State v. Wheeler, 35 Vt. 261.

Face of bills or notes is all that is required; indorsements, etc., need not be set out.—Hess v. State, 5 Ohio 5, 22 Am. Dec. 767. See, supra, § 543, footnotes 9 et seq.

Setting out according to tenor, strict recital is necessary.—State v. Wheeler, 35 Vt. 261. See, also, supra, § 243, footnote 4.

4 See Quigley v. People, 3 Ill. 301; Townsend v. People, 4 Ill. 327; Buckley v. State, 2 G. Greene (Iowa) 162; Clark v. Com., 55 Ky. (16 B. Mon.) 206; Brown v. Com., 8 Mass. 67; Com. v. Carey, 19 Mass. (2 Pick.) 47; Fergus v. State, 14 Tenn. (6 Yerg.) 345; Owen v. State, 37 Tenn. (5 Sneed) 495; Jett v. Com., 18 Gratt. (Va.) 933; State v. Morton, 8 Wis. 352.

In an indictment for the possession of counterfeit coin with intent to utter same, the knowledge of the defendants of the spurious character of the coin is sufficiently charged by alleging that the accused "wilfully, feloniously and knowingly did have in their possession," etc.—People v. Stanton, 39 Cal. 698.

Felonious intent need not be alleged in some jurisdictions.—Quigley v. People, 3 Ill. 301.

be alleged,[5] but the name of the person to be defrauded is not required to be set out.[6] There must be an allegation of an intent to pass[7] as genuine;[8] but the place where the accused intended to pass the counterfeit is immaterial, and need not be alleged.[9] The indictment need not allege either that the bill was a bank-bill,[10] that it was for the payment of money,[11] or by whom it purported to be made.[12] Where the charge is that the accused had two or more counterfeit bank-bills in his possession, it must be averred that he had each and all in his possession at the same time.[13]

5 See Gabe v. State, 6 Ark. 519; Townsend v. People, 4 Ill. 327; Buckley v. State, 2 G. Greene (Iowa) 162; State v. Callendine, 8 Iowa 295; Clark v. Com., 55 Ky. (16 B. Mon.) 206; Com. v. Carey, 19 Mass. (2 Pick.) 47; Com. v. Davis, 77 Mass. (11 Gray) 8; State v. Weller, 20 N. J. L. (Spenc.) 521; Fergus v. State, 14 Tenn. (6 Yerg.) 345; Hooper v. State, 27 Tenn. (8 Humph.) 100.

Felonious or wilful intent to defraud need not be alleged.—State v. Callendine, 8 Iowa 288.

6 See Gabe v. State, 6 Ark. 524; United States v. Bicksler, 1 Mack. D. C. 341; State v. Callendine, 8 Iowa 288; State v. Keneston, 59 N. H. 36; Fergus v. State, 14 Tenn. (6 Yerg.) 345; Hooper v. State, 27 Tenn. (8 Humph.) 101; State v. Morton, 8 Wis. 352.

7 See Gabe v. State, 6 Ark. 519; Townsend v. People, 4 Ill. 327; Clark v. Com., 55 Ky. (16 B. Mon.) 213; Com. v. Cone, 2 Mass. 135; Hopkins v. Com., 44 Mass. (3 Metc.) 460; Com. v. Price, 76 Mass. (10 Gray) 472, 71 Am. Dec. 668; Com. v. Davis, 77 Mass. (11 Gray) 8; Fergus v. State, 14 Tenn. (6 Yerg.) 352; Perdue v. State, 21 Tenn. (2 Humph.) 494; Owen v. State, 37 Tenn. (5 Sneed) 495.

8 See Gabe v. State, 6 Ark. 519; People v. Stewart, 4 Mich. 655; Fergus v. State, 14 Tenn. (6 Yerg.) 352.

In Massachusetts a different rule prevails, this allegation not being required.—Hopkins v. Com., 44 Mass. (3 Metc.) 464; Com. v. Davis, 77 Mass. (11 Gray) 4.

9 See Clark v. Com., 55 Ky. (16 B. Mon.) 213; Com. v. Cone, 2 Mass. 135.

"Possession of counterfeit bank-bills in the similitude of the bills issued by any bank established in this state, knowing them to be counterfeit, and with intent to pass them in another state, is a punishable offense under the revised statutes." — Com. v. Price, 76 Mass. (10 Gray) 472, 71 Am. Dec. 668.

10 Com. v. Carey, 19 Mass. (2 Pick.) 49.

11 Townsend v. People, 4 Ill. 328.

12 State v. Weller, 20 N. J. L. (Spenc.) 524.

13 State v. Bonney, 34 Me. 224; Edwards v. Com., 36 Mass. (19 Pick.) 136.

Counterfeit coin[14] charged to have been in the possession of the accused, the indictment must allege an intent to defraud,[15] and also that accused had knowledge of the spurious character of the coin.[16] Where the statute requires it, there must be an allegation that the counterfeit was in the similitude[17] of the genuine,[18] otherwise such allegation is said not to be necessary,[19] but the safer practice is to so allege. There must also be an allegation that the coin charged to have been counterfeited was current by law and usage of the state at the time;[20] but where there is an averment that the coin was one of the silver or other coins of the United States, that is sufficient without a specific allegation that it was current in the state.[21]

§ 551. Passing counterfeit money.[1] An indictment charging accused with uttering and passing counterfeit money—whether bank-bills, coin, or treasury notes—must allege that the money was passed to a particular person, firm or corporation,[2] the name of the person, firm or

14 **As to form of indictment** for having counterfeit coin in one's possession, see Forms Nos. 731, 732.

15 People v. Farrell, 30 Cal. 317; State v. Keneston, 59 N. H. 37; United States v. Otey, 12 Sawy. 416, 31 Fed. 72.

16 People v. Stanton, 39 Cal. 698.

17 **Charging counterfeiting silver coin** implies that the counterfeit pieces were made in the similitude of, but not really of, silver.—State v. McPherson, 9 Iowa 53.

"Similar" is not equivalent to the use of the statutory words "in the similitude of," and can not be substituted therefor.—State v. McKenzie, 42 Me. 392.

18 State v. McKenzie, 42 Me. 392.

19 Nicholson v. State, 18 Ala. 529, 54 **Am. Dec.** 168; State v. Williams, 8 Iowa 533; United States v. Weikel, 8 Mont. 124, 19 Pac. 396; United States v. Trout, 4 Biss. 105, Fed. Cas. No. 16542; United States v. Owens, 37 Fed. 112, citing United States v. Howell, 78 U. S. (11 Wall.) 432, 436.

20 State v. Williams, 8 Iowa 535; Com. v. Stearns, 51 Mass. (10 Metc.) 258; Fight v. State, 7 Ohio (pt. I) 180, 28 **Am. Dec.** 626.

21 State v. Griffin, 18 Vt. 198.

1 **As to form of indictment** for uttering and passing counterfeit money, see Forms Nos. 717-725.

2 Gabe v. State, 6 Ark. 540.

corporation must be set out[3] where known, and where it is not known, that fact must be stated;[4] but where the wording of the statute is "with intent to defraud any person whatsoever," it has been held to be sufficient for the indictment to set out the name of the person intended to be defrauded, without giving the name of the person to whom the counterfeit was passed.[5]

Intent to defraud being an essential element of the offense on a charge of uttering and passing counterfeit money, that intent must be specifically alleged;[6] but an intent to defraud will be presumed from the act of uttering and passing the money with knowledge of the false and base character of same.[7]

Knowledge of the base or false character of the bill or coin uttered and passed is an essential ingredient in the offense of uttering and passing counterfeit money, and that fact must be distinctly alleged in the indictment;[8]

3 Buckley v. State, 2 G. Greene (Iowa) 162.

4 Buckley v. State, 2 G. Greene (Iowa) 162.

5 United States v. Bejandio, 1 Woods 294, Fed. Cas. No. 14561.

6 State v. Nicholson, 14 La. Ann. 799; Com. v. Woodbury, Thacher Cr. Cas. (Mass.) 47; Com. v. Goodenough, Thacher Cr. Cas. (Mass.) 132; State v. Seran, 28 N. J. L. (4 Dutch.) 519; State v. Penny, 4 N. C. 130; Van Valkenburgh v. State, 11 Ohio 400; Hutchins v. State, 13 Ohio 199; Fergus v. State, 14 Tenn. (6 Yerg.) 345; Hooper v. State, 27 Tenn. (8 Humph.) 93, 101; Williams v. State, 28 Tenn. (9 Humph.) 80; Brown v. Com., 2 Leigh (Va.) 773; United States v. Otey, 12 Sawy. 416, 31 Fed. 71.

7 McGregor v. State, 16 Ind. 9, 13.

8 See: IND.—Hampton v. State, 8 Ind. 338; Wilkinson v. State, 10 Ind. 372; McGregor v. State, 16 Ind. 9. IOWA—Buckley v. State, 2 G. Greene 162. LA.—State v. Nicholson, 14 La. Ann. 799. MASS.—Com. v. Houghton, 8 Mass. 107. MO.—Hobbs v. State, 9 Mo. 855. N. H.—State v. Ward, 6 N. H. 529. N. J.—State v. Seran, 28 N. J. L. (4 Dutch.) 519. N. C.—State v. Ward, 9 N. C. (2 Hawks.) 443; State v. Dourdon, 13 N. C. (2 Dev. L.) 443. PA.—Butler v. Com., 12 Serg. & R. 237, 14 Am. Dec. 679. TENN.—State v. Shelton, 26 Tenn. (7 Humph.) 31; Hooper v. State, 27 Tenn. (8 Humph.) 100; Owen v. State, 37 Tenn. (5 Sneed) 493. VA.—Brown v. Com., 2 Leigh 773; Hendrick v. Com., 5 Leigh 707; Buckland v. Com., 8 Leigh 735; Jett v. Com., 18 Gratt. 933. WIS.—State v. Norton, 8 Wis. 352. FED.—United States v. Howell, 78 U. S. (11 Wall.) 432, 20 L. Ed. 195; United

but it seems that it need not be alleged that accused passed same as genuine.[9]

§ 552. Bartering or selling counterfeit money.[1] Selling counterfeit money is one form of uttering and passing the same, and an indictment charging the offense is substantially the same as the indictment charging uttering and passing, treated in the preceding section. An indictment charging having in possession and making a sale of counterfeit bank-notes, need not aver that the sale was for a consideration, or to the injury of any one, or that the notes were indorsed,[2] because the indorsement is not considered as a part of the note.[3]

Devices for sale of counterfeit money being prohibited and made an indictable offense by statute,[4] an indictment charging an effort or attempt to sell "green goods"[5] by means of circulars and letters, or by other means and devices, must show an offense completed in itself, and also show that the purpose of the accused was to sell and circulate counterfeit money,[6] or it will be wholly insufficient.[7]

§ 553. Making[1] or having in possession[2] counterfeiting tools. The statute making it an indictable offense

States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Roudenbush, 1 Baldw. 514, Fed. Cas. No. 16198. ENG.—R. v. Page, 9 Car. & P. 756, 38 Eng. C. L. 322; R. v. Jones, 9 Car. & P. 761, 38 Eng. C. L. 325.

Accessory before the fact should be charged with guilty knowledge. —State v. Seran, 28 N. J. L. (4 Dutch.) 519.

9 State v. Wilkins, 17 Vt. 151.

1 As to form of indictment for bartering or selling counterfeit money, see Forms Nos. 726-728.

2 Hess v. State, 50 Mo. 5, 22 Am. Dec. 767.

3 Id. See Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Ross, 2 Mass. 373.

4 As N. Y. Pen. Code, § 527.

5 Indictment for advertising "green goods," see Form No. 728.

6 See People v. Albow, 140 N. Y. 133, 10 N. Y. Cr. Rep. 546, 35 N. E. 438; People v. Reilly, 51 Hun (N. Y.) 624, 4 N. Y. Supp. 81; People v. Marvin, 79 Hun (N. Y.) 310, 9 N. Y. Cr. Rep. 247, 29 N. Y. Supp. 381, affirmed, 144 N. Y. 647, 39 N. E. 494.

7 People v. Albow, supra.

1 As to form of indictment for making instrument for counterfeiting, see Form No. 737.

2 As to form of indictment for

to make or have in possession counterfeiting tools or instruments must be followed strictly in an indictment charging that offense. If the statute uses the word "knowingly" in connection with the making or possession, the indictment must charge the act as knowingly done;[3] and if the statute uses the words "for purposes of counterfeiting" or words of like import, in connection with the keeping, the indictment must allege that the instruments were kept by the accused for purposes of counterfeiting.[4] The indictment should fully describe the instruments or tools employed[5] and the manner of their use,[6] a single allegation of fraudulent use not being sufficient in that it states a conclusion simply, and the facts upon which that conclusion is based should be set forth.[7]

having counterfeiting instruments in possession, see Forms Nos. 738-741.

3 Chamberlain v. State, 5 Blackf. (Ind.) 573.

Charge instrument secretly kept for purpose of counterfeiting sufficiently charges that the act was knowingly done.—Sutton v. State, 9 Ohio 133.

4 People v. Page, 1 Idaho 102.

Material for counterfeiting charged, indictment must allege accused had it in his possession with intent to use and employ it in counterfeiting. — Com. v. Cone, 2 Mass. 132.

5 Chamberlain v. State, 5 Blackf. (Ind.) 573; People v. State, 6 Blackf. (Ind.) 96; State v. Collins, 10 N. C. (3 Hawks.) 191; Bradford v. State, 22 Tenn. (3 Humph.) 370.

6 Id.

7 Bell v. State, 10 Ark. 539.

CHAPTER XXXV.

INDICTMENT—SPECIFIC CRIMES.

Disorderly Conduct and Persons.

§ 554. Form and sufficiency of indictment.[1] The offense of disorderly conduct, or of persons being disorderly, is a statutory offense in practically all the states in the Union, and an indictment or information charging such offense must set forth all the facts which, by the statute under which the indictment is drawn, are made constituents of the offense,[2] with sufficient particularity to show that the accused has been guilty of an infraction of the statute.[3] Thus, it has been said that a charge of disturbing the peace "by loud and unusual noise" must fully set forth the acts complained of;[4] a charge of disturbing a family "by offensive conduct" must set out the

1 As to forms of indictment for disorderly conduct and against disorderly persons, see Forms Nos. 744-775.

2 Ivey v. State, 61 Ala. 58; People ex rel. Kingsley v. Pratt, 22 Hun (N. Y.) 300.

3 "By offensive and indecent conversation" does not sufficiently set forth the statutory offense of disturbing the peace "by loud and offensive or indecent conversation." — State v. Gallego, 57 Mo. App. 515.

4 State v. James, 37 Mo. App. 214.

"By loud and offensive and indecent conversation, by cursing and swearing," sufficiently describes the acts by which the peace was disturbed. — State v. Parker, 39 Mo. App. 116.

acts constituting the conduct complained of,[5] and the like. Where the alleged disorderly conduct was an offense at common law, and there is no statutory form of indictment prescribed, the offense should be charged as at common law.[6] But whatever the form of the indictment, it must be sufficiently specific to inform the accused with certainty as to the exact charge he is called upon to meet.[7]

Intent to break the public peace need not be alleged, unless the statute requires such an allegation, a wilful or malicious intent being imparted by the character of the act.[8]

Following language of statute setting forth all the essential elements of the offense sought to be charged, has been said to be sufficient;[9] but where the statutory words

5 Finch v. State, 64 Miss. 461, 1 So. 630.

6 Goree v. State, 71 Ala. 7.

7 An indictment charging a disturbance of the peace of a family "by loud and unusual noise" is insufficient. — State v. James, 37 Mo. App. 214.

To charge that accused did "revel, quarrel, commit mischief, and otherwise behave in a disorderly manner," is not bad for uncertainty.—In re Began, 12 R. I. 209.

8 State v. Archibald, 59 Vt. 548, 59 Am. Rep. 755, 9 Atl. 362.

9 ALA.—Yancy v. State, 63 Ala. 141; Weaver v. State, 79 Ala. 279; Jackson v. State, 137 Ala. 80, 34 So. 611. CAL.—Ex parte Foley, 62 Cal. 508. KAN.—City of Topeka v. Heitman, 47 Kan. 739, 28 Pac. 1096; State v. Brower, 75 Kan. 823, 88 Pac. 884. MISS.—Quin v. State, 65 Miss. 479, 4 So. 548. MO.—State v. Fogerson, 29 Mo. 416; State v. Fare, 39 Mo. App. 110, overruling State v. Bach, 25 Mo. App. 554; State v. Brumley, 53 Mo. App. 126; State v. Hocker, 63 Mo. App. 415. TEX.—Foreman v. State, 31 Tex. Cr. Rep. 477, 20 S. W. 1109.

It is sufficient to charge the offense in the substantial form of the act when it is specific as to time, place, and language used.—Bassette v. State, 51 N. J. L. 502, 18 Atl. 354.

"A woman," where statute uses "a female," sufficient.—Jackson v. State, 137 Ala. 80, 34 So. 611.

"Conversation" used in the statute, an indictment charging wilfully and unlawfully disturbing the peace of the neighborhood "by then and there cursing and swearing, and by loud and abusive and indecent language," held to be sufficient, the words "conversation" and "language" being equivalent in meaning.—State v. Fogerson, 29 Mo. 416.

do not fully describe the offense the indictment or information must further set forth facts and circumstances which show fully the criminal nature of the acts of which complaint is made.[10] However, there are authorities which hold that it is not sufficient to charge the offense in the language of the statute.[11]

Duplicity can not be charged against an indictment or information which charges a series of acts in the conjunctive, which the statute enumerates in the disjunctive;[12] neither will an indictment be regarded as duplicitous where it joins an insufficient count with a sufficient count.[13]

§ 555. ABUSIVE, INDECENT, OFFENSIVE, OR PROFANE LANGUAGE.[1] Where the disorderly conduct complained of is the use of abusive language, in some jurisdictions the language is not required to be set out,[2] but the general rule and the better practice require that the indictment or information shall specifically set out the language or words used;[3] where the gist of the offense is the disturb-

10 State v. Coffing, 3 Ind. App. 304, 29 N. E. 615; State v. Brewington, 84 N. C. 783.

11 State v. Peirce, 43 N. H. 273.

Where offensive conduct is the offense, the indictment must set out the facts constituting it, and it is not sufficient to follow the language of the statute.—Finch v. State, 64 Miss. 461, 1 So. 630.

12 As "making a great noise, brawl and tumult."—State v. Perkins, 42 N. H. 464.

Charging making "a brawl or tumult" is good. — State v. Rollins, 55 N. H. 101.

13 State v. Rollins, 55 N. H. 101.

1 **As to forms of indictment,** see Forms Nos. 769-775.

2 Ex parte Foley, 62 Cal. 508; State v. Fare, 39 Mo. App. 110, overruling State v. Bach, 25 Mo. App. 554; State v. Parker, 39 Mo. App. 116, overruling State v. Bach, 25 Mo. App. 554; Foreman v. State, 31 Tex. Cr. Rep. 477, 20 S. W. 1109.

Character of language or conversation must be stated with sufficient particularity to show the statute has been offended against by the accused.—State v. James, 37 Mo. App. 214.

3 Walton v. State, 64 Miss. 207, 8 So. 171; State v. Barham, 79 N. C. 646; State v. Brewington, 84 N. C. 783; Steuer v. State, 59 Wis. 472, 18 N. W. 423.

Abusive language charged against accused by unlawfully, in the presence and hearing of A, calling A names, which are set out, is sufficient, although not containing the statutory words "con-

ance of the public peace, and not the language made use of, the rule is relaxed and the language or words used need not be so particularly described.[4] In those cases in which the language or words used are not necessarily violative of the statute—e. g., not abusive, not indecent, not licentious, not offensive, not profane—unless made so by extrinsic circumstances, the indictment or information, in addition to the language or words used, must show in what connection the language or words complained of were used.[5]

Addressing, annoying, or disturbing persons[6] being charged, the name of the person thus addressed, annoyed or disturbed must be set out in the indictment or information with sufficient particularity as to the acts complained of and the circumstances of the situation to show a breach of the statute by the accused.[7] Thus, where the charge against the accused is under a statute denouncing and punishing the use of abusive, vulgar or insulting language or words "in the presence of the family of the owner or possessor thereof, or of any member of his family, or of any female," the indictment or information must specifically allege the presence of some one or more of the persons mentioned in the statute, otherwise there will be no offense stated under the statute,[8] and the name or names of such person or persons should be set out,

cerning him."—Menasco v. State, 32 Tex. Cr. Rep. 582, 25 S. W. 422.

4 State v. Fogerson, 39 Mo. 417 (indictment upheld, although it did not set forth the language or words used); State v. Fare, 39 Mo. App. 110, overruling State v. Beach, 25 Mo. App. 554; State v. Parker, 39 Mo. App. 116.

5 State v. Coffing, 3 Ind. App. 304, 29 N. E. 615; Peters v. State, 66 Wis. 339, 28 N. W. 138.

6 "Peeping Tom," as to form and sufficiency of indictment, see Form No. 762; also, City of Grand Rapids v. Williams, 112 Mich. 247, 67 Am. St. Rep. 396, 36 L. R. A. 137, 70 N. W. 547.

7 State v. Clarke, 31 Minn. 207, 17 N. W. 344; Menasco v. State, 32 Tex. Cr. Rep. 582, 25 S. W. 422.

8 Ivey v. State, 61 Ala. 58.

"A woman" alleged to be present, instead of "a female," used in statute, does not vitiate the indictment.—Jackson v. State, 137 Ala. 80, 34 So. 611.

where known,[9] it not being sufficient merely to set out the language or words complained of and allege that it was uttered in the presence of others.[10]

Profane swearing[11] charged against the accused, the indictment or information must allege that the words were used in the presence and hearing of divers persons,[12] an allegation that it was done publicly not being sufficient;[13] and it must in addition charge every element of the offense as the same is defined by the statute under which drawn,[14] and must set out the profane language or words used, where the statute so requires.[15]

§ 556. Discharging firearms near public highway.[1] Many of the states of the Union have statutes prohibiting and punishing the discharge of firearms in or near a public highway. Where these statutes contain any exceptions, an indictment or information charging the offense must negative and the proof must show that the shooting charged did not fall within the exception in the statute. Thus, the Georgia statute[2] provides that "if any person shall, between dark and daylight, wilfully and wantonly fire off or discharge any loaded gun or pistol on a public highway, and within fifty yards of a public

9 State v. Clarke, 31 Minn. 207, 17 N. W. 344.

10 Peters v. State, 66 Wis. 339, 28 N. W. 138.

11 As to profanity, see, infra, § 560; also, title "Profanity," this chapter.

As to form of indictment for profane swearing, see Forms Nos. 763, 764.

Profane swearing as a public nuisance, see, infra, § 560.

12 Goree v. State, 71 Ala. 7.

13 Id.

14 Where the indictment fails to charge that the use of the language was "to the annoyance of others" it is fatally defective, and charges no offense under the statute.—Herbes v. State, 79 Neb. 832, 113 N. W. 530.

15 Walton v. State, 64 Miss. 207, 8 So. 171.

1 Form of indictment for discharging firearms in city or town, or in or near a public highway. See Forms Nos. 742, 743.

2 Ga. Pen. Code, § 508.

Shooting "sling shot" in city is not disorderly conduct unless it creates disorder or disturbs the public peace.—Kinney v. Town of Blackshear, 115 Ga. 810, 42 S. E. 231.

highway, except in defense of person or property, or on his own premises," etc. In a prosecution under this statute the court held that it was necessary to allege and prove that the shooting was not done "in defense of person or property."[3]

§ 557. Eavesdropping. The offense of eavesdropping is disorderly conduct indictable both at common law[1] and under statute;[2] but to be indictable at common law it must be an habitual course of conduct, and combine the lurking about a dwelling-house and other places where persons meet for private discourse,[3] secretly listening to

3 Rumph v. State, 119 Ga. 121, 15 Am. Cr. Rep. 203, 45 S. E. 1002.

"Incumbent on the state to negative each of these things in order to make out the offense. All are negatived in the accusation, and the fact that the shooting was not done on the premises of the accused was proved, but the state wholly failed to exclude the other two. The line is sometimes very closely marked between what exceptions need be proved and what need not. It is safe to say, however, that whenever the exception constitutes a part of the offense itself, and not merely an exception to a general offense previously defined, it is necessary to allege and prove that the case is not within the exception. Or, to state it differently, whenever a statute makes penal an act when committed by a particular class of persons, or when committed under particular circumstances, it must appear that the person accused was within the particular class, or committed the act under the particular circumstances."—Id. See Herring v. State, 114 Ga. 96, 39 S. E. 866.

"When the statute provides that the commission of an act by any person, or under any circumstances, shall constitute an offense, and then declares that the provisions of the act shall not apply to a particular class of persons, or to a specified set of circumstances, the burden is on the accused to show that he comes within some of those exceptions."—Rumph v. State, supra. See Elkins v. State, 13 Ga. 435; Cook v. State, 26 Ga. 605; Tigner v. State, 116 Ga. 114, 45 S. E. 1001; Kitchens v. State, 116 Ga. 847, 43 S. E. 256.

1 State v. Davis, 139 N. C. 547, 111 Am. St. Rep. 816, 51 S. E. 897; Com. v. Lovett, 4 Clark (Pa.) 5, 6 Pa. L. J. 226; State v. Williams, 2 Tenn. (2 Overt.) 108; State v. Pennington, 40 Tenn. (3 Head) 299, 75 Am. Dec. 771.

2 As N. Y. Pen. Code (1881), § 436.

3 As stealthily approaching grand jury room while grand jury is in session, for purpose of overhearing what is said and done.—State v. Pennington, 40 Tenn. (3 Head) 299, 75 Am. Dec. 771.

what is said and then tattling it abroad,[4] and an indictment at common law must so allege. An indictment which fails to describe the conduct as habitual, or to allege facts from which such habit may be inferred, or fails to allege that anything heard while thus listening was repeated in the hearing of divers other persons, is insufficient.[5]

§ 558. NIGHT-WALKING.[1] Night-walking or street-walking is an indictable offense at common law,[2] and consists in being abroad at night for the purpose of committing some crime,[3] or for the purpose of disturbing the peace,[4] or of doing some wrongful or wicked act;[5] but the term is usually applied to women who stroll the streets at night for the unlawful purpose of picking up men for the purpose of lewd intercourse, whether with or without the expectation of gain therefrom.[6] An indictment or information charging the offense should describe the acts complained of, but need not allege that the act was done for the purpose of gain.[7]

4 State v. Davis, 139 N. C. 547, 111 Am. St. Rep. 816, 51 S. E. 897.

See, also, 2 Kerr's Whart. Crim. Law, § 1717.

5 State v. Davis, 139 N. C. 547, 111 Am. St. Rep. 816, 51 S. E. 897.

1 As to form of indictment for night-walking, see Forms Nos. 755, 756.

2 Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22, 9 So. 400; Williams v. State, 98 Ala. 52, 13 So. 333; Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96; State v. Dowers, 45 N. H. 543.

See, also, 2 Kerr's Whart. Crim. Law, § 1717.

3 As a prostitute plying her trade.—Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22, 9 So. 400.

Mere presence of prostitute in or return to corporate limits is not an indictable offense; some overt acts are necessary to make her liable.—Paralee v. City of Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. 654. See Buell v. State, 45 Ark. 336.

4 Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22, 9 So. 400; Paralee v. City of Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. 654.

5 Persons eavesdropping, casting men's gates, carts, and the like, are night-walkers.—Thomas v. State, 55 Ala. 260.

6 Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22, 9 So. 400.

7 Thomas v. State, 55 Ala. 260; Stokes v. State, 92 Ala. 73, 25 Am. St. Rep. 22, 9 So. 400.

§ 559. PLACE OF OFFENSE. The place where the disorderly conduct complained of occurred, being an essential element in the offense sought to be charged, the indictment or information must specifically set out the locality of the alleged offense,[1] and a local offense must be described as committed in a particular town,[2] it being insufficient merely to charge that the offense was committed in the presence of divers persons.[3] Designation of the place as "a street" in a named city or town is sufficient without describing or naming the street;[4] and the same is true of an allegation of place as "a house on the corner" of two named streets in a designated city or town.[5]

Abusive language, and the like, "at the dwelling-house of another, or the yard or curtilage thereof, or upon any public highway, or in any other place near such premises," being denounced by a statute, an indictment charging accused used abusive language "near the premises" of a named person, fails to state an offense within the prohibition of the statute.[6]

Rude, indecent or disorderly conduct "in any street, lane, alley," etc., being denounced by the statute, an indictment or information must set out the place at which the offense occurred; charging the offense was committed

1 Quin v. State, 65 Miss. 479, 4 So. 548; Cowell v. State, 63 N. J. L. 523, 43 Atl. 436.

"A place where people commonly resort" in an indictment charging disturbing the peace, is equivalent to the statutory words "a place where people commonly assemble." — Hammond v. State, (Tex. Cr. Rep.) 28 S. W. 204.

2 See State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135.

Under Delaware Act March 26, 1909 (25 Del. Laws, ch. 247), indictment must charge that the misconduct was committed in a public place within the state and outside of the limits of an incorporated city or town.—Lofland v. State, 26 Del. (3 Boyce) 333, 83 Atl. 1033.

3 State v. Kennison, 55 N. H. 242.

4 State v. Brown, 38 Kan. 390, 16 Pac. 259.

5 City of Grand Rapids v. Williams, 112 Mich. 247, 67 Am. St. Rep. 396, 36 L. R. A. 137, 70 N. W. 547.

6 State v. Moore, (Miss.) 24 So. 308.

"openly and in the presence of divers persons" does not bring the act complained of within the statute because it does not show it to have occurred at a place named in such statute.[7]

§ 560. PUBLIC NUISANCE. Disorderly conduct or language of accused charged as a public nuisance, the indictment or information must show that the whole community was affected; it will not be sufficient to allege designated persons were disturbed thereby.[1] Disorderly conduct in uttering loud cries and exclamations in a public street charged as a common nuisance, it is necessary to allege that it was such to all the citizens of the commonwealth there inhabiting, being and residing,[2] an allegation that it disturbed "divers citizens" being insufficient.[3]

Profane swearing is indictable as disorderly conduct[4] and also as a public nuisance,[5] but is not per se a public nuisance,[6] and an indictment charging profanity as a public nuisance must properly allege facts showing it to be such, such as continued public use in a loud and boisterous manner[7] and in the hearing of divers persons.[8]

7 State v. Kennison, 55 N. H. 242.

1 State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 195.

2 Com. v. Smith, 60 Mass. (6 Cush.) 80; Com. v. Harris, 101 Mass. 39; Com. v. Oaks, 113 Mass. 8.

3 Com. v. Smith, 60 Mass. (6 Cush.) 80.

4 See, supra, § 555, footnotes 11-15.

5 State v. Kirby, 5 N. C. (1 Murph. L.) 254; State v. Ellar, 12 N. C. (1 Dev. L.) 267; State v. Graham, 35 Tenn. (3 Sneed) 134; Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

6 State v. Powell, 70 N. C. 67; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713.

7 State v. Powell, 70 N. C. 67; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713.

See, also, in this connection: State v. Kirby, 5 N. C. (1 Murph.) 254; State v. Ellar, 13 N. C. (2 Dev. L.) 267; State v. Baldwin, 22 N. C. (2 Dev. & B. L.) 195; State v. Jones, 31 N. C. (9 Ind. L.) 38; State v. Graham, 35 Tenn. (3 Sneed) 134; Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

8 State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

Thus, an indictment alleging the singing of a ribald song in a loud and boisterous manner, in a public street, in the presence and hearing of numerous persons, charges a public nuisance.[9]

§ 561. Second and subsequent offenses. Where the statute provides for a more severe punishment for a second and subsequent offenses of disorderly conduct, and it is sought to secure an infliction of the heavier penalty, the indictment or information must specially allege a prior conviction or convictions, the same as in all other cases where the heavier penalty is sought because of a former conviction for the same kind of an offense;[1] but a charge of a third offense need simply allege the two previous convictions, it not being necessary to state that the former convictions were for first and second offenses.[2]

9 State v. Toole, 106 N. C. 736, 11 S. E. 168.

1 CAL.—People v. Carlton, 57 Cal. 559. MD.—Maguire v. State, 47 Md. 485. MASS.—Plumbley v. Com., 43 Mass. (2 Metc.) 413. OHIO—Larney v. City of Cleveland, 34 Ohio St. 599. PA.—Rauch v. Com., 78 Pa. St. 490. VT.—State v. Freeman, 27 Vt. 523. VA.—Rand v. Com., 50 Va. (9 Gratt.) 938. ENG.—R. v. Page, 9 Car. & P. 756, 38 Eng. C. L. 437; R. v. Willis, L. R. 1. C. C. 363; R. v. Allen, R. & R. 513.

2 People v. Booth, 121 Mich. 131, 79 N. W. 1100.

CHAPTER XXXVI.

INDICTMENT—SPECIFIC CRIMES.

Disorderly Houses.

§ 562. In general.[1] Keeping a disorderly house may be prohibited both by city ordinance and by state statute, and the fact that accused has been prosecuted and punished under the city ordinance for keeping a disorderly house in violation of such ordinance will not be a bar to a prosecution for a violation of the state statute by the same acts and circumstances.[2] In some jurisdictions it is held that a prosecution on a charge of keeping a disorderly house can be maintained by indictment,[3] only, and that a statute authorizing proceedings by any other means is unconstitutional,[4] in others by information,[5] while in other jurisdictions the offense of keeping[6]

1 As to forms of indictment for offenses relating to disorderly houses, see Forms Nos. 777-802.

2 Kemper v. Com., 85 Ky. 219, 7 Am. St. Rep. 593, 3 S. W. 159; State v. Lee, 29 Minn. 445, 3 N. W. 913; State v. Sanders, 68 S. C. 192, 47 S. E. 55.

Compare: State v. Thornton, 37 Mo. 360, holding contrary, and State v. Oleson, 26 Minn. 507, 5 N. W. 959, in which court was unable to agree.

3 Indictment is the appropriate remedy both at common law and under the statute in proceedings to suppress the keeping of houses of ill fame.—Welch v. Stowell, 2 Doug. (Mich.) 332.

4 Atlantic City v. Rollins, (N. J.) 69 Atl. 964.

5 See State v. Ball, 93 Kan. 606, 144 Pac. 1012; State v. Hendricks, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93; Brooks v. State, 4 Tex. App. 567.

6 Com. v. Ballou, 124 Mass. 62.

or of living in[7] a bawdy-house or house of ill-fame may be prosecuted either by indictment or on complaint.

Corporation may be indicted[8] for keeping a disorderly house.[9]

Male frequenting bawdy-house or house of ill-fame for purposes of lewdness may be indicted, and the indictment need not set out the specific acts of lewdness constituting the offense complained of.[10]

§ 563. Form and sufficiency of indictment. An indictment charging keeping a disorderly house, framed in the language of the statute under which drawn, is generally sufficient;[1] but the offense must be set forth with certainty.[2] Quære, whether at common law, it was necessary to allege the house was kept for lucre.[3] It is not necessary to allege that prostitutes resort thereto;[4] and where the offense charged is the keeping of a disorderly house "to the encouragement of idleness and other misbehavior," it is not necessary to set out the facts consti-

7 Webber v. Harding, 155 Ind. 408, 58 N. E. 533.

8 As to indictment against a corporation and the necessary formal allegations, see Form No. 88.

9 State v. Passaic County Agricultural Assn., 54 N. J. L. 260, 23 Atl. 680.

10 State v. Rayburn, 170 Iowa 514, L. R. A. 1915F, 640, 153 N. W. 59.

1 See: ALA.—Sparks v. State, 59 Ala. 82. COLO. — Howard v. People, 27 Colo. 396, 61 Pac. 595. IOWA — State v. Alderman, 40 Iowa 375; State v. Toombs, 79 Iowa 741, 45 N. W. 300. ME.—State v. Homer, 40 Me. 438. MASS.—Com. v. Ashley, 68 Mass. (2 Gray) 356. MO.—State v. Bregard, 76 Mo. 322. NEV.—In re Breckenridge, 34 Nev. 275, Ann. Cas. 1914B, 871, 118 Pac. 687. TEX.—Schulze v. State, 56 S. W. 918; Farrell v. State, 64 Tex. Cr. Rep. 200, 141 S. W. 535. WASH.—State v. Brown, 7 Wash. 10, 34 Pac. 132. W. VA.—State v. Jones, 53 W. Va. 613, 45 S. E. 916.

See, also, footnote 6, this section.

Where the language of the statute is followed, the indictment will be held sufficient on demurrer or on motion to quash.—State v. Jones, 53 W. Va. 613, 45 S. E. 916.

2 Linden Park Blood Horse Assn. v. State, 55 N. J. L. 557, 9 Am. Cr. Rep. 235, 27 Atl. 1091.

3 Jennings v. Com., 34 Mass. (17 Pick.) 80.

4 Brooks v. State, 4 Tex. App. 567.

tuting the "other misbehavior."[5] The general rule is that in a charge of keeping a disorderly house it is not necessary to specify the particular acts of disorderly conduct complained of, it being sufficient to follow the language of the statute,[6] when sufficient to set out so much of the facts as to show the criminal character of the offense charged against the accused;[7] but there are cases which hold that such acts are a necessary part of the indictment,[8] and that a general charge of keeping a disorderly house is insufficient.[9]

A common nuisance by statute to keep a disorderly house, the indictment must allege that the house was a public place, or that the public were affected thereby,[10] and the omission is not supplied by the concluding allegation that it was "to the great damage and common nuisance of all the citizens of the state."[11] Yet it has

5 Jones v. State, 2 Ga. App. 433, 58 S. E. 559.

"Other misbehavior" surplusage. —Jones v. State, 2 Ga. App. 433, 58 S. E. 559, citing Brand v. State, 112 Ga. 25, 37 S. E. 100, and Hubbard v. State, 123 Ga. 17, 51 S. E. 11.

Sufficient to support conviction under such a charge if the evidence showed that the defendant kept a common, ill-governed, and disorderly house, to the encouragement of idleness and drinking. —Jones v. State, 2 Ga. App. 433, 58 S. E. 559.

6 Howard v. People, 27 Colo. 400, 61 Pac. 595, citing Leary v. State, 39 Ind. 544; Com. v. Pray, 30 Mass. (13 Pick.) 359; Stratton v. Com., 51 Mass. (10 Metc.) 217; State v. Hayward, 83 Mo. 299; State v. Dame, 60 N. H. 479, 49 Am. Rep. 331; Com. v. Stewart, 1 Serg. & R. (Pa.) 342; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. See, also, authorities, footnote 1, this section.

7 State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; In re Breckenridge, 34 Nev. 275, Ann. Cas. 1914B, 871, 118 Pac. 687; State v. Dame, 60 N. H. 479, 49 Am. Rep. 331.

8 See Leary v. State, 39 Ind. 544; Hosea v. State, 47 Ind. 180; Frederick v. Com., 43 Ky. (4 B. Mon.) 7; Linden Park Blood Horse Assn. v. State, 55 N. J. L. 557, 9 Am. Cr. Rep. 235, 27 Atl. 1091.

9 Linden Park Blood Horse Assn. v. State, 55 N. J. L. 557, 9 Am. Cr. Rep. 235, 27 Atl. 1091.

10 Mains v. State, 42 Ind. 327, 13 Am. Rep. 364.

11 Id.

Must allege facts making it a nuisance, such as that it is a public place, or that people reside near thereto, or other facts and circumstances showing the public

been said that a house tending to public annoyance is a disorderly house, although one person only is actually disturbed.[12]

Bawdy-house or house of ill-fame charged as kept by accused, the indictment need not set out the names of the persons frequenting the place,[13] nor of the inmates thereof,[14] nor state the facts concerning their character,[15] for these matters may be given in evidence under the general charge.[16] Some authorities hold that the indictment must allege it to be a common nuisance;[17] others that it should be alleged whether the premises were owned or leased by the accused, or under his control,[18]

is affected thereby. — Mains v. State, 42 Ind. 327, 13 Am. Rep. 364; State v. Plant, 67 Vt. 454, 48 Am. St. Rep. 821, 32 Atl. 237.

Prostitutes and vagabonds resorting to and buying and drinking beer does not in and of itself constitute a place a disorderly house, where respectable people also resort there for the same purpose, and the proprietor is engaged in carrying on a legitimate business. — Harmes v. State, 26 Tex. App. 190, 8 Am. St. Rep. 470.

12 Com. v. Hopkins, 133 Mass. 381, 43 Am. Rep. 527.

13 State v. Beebe, 115 Iowa 128, 88 N. W. 358; City of Poplar Bluff v. Meadows, 187 Mo. App. 450, 173 S. W. 11; State v. Patterson, 29 N. C. (7 Ired.) 70, 45 Am. Dec. 506.

The names of the persons charged with having indulged in illegal practices in a house of ill-fame need not be alleged, especially where the city prosecutor does not know them.—City of Poplar Bluff v. Meadows, 187 Mo. App. 450, 173 S. W. 11.

14 State v. Raymond, 86 Mo. App. 537.

15 Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; State v. Dame, 60 N. H. 479, 49 Am. Rep. 331.

16 State v. Patterson, 29 N. C. (7 Ired. L.) 70, 45 Am. Dec. 506.

17 Com. v. Davis, 77 Mass. (11 Gray) 48.

A conviction for keeping a disorderly house may be sustained where the defendant was charged with keeping an "ill governed house" but the indictment failed to allege that it was "to the common nuisance."—State v. Wilson, 93 N. C. 608.

Where it is alleged that the house was kept to the common nuisance of all good citizens, there need be no express allegation that the accused kept a common nuisance. — Wells v. Com., 78 Mass. (12 Gray) 326.

18 State v. Ball, 93 Kan. 606, 144 Pac. 1012.

Under the White Slave Act, § 2 (Laws 1913, ch. 179), it is unnecessary to specifically allege that the man and woman were not husband and wife where the language employed makes such an inference

but other cases hold that such facts are immaterial and need not be alleged.[19]

Bill of particulars will be denied by the court where the indictment or information is sufficiently specific in its statement of the facts constituting the offense.[20]

Variance immaterial, indictment or information will not be vitiated,[21] such as the charge of keeping a disorderly house, when in fact accused has but a single room.[22]

§ 564. TIME. In a prosecution charging accused with keeping a disorderly house, time is not an essential element, and though some time is usually required to be alleged, the exact time need not be stated in the indictment or information.[1] It is held in Maine and Massachusetts, however, that time is a material element, and for that reason the time of the offense must be alleged, and that the state will be barred by the allegation as

impossible.—State v. Ball, 93 Kan. 606, 144 Pac. 1012.

19 Mosher v. State, 63 Tex. Cr. Rep. 42, 136 S. W. 467.

A complaint is not defective because it alleges that the defendant was the owner, tenant, and lessee of the house. — Merrell v. State, (Tex.) 29 S. W. 41.

Where it was alleged that defendant was the tenant and not the lessee, the indictment will not be quashed therefor, since the words are synonymous.—Jackson v. State, (Tex.) 179 S. W. 711.

20 State v. Hendricks, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93.

21 State v. Nichols, 83 Ind. 228, 43 Am. Rep. 66; Com. v. Bulman, 118 Mass. 456, 19 Am. Rep. 469; State v. Hendricks, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93.

22 Com. v. Bulman, 118 Mass. 356, 19 Am. Rep. 469.

1 IND. TER.—Carter v. United States, 1 Ind. Ter. 342, 37 S. W. 204. IND.—State v. Lindley, 14 Ind. 430. IOWA—State v. Arnold, 98 Iowa 253, 67 N. W. 252. KAN.—State v. Reno, 41 Kan. 674, 21 Pac. 803. MASS.—Wells v. Com., 78 Mass. (12 Gray) 326. MINN.—State v. Dufour, 123 Minn. 451, 49 L. R. A. (N. S.) 792, 143 N. W. 1126. FED. — United States v. Burch, 1 Cr. C. C. 36, Fed. Cas. No. 14683; United States v. McCormick, 4 Cranch C. C. 104, Fed. Cas. No. 15661.

Time of keeping bawdy house need not be alleged in indictment. —State v. Wister, 62 Mo. 592, an extreme case, apparently not the rule elsewhere.

to time.[2] Of this latter doctrine Mr. Justice Holmes[3] has said "that it has been thought to be a local peculiarity, and the contrary has been decided elsewhere."[4] Refining on this doctrine a distinction is recognized, in the matter of allegation as to time, between those cases where the offense consists of a single act and those cases where the offense consists of a series of distinct acts; in the first class of cases the precise date is not required to be alleged because not material, while in the latter class of cases an exact date for one of the acts must be fixed, "and on divers days and times" since that day and the date of the finding of the indictment.[5]

Time within a period alleged as being the date of the offense, no particular day need be specified;[6] or the in-

2 State v. Small, 80 Me. 452, 14 Atl. 942; Com. v. Pray, 30 Mass. (13 Pick.) 359; Com. v. Elwell, 67 Mass. (1 Gray) 463; Com. v. Adams, 70 Mass. (4 Gray) 27; Com. v. Gardner, 73 Mass. (7 Gray) 494; Wells v. Com., 78 Mass. (12 Gray) 326; Com. v. Dunster, 145 Mass. 101, 13 N. E. 350.

Doctrine originated in a dictum in the case of Com. v. Pray, 30 Mass. (13 Pick.) 359, 364; was said in Com. v. Briggs, 52 Mass. (11 Metc.) 573, to be the "well-settled" rule, and has been followed in many cases since. See, among other cases, Com. v. Elwell, 67 Mass. (1 Gray) 463; Com. v. Gardner, 73 Mass. (7 Gray) 494; Com. v. Connors, 116 Mass. 35; Com. v. Dunster, 145 Mass. 101, 13 N. E. 350; Com. v. Peretz, 212 Mass. 253, **Ann. Cas.** 1913D, 484, 98 N. E. 1054.

—An offense consisting of successive acts has been said to be governed by the same rule.—Com. v. Elwell, 67 Mass. (1 Gray) 463; Com. v. Traverse, 93 Mass. (11 Allen) 260.

—Dictum followed, on strength of subsequent Massachusetts cases, in Brevaldo v. State, 21 Fla. 789; State v. Small, 80 Me. 452, 14 Atl. 984; Fleming v. State, 28 Tex. App. 234, 12 S. W. 505, but not elsewhere.

3 Speaking for the court in United States v. Kissel, 218 U. S. 601, 609, 54 **L. Ed.** 1168, 1179, 31 Sup. Ct. Rep. 124.

4 See Howard v. People, 27 Colo. 396, 61 Pac. 595; Carter v. United States, 1 Ind. Ter. 347, 37 S. W. 204; State v. Arnold, 98 Iowa 253, 67 N. W. 252; State v. Reno, 41 Kan. 678, 21 Pac. 803; State v. Dufour, 123 Minn. 451, 49 **L. R. A.** (N. S.) 792, 143 N. W. 1126; State v. Ah Sam, 14 Ore. 347, 13 Pac. 303; United States v. Riley, 5 Blatchf. 204, **Fed. Cas. No.** 16164.

5 Com. v. Traverse, 93 Mass. (11 Allen) 260.

6 People v. Russell, 110 Mich. 46, 67 N. W. 1099.

dictment may charge the offense to have been upon a specified date and on divers other days between that date and the time of the finding of the indictment,[7] or the time may be laid between two dates,[8] and the first date may be fixed at any time within the statute of limitations.[9] Where the house has acquired a reputation of being disorderly, it seems that a charge of keeping the place on a single day is sufficient;[10] but where the offense charged consists of a series of acts or course of conduct, the indictment or information, to be sufficient, must show a frequency and continuity of acts or uniform course of conduct during the time fixed.[11]

§ 565. Place. In a charge of keeping a disorderly house the location of the house is sufficiently laid as being within the county;[1] the name of the street on which the

7 State v. Brounrigg, 87 Me. 500, 33 Atl. 11; State v. Peloquin, 106 Me. 358, 76 Atl. 888; Com. v. Wood, 70 Mass. (4 Gray) 11; Com. v. Langley, 80 Mass. (14 Gray) 21; Com. v. Shea, 150 Mass. 314, 23 N. E. 47; State v. Bailey, 21 N. H. 343.

Where it is alleged that on Feb. 2, 1907, and on each and every day from then to March 1, 1907, the accused unlawfully kept a disorderly house for public prostitution and as a common resort for prostitutes and vagabonds, it is sufficient.—Wimberly v. State, 53 Tex. Cr. Rep. 11, 108 S. W. 384.

8 Com. v. Clark, 145 Mass. 251, 13 N. E. 888; People v. Russell, 110 Mich. 46, 67 N. W. 1099.

An indictment charging the keeping of a disorderly house "on the ..... days of ..... 1894, and before the finding of this indictment," without charging a repetition or frequency of the acts of disorder, etc., is insufficient.—Com. v. Bessler, 97 Ky. 498, 30 S. W. 1012.

9 State v. Cofren, 48 Me. 364.

10 State v. Rickards, 21 Minn. 47.

Thus it has been said that time is sufficiently charged where it is averred "that on, to wit, the twentieth day of April" in a named year the accused did keep a house for the purpose of public prostitution, etc.—Lane v. State, 4 Tex. App. 34.

11 Com. v. Bessler, 97 Ky. 498, 30 S. W. 1012; Com. v. Myers, 21 Ky. L. Rep. 1770, 56 S. W. 412; Com. v. Wood, 70 Mass. (4 Gray) 11; People v. Russell, 110 Mich. 46, 67 N. W. 1099.

1 State v. Des Moines Union Ry. Co., 137 Iowa 570, 115 N. W. 232; Wilson v. State, 61 Tex. Cr. Rep. 628, 136 S. W. 447; Farrell v. State, 64 Tex. Cr. Rep. 200, 141 S. W. 535.

Where the indictment alleges a nuisance by openly permitting persons to congregate at her

house is located need not be set out,[2] and the indictment need not give the name of the house or the number of the lot on which situated,[3] or contain any description of the realty on which the house is located.[4]

§ 566. INTENT AND KNOWLEDGE. The indictment need not allege that the offense was committed feloniously, where the charge was the keeping of a house of ill-fame,[1] nor need there be an allegation of an unlawful or guilty intent where the offense is expressly forbidden by statute.[2] In an indictment under a statute punishing any one who directly or as agent keeps or assists in keeping a bawdy-house, a tenant is guilty, and the indictment need not allege that he knowingly permitted the keeping of the house.[3]

§ 567. LEASING PROPERTY FOR PURPOSES OF PROSTITUTION.[1] An indictment or information charging the leasing or letting of a house for purposes of prostitution need not lay the location of such house with the precision required at common law, and need not be more accurate than in

house for the purpose of having sexual intercourse, the house must be located either by street or town.—Meadows v. Com., 31 Ky. Law Rep. 1159, 104 S. W. 954.

2 State v. Stevens, 40 Me. 559.

3 The information need not name the house nor the lot on which it is situated.—Sprague v. State, (Tex.) 44 S. W. 837.

4 The affidavit upon which a prosecution for keeping a house of prostitution is based need not contain any description of the realty on which the house is located.—Johnson v. State, 13 Ind. App. 299, 41 N. E. 550.

1 State v. Beebe, 115 Iowa 128, 88 N. W. 358.

2 Com. v. Shea, 150 Mass. 314, 23 N. E. 47.

3 Farrell v. State, 64 Tex. Cr. Rep. 200, 141 S. W. 535.

Where it was averred that the accused "maintains a house of ill fame resorted to for the purpose of prostitution and lewdness, and in said house for lucre and gain, certain persons, as well men as women of evil fame and dishonest conversation, to frequent and come together, did cause," etc., the knowledge of the character of those he caused to assemble is sufficiently averred. — Com. v. Davis, 9 Ky. Law Rep. 494.

1 **As to indictment for leasing property for bawdy house, etc., see Forms Nos. 798, 799.**

an indictment charging arson or burglary;[2] and it has been said that a failure to allege the location of the house is not fatal to the indictment.[3] The indictment or information must aver that the accused was the owner or in control of the property at the time of the letting,[4] must set out the name of the lessee or properly excuse the failure to do so, and must also aver that the lessee accepted the lease,[5] but need not state the time of the commencement or termination of the lease,[6] or specifically aver that the premises were in fact used for purposes of prostitution.[7] Although some day is required to be alleged as the time of making the lease,[8] where such time is not given as a part of the description of the offense it need not be proved as laid.[9]

Repugnancy is not created by an indictment charging the leasing of a house knowing that the lessee intended to use it for purposes of prostitution, or knowingly permitting the lessee to use the house for purposes of pros-

2 Saunders v. People, 29 Mich. 269, 1 Am. Cr. Rep. 346.

Allegation that defendant did "suffer and permit an indecent and disorderly house to be kept on his plantation or premises" is insufficient in not charging with sufficient certainty that he kept the house, or had leased it to another knowing its intended use, or that the house was within his occupancy and control. — Taylor v. Com., 62 Ky. (1 Duv.) 160.

No conviction at common law can be had on an indictment charging letting a house for bawdy, etc., purposes unless it is charged that the accused was the keeper of the house. — State v. Lewis, 5 Mo. App. 465; State v. Vette, (Mo. App.) 78 S. W. 1133.

3 Harlow v. Com., 74 Ky. (11 Bush) 610.

4 Bourlier v. Com., 10 Ky. L. Rep. 154.

5 Com. v. Moore, 65 Mass. (11 Cush.) 600.

6 Smith v. State, 6 Gill (Md.) 425.

7 Crofton v. State, 25 Ohio St. 249, 2 Am. Cr. Rep. 378.

Where the indictment described the offense substantially as in the statute, with the further averment that the accused unlawfully and knowingly permitted the lessee to keep certain females in said house for purposes of prostitution, with intent that such females should therein have illicit intercourse with men, it is sufficient.—Crofton v. State, 25 Ohio St. 249, 2 Am. Cr. Rep. 378.

8 Com. v. Moore, 65 Mass. (11 Cush.) 600.

9 Saunders v. People, 29 Mich. 269, 1 Am. Cr. Rep. 346.

titution;[10] and the two acts being offenses under the statute[11] may be alleged conjunctively without rendering the indictment duplicitous.[12]

§ 568. Joinder of offenses—Duplicity. It is a general rule of criminal law[1] that offenses of the same nature may be joined in one indictment, in separate counts;[2] but a defendant can not be charged with separate and distinct offenses in one count.[3] Thus, it has been held that accused can not be charged in one count on an indictment or information with keeping a lewd house, under one section of the statute,[4] and in another count, under another section of the statute,[5] with an open act of lewdness and a notorious act of public indecency,[6] in that, for a money consideration received, he hired out his wife for an act of immorality and lewdness to be committed privately, and at a place other than his house.[7] But an indictment may join a count alleging "keeping and maintaining a lewd house," under one statute,[8] with a count charging "keeping a common, ill-governed, and disorderly house," under another statute,[9] without being vulnerable to a demurrer on the ground that it joins two distinct offenses, not kindred in nature.[10]

10 State v. Des Moines Union R. Co., 137 Iowa 570, 115 N. W. 232.

11 Iowa Code, § 4941.

12 State v. Des Moines Union Ry. Co., 137 Iowa 570, 115 N. W. 232.

1 See, supra, §§ 335 et seq.

2 Haskins v. State, 4 Ga. 92; Williams v. State, 72 Ga. 180; Jones v. State, 2 Ga. App. 433, 58 S. E. 559; Lasseter v. State, 17 Ga. App. 323, 86 S. E. 742.

3 Lasseter v. State, supra. See, also, supra, §§ 292 et seq.

4 As Ga. Pen. Code, 1910, § 382.

5 As Ga. Pen. Code, 1910, § 381.

6 Lasseter v. State, 17 Ga. App. 323, 86 S. E. 742.

7 Id.

This count was held to be defective in that it did not set forth with sufficient clearness and fullness the facts, in that it failed to set out to whom defendant hired his wife, or for what length of time, or for how much or for what kind of immoral purpose.—Lasseter v. State, 17 Ga. App. 322, 86 S. E. 742.

8 As Ga. Pen. Code (1907), § 391.

9 As Ga. Pen. Code (1907), § 393.

10 Jones v. State, 2 Ga. App. 433, 58 S. E. 559.

Duplicity can not be successfully charged against an indictment or information alleging a continuing offense, as that accused kept a disorderly house from July 1 to November 1, of a named year; the objection that such an indictment charged one hundred and twenty distinct and separate offenses—there being that number of days intervening between the two dates set out—was held to be untenable, the court saying that but one offense was charged and but one conviction could be had thereon.[11] Likewise it has been held that an indictment charging, in one count, that accused "kept and maintained a disorderly house," and "a house where lewd, dissolute and drunken persons assembled," alleges but one offense and was not demurrable on the ground of duplicity;[12] specifying the kind of disorder in keeping the house does not constitute duplicity.[13]

11 Novy v. State, 62 Tex. Cr. Rep. 492, 138 S. W. 139. See R. v. Williams, 37 U. C. Q. B. 540; R. v. Keeping, 34 N. S. (Can.) 442.

Where offense continuous one, a conviction bars all further or other prosecutions up to the time of conviction, unless the indictment sets out the time of the commission of the offense and the evidence, as well as the pleading, is confined to the time so set out.—Hoffman v. State, 23 Tex. Cr. Rep. 491; Fleming v. State, 28 Tex. App. 234, 12 S. W. 605; Novy v. State, 62 Tex. Cr. Rep. 492, 138 S. W. 139.

Continuance in same house essential. True, the gist of the offense is the keeping of the house; and, although the crime may have continuance by repetition of the conduct that gives character to the house, yet that continuity may be broken, so that separate and distinct offenses will be committed; and it is thus broken when the business is given up at one place and resumed at another and a different place, for then the keeping of the former house is completed and ended, and, as the keeping is the gist of the crime, the crime itself is equally completed and ended, and the resumption of the business at the other place is a separate and distinct keeping, and so a separate and distinct crime, and there are as many crimes as there are separate and distinct keepings of separate and distinct houses.—State v. Plant, 67 Vt. 454, 48 Am. St. Rep. 821, 10 Am. Cr. Rep. 272, 32 Atl. 237.

12 State v. De Ladson, 66 Conn. 7, 33 Atl. 531.

13 Id.

§ 569. JOINDER OF DEFENDANTS. An indictment or information alleging that accused was guilty of keeping a disorderly house charges a misdemeanor and, under the general rule of law that all are principals in misdemeanors, all persons aiding directly or indirectly in the commission of the offense may be joined in the indictment.[1] This doctrine is thought to include husband and wife in a charge of keeping a bawdy-house, where the wife owns the property and runs the business, the husband living in the house and exercising acts of control over it;[2] but it does not include official action or sanction, such as the passage of an ordinance sanctioning the license of a bawdy-house, because by such official action the councilman does not become a participant or aider or abettor in the conduct of the business.[3]

1 **As sustaining the general doctrine** and as to disorderly houses in particular, see: FLA.—McBride v. State, 39 Fla. 442, 22 So. 711. GA.—Clifton v. State, 53 Ga. 241; Kessler v. State, 119 Ga. 301, 46 S. E. 408; Jones v. State, 2 Ga. App. 433, 58 S. E. 559. ILL.—Stevens v. State, 67 Ill. 587. KY.—Ross v. Com., 41 Ky. (2 B. Mon.) 417; Harlow v. Com., 74 Ky. (11 Bush) 610; Com. v. Keller, 8 Ky. L. Rep. 537. MASS.—Com. v. Garnett, 83 Mass. (1 Allen) 7, 79 **Am. Dec.** 693; Brown v. Perkins, 83 Mass. (1 Allen) 89; Com. v. Kimball, 105 Mass. 465; Com. v. Wallace, 108 Mass. 12; Com. v. Dowling, 114 Mass. 260; Com. v. Brown, 154 Mass. 55, 13 **L. R. A.** 195, 27 N. E. 776; Com. v. Moore, 157 Mass. 330, 31 N. E. 1070; Com. v. Ahearn, 160 Mass. 300, 34 N. E. 853. MICH.—People v. Wright, 90 Mich. 362, 51 N. W. 517. MISS.—Williams v. State, 20 Miss. (12 Smed. & M.) 58. N. J.—Engeman v. State, 54 N. J. L. 257, 23 Atl. 679. N. Y.—People v. Erwin, 4 Den. 129; Lowenstein v. People, 54 Barb. 299, 1 Cow. Cr. Rep. 421. N. C.—State v. Clark, 35 N. C. (13 Ired. L.) 114. R. I.—State v. Hoxsie, 15 R. I. 1, 2 **Am. St. Rep.** 838, 22 Atl. 1059. TEX.—Dunman v. State, 1 Tex. App. 593. FED.—United States v. Gooding, 25 U. S. (12 Wheat.) 460, 6 **L. Ed.** 693.

Indictment will not be quashed because it charged several defendants with keeping the house for "his" instead of "their" own lucre, where the making of gain was not a necessary ingredient of the offense.—State v. Parks, 61 N. J. L. 438, 39 Atl. 1023.

2 See Com. v. Wood, 97 Mass. 225; Com. v. Hopkins, 133 Mass. 381.

3 State v. Lismore, 94 Ark. 211, 29 **L. R. A.** (N. S.) 721, 126 S. W. 855.

CHAPTER XXXVII.

INDICTMENT—SPECIFIC CRIMES.

Disturbing Public Meetings.

§ 570. In general. That it is an indictable offense at common law to disturb a public meeting, has been discussed elsewhere,[1] and the same is true under statute.[2] Where the statute defines and punishes the offense, even though it be by a different punishment, that does not take away the common-law remedy by indictment.[3] This applies to any lawful assembly,[4] as a business meeting[5] of school directors,[6] and the like; religious meetings,[7] sing-

1 3 Kerr's Whart. Crim. Law, § 1872.

2 Id., § 1873.

3 People v. Degey, 2 Wheel. Cr. Cas. (N. Y.) 135; People v. Crowley, 23 Hun (N. Y.) 412.

4 Com. v. Porter, 67 Mass. (1 Gray) 476; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; State v. Branner, 149 N. C. 559, 63 S. E. 169.

As to form of indictment generally, see Form No. 807.

5 As to form of indictment, see Form No. 808.

6 Campbell v. Com., 59 Pa. St. 266. See State v. Ellis, 71 Mo. App. 269.

As to form of indictment, see Form No. 821.

7 Com. v. Porter, 67 Mass. (1 Gray) 476; Com. v. Bears, 132 Mass. 542, 42 Am. Rep. 450; State v. Cate, 58 N. H. 240 (unusual traffic within two miles of religious assembly); People v. Degey, 3 Wheel. Cr. Cas. (N. Y.) 135; People v. Crowley, 23 Hun (N. Y.) 412; State v. Jasper, 15 N. C. (4 Dev. L.) 232; Graham v. Bell, 1 Nott & McC. (S. C.) 278, 9 Am. Dec. 687; United States v. Brooks, 4 Cr. C. C. 427, Fed. Cas. No. 14655.

As to forms of indictment, see Forms Nos. 809-820.

ing school,[8] town meeting,[9] women's meeting,[10] and the like.

§ 571. Form and sufficiency of indictment. An indictment or information at common law, besides the usual formal parts, must charge that accused at a time and place, by means or in a manner fully set forth, did disturb a public meeting, describing it, and must be sufficient on its face to show (1) that the act complained of was indictable, and (2) that the meeting was one the disturbance of which is punishable at common law.

Statutory offense charged, it must be with such definiteness as to establish the identity of the offense,[1] but it is usually sufficient for the indictment or information to follow the language,[2] or substantially the language,[3] of the statute, in all cases in which the language of the statute so particularly individuates the offense as to inform the accused what particular and precise offense he is called upon to defend against,[4] otherwise it will be insufficient.[5]

A disturbance of members of congregation is disturbance of religious worship.—State v. Wright, 41 Ark. 410, 48 Am. Rep. 43.

Actually engaged in religious worship not necessary. — Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625; State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

8 State v. Oskins, 28 Ind. 364; State v. Zimmerman, 53 Ind. 360; Kidder v. State, 58 Ind. 68.

Compare: Blake v. State, 18 Ind. App. 280, 47 N. E. 942.

9 Com. v. Hoxey, 16 Mass. 385.

10 **As to form of indictment,** see Form No. 822.

1 State v. Kindrick, 21 Mo. App. 507; State v. Fugitt, 66 Mo. App. 507.

2 Blake v. State, 18 Ind. App. 280, 47 N. E. 942; State ex rel. Bryant v. Launer, 26 Neb. 757, 42 N. W. 762; Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658; Von Rueden v. State, 96 Wis. 671, 71 N. W. 1048.

3 Blake v. State, 18 Ind. App. 280, 47 N. E. 942; State v. Mitchell, 25 Mo. 420; Com. v. Gennerette, 10 Pa. Sup. Ct. 598; Robertson v. State, 99 Tenn. 180, 41 S. W. 441; State v. Yarborough, 19 Tex. 161.

4 Smith v. State, 63 Ala. 55; Minter v. State, 104 Ga. 743, 305 S. E. 989; State v. Howard, 87 Ind. 87; State v. Stubblefield, 32 Mo. 563; State v. Hynes, 39 Mo. App. 569; State v. McDaniel, 40 Mo. App. 356.

5 See Marvin v. State, 19 Ind. 181.

—— *Form prescribed* in statute not followed, the indictment or information must set out every material constituent of the offense charged, whether contained in the statute or not.[6]

Time when offense charged was committed should be specifically set out,[7] and in some jurisdictions the further averment must be made that the meeting alleged to have been disturbed was in session,[8] but it is not necessary that meeting be actually engaged in divine worship.[9]

Conclusion against the form of the statute, the indictment may still be good where the facts charged amount to an offense at common law, although not within the purview of the statute.[10]

§ 572. EXISTENCE AND NATURE AND KIND OF MEETING. The indictment or information must allege the existence of the meeting asserted to have been disturbed,[1] set forth facts sufficient to show that it was a meeting against which the offense charged could be committed, either at common law or under the statute,[2] must allege that it

6 Smith v. State, 63 Ala. 55.

7 Stratton v. State, 13 Ark. 688; State v. Jasper, 15 N. C. (4 Dev. L.) 323.

"Other days" both before and after a specified date, set out in the indictment or information, is void for uncertainty as to such "other days."—State v. Jasper, 15 N. C. (4 Dev. L.) 323.

8 Disturbance after religious exercises are over and when congregation has entered upon secular business, not a misdemeanor.—State v. Fisher, 25 N. C. (3 Ired. L.) 111; approved, State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

Disturbing school charged, the indictment or information must allege that the school was at the time in session, or it will be insufficient.—State v. Gager, 28 Conn. 232.

9 Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625; State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

It is sufficient that the people are assembled for the purpose of worship and are prevented therefrom by the acts of the accused.—People v. Ramsay, supra.

10 State v. Hoxey, 16 Mass. 385.

1 Smith v. State, 63 Ala. 55.

2 People v. Degey, 2 Wheel. Cr. Cas. 135; State v. Fisher, 25 N. C. (3 Ired. L.) 111.

was held for a lawful purpose,[3] but need not state the specific purpose,[4] and, in some jurisdictions, it must be averred that the meeting was conducting itself in a lawful manner when disturbed,[5] while in yet other jurisdictions it is held that it must be alleged and proved that the disturbed congregation consisted of inhabitants of the state;[6] but these latter requirements are due entirely to the peculiarities of local statutes. It must be averred that the persons disturbed were met "in public assembly,"[7] or as an official body—as school directors—in a regular or called meeting,[8] or that the school was in session,[9] or that the meeting was divine or religious worship or service—but need not set out the name of the religious society disturbed,[10] but it is the better practice to do so.[11]

3 State v. Zimmerman, 53 Ind. 360; State v. Steel, 74 Mo. App. 5; Von Rueden v. State, 96 Wis. 671, 71 N. W. 1048.

Enough to allege in language of statute that meeting was lawful and peacefully assembled, or otherwise to follow the words of the statute; special facts in this regard need not be alleged.

4 Howard v. State, 87 Ind. 68; Blake v. State, 18 Ind. App. 280, 47 N. E. 942; Com. v. Gennerette, 10 Pa. Sup. Ct. 598; Von Rueden v. State, 96 Wis. 671, 71 N. W. 1048.

5 Mullinix v. State, 32 Tex. Cr. Rep. 116, 22 S. W. 407; Nash v. State, 32 Tex. Cr. Rep. 368, 24 S. W. 32, 26 S. W. 412.

Insufficient to allege that they had "assembled for religious worship in a lawful manner."—Kizzia v. State, 38 Tex. Cr. Rep. 319, 43 S. W. 86.

6 Cooper v. State, 75 Ind. 62.

7 Smith v. State, 63 Ala. 55.

8 Meeting of school directors of a designated district.—Campbell v. Com., 59 Pa. St. 266.

Compare: State v. Ellis, 71 Mo. App. 269.

9 State v. Gager, 28 Conn. 232.

10 State v. Ringer, 6 Blackf. (Ind.) 109; State v. Fisher, 25 N. C. (3 Ired. L.) 111.

11 Church name or official name or designation of congregation, where a religious meeting.—Edwards v. State, 121 Ga. 590, 49 S. E. 674; People v. Degey, 3 Wheel. Cr. Cas. 135; United States v. Brooks, 4 Cr. C. C. 427, Fed. Cas. No. 14655; R. v. Parry, Tremaine's P. C. 239.

—Preparing to eat dinner near place of worship, congregation held to be at the time "assembled for purpose of public worship."—Stafford v. State, 154 Ala. 71, 45 So. 673; Minter v. State, 104 Ga. 743, 30 S. E. 989; Folds v. State, 123 Ga. 167, 51 S. E. 305.

—"Quarterly-meeting conference" held to be too general; there should be an added allega-

§ 573. THE DISTURBANCE—IN GENERAL. Disturbance being the gist of the offense, the indictment or information must allege that a designated meeting, protected by the common law or by statute, was in fact disturbed by the accused,[1] and set out the manner in which the disturbance was created.[2] It is not necessary to allege that certain persons named in the meeting or congregation were disturbed,[3] but if any members of the meeting or congregation are disturbed, the meeting or congregation is disturbed.[4]

§ 574. —— MANNER OF DISTURBANCE. An indictment or information charging the disturbing of a public meeting should show what the disturbance was; that is, should allege the manner or means[1] by which the meeting was disturbed.[2] It is held that this allegation of manner of disturbance may be made in a general way without entering into details,[3] as by charging that accused "did wilfully, maliciously and unlawfully disturb a meeting

tion assembly was met for "divine worship," "divine services," or the like.—State v. Fisher, 25 N. C. (3 Ired. L.) 111.

—Singing class met together for instruction in singing of hymns or religious songs, has been held not to be a "religious assemblage" within the provisions of the statute.—Adair v. State, 134 Ala. 183, 32 So. 326.

1 State v. Bankhead, 25 Mo. 558; Com. v. McDale, 2 Pa. Dist. Rep. 370.

2 See, infra, § 574.

3 Hull v. State, 120 Ind. 153, 22 N. E. 117.

4 State v. Wright, 41 Ark. 410, 48 Am. Rep. 43; Nichols v. State, 103 Ga. 61, 29 S. E. 431; Cockerham v. State, 26 Tenn. (7 Humph.) 11; Dawson v. State, 7 Tex. App. 59.

1 In Virginia, however, it has been held that the means of disturbing a religious meeting need not be set out.—Com. v. Daniels, 4 Va. (2 Va. Cas.) 402.

2 ARK.—State v. Minyard, 12 Ark. 156; Fletcher v. State, 12 Ark. 169; Stratton v. State, 13 Ark. 688. IOWA—State v. Butcher, 79 Iowa 110, 44 N. W. 239. MISS.—Coverly v. State, 66 Miss. 96, 5 So. 625. MO.—State v. Bankhead, 25 Mo. 558. NEB.—Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658. PA.—Com. v. McDale, 2 Pa. Dist. Rep. 370. TEX.—Thompson v. State, 16 Tex. App. 159.

3 State v. Minyard, 12 Ark. 156; Thompson v. State, 16 Tex. App. 159.

of," naming the religious society or other public meeting lawfully assembled,[4] "and its members," or "the officiating person," which has been said to sufficiently describe the manner of disturbance.[5] But the better practice and the safer pleading is thought to be to allege, in addition, the specific acts constituting the disturbance—e. g., abusive language,[6] assaulting or threatening a member of the assembly or congregation,[7] firing a gun,[8] indecent actions and grimaces during performance of divine services,[9] laughing and talking and profane swearing,[10] loud and vociferous talking and swearing,[11] rude and indecent conduct,[12] and the like, as the case may be[13]—and

4 See, supra, § 572, footnote 3.

5 State ex rel. Bryant v. Lauver, 26 Neb. 757, 42 N. W. 762; Jones v. State, 28 Neb. 495, 7 L. R. A. 325; 44 N. W. 658.

6 State v. Hinson, 31 Ark. 638.

7 State v. Bankhead, 25 Mo. 558; State v. Karnes, 51 Mo. App. 293.

8 Huffman v. State, 95 Ga. 469, 20 S. E. 216.

Following language of statute, sufficient. — Stancliff v. United States, 5 Ind. Ter. 486, 82 S. W. 882.

9 State v. Jasper, 15 N. C. (4 Dev. L.) 232. See State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

10 ARK.—Stratton v. State, 13 Ark. 688. IND.—State v. Ringer, 6 Blackf. 109. MISS.—Coverly v. State, 66 Miss. 96, 5 So. 625. NEB.—Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658. TENN. — Cockreham v. State, 26 Tenn. (7 Humph.) 11. TEX. — Thompson v. State, 16 Tex. App. 159.

11 Lockett v. State, 40 Tex. 4.

"By cursing and quarreling and fighting and discharging a loaded pistol and by boisterous conduct, and by otherwise indecently acting" held to be a sufficient decription of the mode or manner of disturbance.—Huffman v. State, 95 Ga. 469, 20 S. E. 216. See, also, Hicks v. State, 60 Ga. 464; Minter v. State, 104 Ga. 743, 30 S. E. 989.

12 Robertson v. State, 99 Tenn. 180, 41 S. W. 441.

13 See: ARK.—State v. Horn, 19 Ark. 578; State v. Booe, 62 Ark. 512, 37 S. W. 47. IND.—State v. Ringer, 6 Blackf. 109; Kidder v. State, 58 Ind. 68. MASS.—Com. v. Hoxey, 16 Mass. 385. MO.—State v. Stubblefield, 32 Mo. 563. NEB.—Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658. N. Y.—People v. Degey, 2 Wheel. Cr. Cas. 135. TENN. — Cockreham v. State, 26 Tenn. (7 Humph.) 11. TEX. — Lockett v. State, 4 Tex. 4; Bush v. State, 5 Tex. 64; Holmes v. State, 39 Tex. Cr. Rep. 231, 73 Am. St. Rep. 921, 45 S. W. 487. FED.—United States v. Brooks, 4 Cr. C. C. 427, Fed. Cas. No. 14655. ENG.—R. v. Hube, 5 Dumf. & E. (5 T. R.)

alleging that they were likely to produce disturbance,[14] without descending into the details of those acts.[15]

Charging in language of statute designating the various ways in which designated public meetings may be disturbed, without further specifying the means of disturbance, has been held to be sufficient;[16] but where an indictment or information thus charging fails to state how the disturbance was effected, it is thought that it will be insufficient,[17] although there are cases to the contrary.[18]

§ 575. PLACE—OF DISTURBANCE. Whether an indictment or information must set out the place of the dis-

542; R. v. Parry, Tremaine's P. C. 239.

Talking and laughing charged, some cases hold it must be averred how it was calculated to produce disturbance. See State v. Ratliff, 10 Ark. 530; State v. Hinson, 31 Ark. 638; Minter v. State, 104 Ga. 743, 30 S. E. 989; Thompson v. State, 16 Tex. App. 159.

It is enough to charge that the disturbance was committed "by cursing and quarreling and fighting and discharging a loaded pistol, and by boisterous conduct, and by otherwise indecently acting."—Huffman v. State, 95 Ga. 469, 20 S. E. 216; Com. v. Gennerette, 10 Pa. Sup. Ct. 598.

14 State v. Booe, 62 Ark. 512, 37 S. W. 47.

15 See: ARK.—State v. Hinson, 31 Ark. 638. GA.—Minter v. State, 104 Ga. 743, 30 S. E. 989. IND.—State v. Ringer, 6 Blackf. 109. MO.—State v. Stubblefield, 32 Mo. 563. TENN.—Cockerham v. State, 26 Tenn. (7 Humph.) 11. TEX.—Kindred v. State, 33 Tex. 67; Bush v. State, 5 Tex. App. 64.

Abusive language charged, character of language need not be averred or the words used set out. —State v. Hinson, 31 Ark. 638.

Profane swearing charged, the language used need not be set out.—State v. Ratliff, 10 Ark. 536; State v. Hinson, 31 Ark. 638; State v. McDaniel, 40 Mo. App. 356.

Precise language used not required to be set out in indictment or information, it being sufficient to say accused cursed, used profane and indecent language, and the like.—Minter v. State, 104 Ga. 743, 30 S. E. 989.

In Texas it is necessary to set out the specific acts.—Thompson v. State, 16 Tex. App. 159.

16 State v. Minyard, 12 Ark. 156; Minter v. State, 104 Ga. 743, 30 S. E. 989; Stancliff v. United States, 5 Ind. Ter. 486, 82 S. W. 882; Com. v. Gennerette, 10 Pa. Sup. Ct. 598.

17 Conerly v. State, 66 Miss. 96, 5 So. 625.

18 See Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658; Kindred v. State, 33 Tex. 67.

turbance depends upon the wording of the statute under which drawn. Where the statute mentions the places wherein the act must have been committed to make it offend against the statute, it must be alleged that the act was committed in one of the places specified;[1] but where the wording is simply "at or near," it need not be alleged that the act of disturbance was at or near the meeting disturbed or place of worship.[2]

§ 576. —— Of meeting. It being an indictable offense to disturb a religious congregation engaged in public worship, although it be not assembled in a chapel, church or meeting-house especially set apart for that purpose,[1] an indictment or information charging the disturbance of a religious meeting need not allege that the congregation were assembled in, and the services were being held in, a place set apart for religious worship,[2] or name the church, particular parish, and the like,[3] in the ab-

1 State v. Schieneman, 64 Mo. 386. See State v. Karnes, 51 Mo. App. 293; State v. McClure, 13 Tex. 23.

An averment naming the place as a "house for religious worship" is equivalent to the statutory term "meeting house."—State v. Yarborough, 19 Tex. 161.

2 State v. Smith, 5 Harr. (Del.) 490; Warren v. State, 50 Tenn. (3 Heisk.) 269, overruling State v. Doty, 45 Tenn. (5 Coldw.) 33.

Wilful tumult on outside of meeting place made on own lands for purpose of disturbance.—Com. v. Porter, 67 Mass. (1 Gray) 476.

1 State v. Swink, 20 N. C. (4 Dev. & B. L.) 358; approved in State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

2 State v. Smith, 5 Harr. (Del.) 490; Minter v. State, 104 Ga. 743, 30 S. E. 989; State v. Alford, 142 Mo. App. 412, 127 S. W. 109; Corley v. State, 3 Tex. App. 412; Bush v. State, 5 Tex. App. 64.

In Missouri, however, it has been held indictment must allege congregation was met in a place set apart for religious worship.—State v. Schieneman, 64 Mo. 386; State v. Kindrick, 21 Mo. App. 507; State v. Karnes, 51 Mo. App. 293; State v. Stegall, 65 Mo. App. 243; State v. Fugitt, 66 Mo. App. 625; State v. Ellis, 71 Mo. App. 269.

In Texas indictment must allege congregation assembled at place of meeting mentioned in the statute.—State v. McClure, 13 Tex. 23; State v. Yarborough, 19 Tex. 161.

3 Warren v. State, 50 Tenn. (3 Heisk.) 269; Kindred v. State, 33

sence of statutory provisions so requiring. Where the statute prohibits a congregation from being disturbed at designated places, indictment must allege meeting was at one of those places.[4]

§ 577. INTENT, WILFULNESS AND MALICE. The intent to disturb a public meeting is usually a constituent part of the offense, and must be alleged; thus, loud singing by one who is honestly participating in the service of divine worship, intending no disrespect, while it may annoy other worshipers, is not an indictable offense.[1] Where the statute does not make the offense of disturbing a public meeting or religious worship depend upon intent, and does not use the word "malicious" or "wilful," there need not be an allegation of malice or wilfulness;[2] the rule is otherwise where the statute makes intent an element, or uses the word "malicious" or "wilful."[3]

Tex. 67; Corley v. State, 3 Tex. App. 412; Bush v. State, 5 Tex. App. 64.

4 Stratton v. State, 13 Ark. 688.

Under § 1113, Mississippi Code, 1906, offense is sufficiently charged where it is alleged that the defendant unlawfully and wilfully disturbed "a congregation of persons lawfully assembled at Prospect Church for religious worship, by then and there talking in a loud tone of voice in the presence and hearing of said congregation."—State v. Sowell, (Miss.) 59 So. 848.

1 State v. Linkhaw, 69 N. C. 214; approved in State v. Ramsay, 78 N. C. 448, 2 Am. Cr. Rep. 133.

2 State v. Stuth, 11 Wash. 423, 39 Pac. 665.

3 State v. Stroud, 99 Iowa 16, 68 N. W. 450; State v. Tounsell, 50 Tenn. (3 Heisk.) 6.

In Kentucky it must be charged to have been wilfully or maliciously done.—Com. v. Phillips, 11 Ky. L. Rep. 370.

In Missouri it must be alleged to have been "wilfully, maliciously, or contemptuously" done. —State v. Bankhead, 25 Mo. 558; State v. Hopper, 27 Mo. 599.

But it is sufficient to allege that it was "unlawfully and wilfully done."—State v. Karnes, 51 Mo. App. 293.

Other words of the same import may be used.—State v. Stuth, 11 Wash. 423, 39 Pac. 665.

"Wilfully" and "unlawfully" are not synonymous, and it must be alleged to have been wilfully done. —State v. Tounsell, 50 Tenn. (3 Heisk.) 6.

§ 578. Duplicity. The rules governing as to duplicity generally[1] govern in cases where disturbance of a public or religious meeting is charged, and if two distinct offenses are charged in one count the indictment or information will be bad for duplicity;[2] but different and divers means of creating the disturbance[3] may be alleged without being open to the objection of duplicity,[4] and there may be a charge of disturbing a meeting and also disturbing members thereof without being duplicitous.[5]

Charging in the conjunctive, acts disturbing a meeting which are enumerated in the statute in the disjunctive, does not render the indictment bad for duplicity.[6]

1 See, supra, §§ 292 et seq.

2 Com. v. Symonds, 2 Mass. 163; State v. McDaniel, 40 Mo. App. 356.

3 See, supra, § 574, footnotes 6 et seq.

4 State v. Horn, 19 Ark. 578 (surplusage rejected); State v. Bledsoe, 47 Ark. 233, 1 S. W. 149 (surplusage will be rejected); Hull v. State, 120 Ind. 153, 22 N. E. 117 (surplusage rejected); State v. Edwards, 32 Mo. 548; State v. Stubblefield, 32 Mo. 563; State v. McDaniel, 40 Mo. App. 356; Copping v. State, 7 Tex. App. 61.

"By making loud noises, by rude and indecent behavior, and by profane discourse," not a duplicitous charge.—State v. McDaniel, 40 Mo. App. 356.

5 State v. Ringer, 6 Blackf. (Ind.) 100.

Proof of disturbance of either the meeting or of members thereof sufficient. — State v. Ringer, 6 Blackf. (Ind.) 109; Hull v. State, 120 Ind. 153, 22 N. E. 117.

6 State v. Karnes, 51 Mo. App. 293; Copping v. State, 7 Tex. App. 61. .

See, also, supra, § 278.

CHAPTER XXXVIII.

INDICTMENT—SPECIFIC CRIMES.

Duelling.

§ 579. In general.[1] The act of fighting a duel in itself was not an offense punishable at common law,[2] although the result of such act was an offense; as murder,[3] where death resulted,[4] or maiming,[5] or malicious shooting,[6] or breach of the peace,[7] or an affray, when the duel was fought in public,[8] or a simple assault and battery,[9] as the case might be. Hence, an indictment at common law charging that the accused did fight a duel with pistols, was held bad on demurrer.[10] But the sending or ac-

1 As to forms of indictment for duelling in all of its phases, see Forms Nos. 441-456.

2 Com. v. Lambert, 36 Va. (9 Leigh) 603. See 4 Bl. Com. 145; 3 Co. Inst. 158; 3 Stephen. Crim. Law 100.

3 See title "Homicide," this chapter. Also, R. v. Cuddy, 1 Car. & K. 210, 47 Eng. C. L. 210; R. v. Young, 8 Car. & P. 644, 34 Eng. C. L. 939; Matter of Barronet, 1 El. & Bl. 1, 72 Eng. C. L. 1; 1 Russ. on Crimes (9th Am. ed.), p. 727.

4 As to indictment for killing in duel, see Form No. 1161.

5 See title "Mayhem," §§ 960-969.

6 3 Chit. Crim. Law 848, note (w); 1 Russ. on Crimes (9th Am. ed.), p. 1009.

Shooting or attempting to shoot in duel is punishable under statute.—R. v. Douglas, 1 Car. & M. 193, 41 Eng. C. L. 109.

7 Com. v. Lambert, 36 Va. (9 Leigh) 603; R. v. Rice, 3 East 581, 102 Eng. Repr. 719.

8 1 Hawk. P. C., ch. 63, § 21; 1 Russ. on Crimes (9th Am. ed.), p. 406.

9 Com. v. Lambert, 36 Va. (9 Leigh) 603.

10 Com. v. Lambert, 36 Va. (9 Leigh) 603; R. v. Young, 8 Car. & P. 645, 34 Eng. C. L. 939; R. v. Rice, 3 East 581, 102 Eng. Repr. 719.

"A charge 'to fight a duel' is not

ceptance,[11] or an attempt to entice or provoke a person to send[12] a challenge to fight a duel with deadly weapons was an indictable offense at common law.[13]

§ 580. INDICTMENT AND ITS SUFFICIENCY. We have already seen[1] that an indictment at common law charging the fighting of a duel is insufficient. An indictment under statute must distinctly aver that accused "challenged"[2] another to fight a duel with deadly weapons,[3] and should set out the exact date[4] and place[5] of the offense charged; but an allegation that on a given date, at a designated place, the accused gave to a person named a challenge to

equipollent with the usual charge in an indictment for an affray or common assault. It does not ascertain with sufficient precision the act for which the party is prosecuted. It is uncertain what degree of evidence would be required to make it out, and the consequences of a judgment are not ascertained."—Com. v. Lambert, supra.

"Attempt to provoke a breach of the peace is the gravamen of the charge, and the means used are the acts by which the offense is committed or aggravated. But we have been unable to find a precedent of an indictment for fighting a duel, treating and describing the act of fighting a duel as a distinct offense to which punishment attaches."—Ibid.

11 See Com. v. Lambert, 36 Va. (9 Leigh) 603.

12 R. v. Williams, 5 Camp. 506, 11 Rev. Rep. 781; R. v. Phillips, 6 East 464, 102 Eng. Rep. 1365.

13 Com. v. Lambert, 36 Va. (9 Leigh) 603.

1 See, supra, § 579.

2 Statute providing that "any person who shall by word, message, letter or any other way, challenge another to fight a duel," etc., indictment failing to explicitly aver that accused "challenged" the designated person, held to be insufficient.—State v. Gibbons, 4 N. J. L. (1 South.) 40.

As to the challenge, see, infra, § 581.

3 See Com. v. Rowan, 33 Ky. (3 Dana) 395; Com. v. Hooper, Thach. Cr. Cas. (Mass.) 400, 405.

Challenge to fight with fists not a challenge to fight a duel.—State v. Fritz, 133 N. C. 725, 45 S. E. 957.

Challenge in writing and written acceptance set out, neither of which mentions the weapons to be used, there being no allegation as to weapons, is insufficient under a statute making it unlawful to give or accept a challenge to fight with sword, pistol, or other deadly weapon (Com. v. Rowan, 33 Ky. (3 Dana) 395); but if it is averred that the intention was to fight with deadly weapons, indictment will be sufficient.—Com. v. Pope, 33 Ky. (3 Dana) 418.

4 Harris v. State, 58 Ga. 332.

5 See, infra, § 582.

fight in single combat, has been held to be equivalent to an averment of a challenge to fight a duel, and, being in the language of the statute, is sufficient.[6]

Language of statute making it unlawful to give or accept a challenge to fight a duel with swords, pistols, or other deadly weapons, may be followed in an indictment or information charging that offense,[7] but it is not necessary that the language of the statute shall be followed,[8] where the offense is otherwise sufficiently charged.

Accepting a challenge[9] to fight a duel being charged, the indictment or information need not specifically aver that the parties understood the writing delivered to be, and that it was accepted as, a challenge to fight a duel;[10] whether it was in fact such a challenge is a question for the jury.[11]

Aiding and abetting in a duel being charged, the indictment or information must clearly charge that the duel was fought;[12] and where accused is charged with having acted as a second,[13] the gist of the offense being the consent to so act, the indictment must allege the consent was given within the state.[14]

Carrying a challenge[15] to fight a duel being charged, the indictment or information must allege, and the evidence must show, that accused knowingly did the act complained of;[16] but it is not necessary to allege that the

6 Ivey v. State, 12 Ala. 276.

7 Ivey v. State, 12 Ala. 276; Com. v. Rowan, 33 Ky. (3 Dana) 395.

8 In re Wood, 3 City Hall Rec. 139.

9 **As to form of indictment for** accepting challenge to fight a duel, see Form No. 848.

10 Moody v. Com., 61 Ky. (4 Metc.) 1; Heffren v. Com., 61 Ky. (4 Metc.) 5.

11 See, infra, § 581, footnote 6.

12 Com. v. Dudley, 33 Va. (6 Leigh) 613.

13 **As to form of indictment for** acting as second, see Forms Nos. 852, 853.

14 Harris v. State, 58 Ga. 332.

15 **As to form of indictment for** carrying and delivering a challenge, see Forms Nos. 846-848.

16 United States v. Shackelford, 3 Cr. C. C. 178, Fed. Cas. No. 16260.

Fact letter unsealed and defendant declared that he thought it was a legal notice, for jury in deciding whether accused knew it was a challenge.—United States

sender of the challenge was a citizen or resident of the state at the time of the carrying of the said challenge.[17]

Sending a challenge to fight a duel being charged, the indictment or information need not set out a copy of the challenge,[18] whether written[19] or verbal,[20] but it may do so;[21] and it is thought to be the better practice, at least in cases of doubt, the challenge not explicitly setting forth a challenge to fight a duel with deadly weapons, especially where the instrument contains a provision as to seconds.[22]

Place where duel to be fought, not being a part of the definition of the offense, and not an element therein, need not be averred in the indictment or information, or proved on the trial.[23]

§ 581. THE CHALLENGE. A challenge to fight a duel may consist of a writing or of spoken words, and also of acts accompanying the writing or words;[1] neither the writing[2] nor the verbal words[3] need be set out in the indict-

v. Shackelford, 3 Cr. C. C. 178, Fed. Cas. No. 16260.

17 **Under statute providing** "any person resident in or being a citizen of the state," etc., because the words above quoted do not apply to the bearer of a challenge but to the sender thereof.—State v. Cunningham, 2 Spears (S. C.) 246. See Moody v. Com., 61 Ky. (4 Metc.) 1.

18 State v. Farrier, 8 N. C. (1 Hawks) 487; Brown v. Com., 4 Va. (2 Va. Cas.) 516.

19 Id.

Letter alleged as challenge, the letter need not be set out or its substance given.— State v. Farrier, 8 N. C. (1 Hawks) 487; Brown v. Com., 4 Va. (2 Va. Cas.) 516.

20 **As to verbal challenge,** see, infra, § 581.

21 Com. v. Pope, 33 Ky. (3 Dana) 418; Moody v. Com., 61 Ky. (4 Metc.) 1.

22 Heffren v. Com., 61 Ky. (4 Metc.) 5.

23 Ivey v. State, 12 Ala. 276; Davis v. State, 87 Ala. 12, 6 So. 266; Harris v. State, 58 Ga. 332.

1 State v. Perkins, 6 Blackf. (Ind.) 20; Com. v. Hart, 29 Ky. (6 J. J. Marsh.) 119; State v. Strickland, 2 Nott. & McC. (S. C.) 181.

2 See, supra, § 580.

3 State v. Perkins, 6 Blackf. (Ind.) 20; State v. Strickland, 2 Nott. & McC. (S. C.) 181.

ment; that a letter[4] demanding satisfaction[5] was intended as a challenge need not be averred.

Question whether challenge given to fight a duel by the writing, words, acts and actions complained of, is one for the jury to determine;[6] and to aid them in arriving at a determination the alleged written or verbal challenge may be shown, and parol evidence introduced.[7]

§ 582. THE VENUE. An indictment or information charging a challenge to fight a duel may be returned into court or filed in the jurisdiction where the challenge was given,[1] although the place of encounter was to be in another state or country.[2] The venue must be properly laid[3] by averring the state and county where the challenge was given,[4] whether the encounter is to take place in that state or another.[5]

Consent to act as second charged, indictment may be returned and prosecution had in the jurisdiction in which the consent was given, the act of consent being the gravamen of the offense.[6]

4 There need be no averment that the letter was intended as a challenge and was so understood by the parties.—Moody v. Com., 61 Ky. (4 Metc.) 1.

5 Com. v. Pope, 33 Ky. (3 Dana) 418.

6 Ivey v. State, 12 Ala. 276; Ward v. Com., 132 Ky. 636, 116 S. W. 786; State v. Strickland, 2 Nott. & McC. (S. C.) 181; State v. Herriott, 1 McMull. (S. C.) 126.

7 Com. v. Hart, 29 Ky. (6 J. J. Marsh.) 119; Com. v. Pope, 33 Ky. (3 Dana) 418; Com. v. Hooper, Thach. Cr. Cas. (Mass.) 400; State v. Taylor, 3 Brev. (S. C.) 243; Herriott v. State, 1 McMull. (S. C.) 126.

1 Mailing letter, intended as a challenge to fight a duel, to be delivered in another county, addressed to a person who receives it in such other county, writer may be indicted in county where mailed; defendant's offense would have been the same though letter never delivered.—R. v. Williams, 5 Camp. 506, 11 Rev. Rep. 781.

2 Ivey v. State, 12 Ala. 276; Com. v. Boott, Thach. Cr. Cas. (Mass.) 390; State v. Farrier, 8 N. C. (1 Hawks) 487; State v. Taylor, 3 Brev. L. (S. C.) 243.

3 See Harris v. State, 58 Ga. 332; Gordon v. State, 4 Mo. 375; State v. Warren, 14 Tex. 406.

4 Com. v. Boott, Thach. Cr. Cas. (Mass.) 390.

5 Com. v. Boott, Thach. Cr. Cas. (Mass.) 390, 394, 399, 400; Gordon v. State, 4 Mo. 375; State v. Warren, 14 Tex. 406.

6 Charging leaving state to give,

Carrying challenge charged, the venue is important; it must be alleged and proved on the trial that the act complained of occurred within the jurisdiction of the court.[7]

accept or fight a duel, which fails to state county from which accused departed, is insufficient.—State v. Warren, 14 Tex. 406; Harris v. State, 58 Ga. 332. See, also, supra, § 580.

7 Gordon v. State, 4 Mo. 375.

CHAPTER XXXIX.

INDICTMENT—SPECIFIC CRIMES.

Embezzlement or Statutory Larceny.

§ 583. Form and sufficiency of indictment—In general.[1] The offense of embezzlement, having been unknown to the common law,[2] being purely a creation of the statute, there is no common law form.[3] The indictment or information charging embezzlement must properly set out the special conditions of the statute under which drawn; that is, must embody the statutory characteristics of the offense sought to be charged.[4] Thus, the stat-

1 As to forms of indictment for embezzlement in all its phases, see Forms Nos. 857-907.

2 State v. Wolff, 34 La. Ann. 1153; State v. Davis, 37 R. I. 373, 92 Atl. 821.

3 State v. Davis, supra.

4 People v. Cohen, 8 Cal. 42; Com. v. Pratt, 132 Mass. 246; Coats v. People, 4 Park. Cr. Rep. (N. Y.) 662; reversed on another point, 22 N. Y. 245.

ute specifying money or property "intrusted by the master or employer to the servant," the indictment or information must specifically allege that the money or property alleged to have been embezzled was intrusted to the accused by his employer or it will be insufficient to charge the offense under the statute.[5] That is to say, in each instance all the circumstances of the particular phase of embezzlement charged which are set out in the definition of the offense must be set out.[6]

§ 584. —— CERTAINTY. The general rule must be observed which requires that every indictment shall contain a plain, brief and certain narrative, charging the offense with such clearness and precision that it may be understood,[1] alleging all the requisite elements which constitute the offense, and the particular phase of the offense sought to be charged, every averment so stated that the accused may know just what he is charged with,[2] that it

5 Ricord v. Central Pac. R. Co., 15 Nev. 167.

6 This is the general rule in all statutory crimes and offenses. See State v. Graham, 38 Ark. 519; Wood v. State, 47 Ark. 488; Sloan v. State, 42 Ind. 570; State v. Casey, 45 Me. 435; Wood v. People, 53 N. Y. 511, 1 Cow. Cr. Rep. 554; Phelps v. People, 72 N. Y. 334, 2 Cow. Cr. Rep. 383; State v. Rose, 90 N. C. 712; State v. Shuler, 19 S. C. 140.

1 State v. Hall, 45 Mont. 498, 125 Pac. 639.

2 Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369; State v. Steers, 12 Ida. 174, 85 Pac. 104; State v. Lottridge, 29 Ida. 53, 155 Pac. 487; Sherban v. Com., 8 Watts (Pa.) 212, 34 Am. Dec. 460; State v. Whitworth, 30 Wash. 47, 70 Pac. 254.

See, also, 1 Chit. Crim. Law 172; 2 Hale P. C. 169.

Certainty to a common intent is all that is required, not certainty in every particular.—Sherban v. Com., 8 Watts (Pa.) 212, 34 Am. Dec. 460; State v. Clark, 2 Bail. L. (S. C.) 66, 23 Am. Dec. 117.

Over-nice distinctions and exceptions not to be encouraged.—Sherban v. Com., 8 Watts (Pa.) 212, 34 Am. Dec. 460.

The indictment is sufficient where it informs the accused of the time, place, circumstances, and conditions of his alleged unlawful act and that the act is unlawful. He is then sufficiently informed as to what he is required to meet.—State v. Steers, 12 Ida. 174, 85 Pac. 104.

When an information contains a statement of the acts in ordi-

may be understood by the jury, and with that degree of certainty that the court may know how to render judgment thereon and pronounce sentence according to the right in the case;[3] and must be such that a conviction or acquittal may be pleaded as a bar to another prosecution for the same offense.[4] The distinguishing feature between larceny and embezzlement, that is, the fiduciary capacity, must be clearly alleged.[5]

Statute relating to embezzlement consisting of several sections, each describing a separate and different phase of the crime, the indictment must be framed under the appropriate section to fit the facts in the case; or at least the separate counts in the indictment charging the various phases to meet the facts as developed by the evidence, must be drawn under appropriate sections of the statute or statutes.[6] But it is not necessary to designate under which statute, or which section of a statute, the indictment or information is drawn;[7] and when there are two or more statutes, or two or more sections of a statute, under which the indictment might be drawn, the trial court will not require the prosecutor to elect under which

nary concise language and in such a manner as to enable the accused to know what was intended, and contains no prejudicial defects in matters of form, and apprises him of what he must meet, and is sufficiently definite to enable him later to plead former conviction, it is sufficient and not subject to demurrer.—State v. Lottridge, 29 Ida. 53, 155 Pac. 487.

3 Sherban v. Com., 8 Watts (Pa.) 212, 34 **Am. Dec.** 460.

4 Woodward v. State, 103 Ind. 127, 5 **Am. Cr. Rep.** 210, 2 N. E. 321.

Allegation of facts constituting the alleged crime need be no stronger than the proof of the facts constituting the crime.—State v. Dix, 33 Wash. 405, 74 Pac. 570.

5 Kribs v. People, 81 Ill. 599, 2 **Am. Cr. Rep.** 114; Axtell v. State, 173 Ind. 711, 91 N. E. 354; State v. Ives, 128 La. 273, **Ann. Cas.** 1912C, 901, 54 So. 796.

6 State v. Palmer, 32 La. Ann. 565; Com. v. Butterick, 100 Mass. 1, 97 **Am. Dec.** 65; Com. v. Pratt, 137 Mass. 98; State v. Messenger, 58 N. H. 348; State v. Barter, 58 N. H. 604. See Pullman v. State, 78 Ala. 31, 56 **Am. Rep.** 21.

7 State v. Leonard, 56 Wash. 83, 21 **Ann. Cas.** 69, 105 Pac. 163.

statute the prosecution will be had, even where the punishment provided by the different statutes or sections of a statute are dissimilar in severity,[8] because it makes no difference to the accused that the penalty is different in the different statutes or sections of the same statute; those which concern him are the acts with the commission of which he is charged.[9]

§ 585. —— LANGUAGE OF THE STATUTE. An indictment or information, charging embezzlement, is usually held to comply with the rule laid down in the preceding section where it follows the language of the statute under which drawn,[1] or employs words substantially equivalent to or words more extensive than and necessarily including the words used in the statute,[2] where the language of the statute sets forth every fact essential to constitute the

8 Id.

9 State v. Isensee, 12 Wash. 254, 40 Pac. 985; State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

1 ALA.—Lowenthal v. State, 32 Ala. 589. CAL.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746; People v. Fisher, 16 Cal. App. 271, 116 Pac. 688. GA.—Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369. ILL.—Ker v. People, 110 Ill. 630, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225; Meadowcraft v. People, 163 Ill. 56, 54 Am. St. Rep. 447, 35 L. R. A. 176, 45 N. E. 303; McCracken v. People, 209 Ill. 218, 70 N. E. 749; People v. Schreiber, 250 Ill. 349, 95 N. E. 189. IND. — State v. Beach, 147 Ind. 74, 36 L. R. A. 179, 43 N. E. 949, 46 N. E. 145. LA.—State v. Jones, 109 La. 125, 33 So. 108. MICH. — People v. Glazier, 159 Mich. 528, 124 N. W. 582. MISS.—Richberger v. State, 90 Miss. 806, 44 So. 772. MO.—State v. Mohr, 68 Mo. 303, 3 Am. Cr. Rep. 64; State v. Larew, 191 Mo. 192, 89 S. W. 1031; State v. Blakemore, 226 Mo. 560, 27 L. R. A. (N. S.) 415, 126 S. W. 429. N. J.—Reynolds v. State, 65 N. J. L. 424, 47 Atl. 644. N. M. — State v. Probert, 19 N. M. 13, 140 Pac. 1108. FED. — United States v. Voorhees, 9 Fed. 143.

An information in the language of the statute is sufficient on a motion in arrest of judgment without alleging the circumstances of the felonious conversion.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

2 People v. Page, 116 Cal. 386, 48 Pac. 326; People v. Fisher, 16 Cal. App. 271, 116 Pac. 688; Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369; Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed in 18 Fed. 167, and in 119 U. S. 436, 36 L. Ed. 421, 7 Sup. Ct. Rep. 225; McCracken v. People, 209 Ill. 215, 70 N. E.

offense;[3] and where so drawn can not be held to be insufficient for vagueness, indefiniteness, or uncertainty.[4] Where there is an allegation that the accused obtained possession of the money, securities or other property, by virtue of his office or employment, it is unnecessary to follow the language in a form prescribed by statute.[5]

Allegation of means by which the embezzlement and conversion were accomplished is unnecessary, and where alleged may be treated as surplusage.[6] Thus, under the Illinois statute,[7] it is sufficient to allege, generally, an embezzlement,[8] fraudulent conversion, or taking, with intent to convert to the accused's own use, the money, funds, securities or other property of his employer to a specified amount or value, without specifying any particulars of such embezzlement.[9]

§ 586. PARTICULAR AVERMENTS—FIDUCIARY RELATION. Inasmuch as it is indispensable that there should subsist a fiduciary relation between the accused and the person

749; State v. Beach, 147 Ind. 74, 36 L. R. A. 179, 43 N. E. 949, 46 N. E. 145; Richberger v. State, 90 Miss. 806, 44 So. 772; Chamberlain v. State, 80 Neb. 812, 115 N. W. 555; State v. Ross, 55 Ore. 450, 42 L. R. A. (N. S.) 601, 104 Pac. 596, 106 Pac. 1022; appeal dismissed, 227 U. S. 150, 57 L. Ed. 458, 33 Sup. Ct. Rep. 220. See State v. Scoggins, 85 Ark. 43, 106 S. W. 969; Field v. United States, 27 App. Cas. (D. C.) 433; appeal dismissed, 205 U. S. 292, 51 L. Ed. 807, 27 Sup. Ct. Rep. 543; Strobhar v. State, 55 Fla. 167, 47 So. 6; State v. Jamison, 74 Iowa 602, 38 N. W. 508; State v. Washington, 41 La. Ann. 778, 6 So. 633; Gebhardt v. State, (Tex. Cr. Rep.) 27 S. W. 136; Evans v. State, 40 Tex. Cr. Rep. 54, 48 S. W. 194.

3 State v. Ross, 55 Ore. 450, 42 L. R. A. (N. S.) 601, 104 Pac. 596, 106 Pac. 1022; appeal dismissed, 227 U. S. 150, 57 L. Ed. 458, 33 Sup. Ct. Rep. 220.

4 State v. Blakemore, 226 Mo. 560, 27 L. R. A. (N. S.) 415, 126 S. W. 429.

5 Gleason v. State, 6 Ala. App. 49, 60 So. 518.

6 Jewett v. United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

7 Crim. Code, § 82.

8 "Embezzled" funds, charged against accused, indictment sufficient. — United States v. Mason, 117 Fed. 558.

9 Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225.

whose property is converted before the crime of embezzlement can come into being, the indictment or information must distinctly allege the existence of such a relation, or set out facts which establish, in law, the existence of such a relation, otherwise the instrument will be insufficient to show that the crime charged has been committed;[1] but to indicate this fiduciary relation it is sufficient to state, in the language of the statute under which the indictment or information is drawn, the position which the accused occupied at the time of the alleged embezzlement to the owner of the money, securities, or other property charged to have been embezzled and converted, without setting out the particulars of that relation,[2] it being sufficient to indicate it by the term or

1 ARIZ.—Hinds v. Terr., 8 Ariz. 372, 76 Pac. 469. ARK.—Tally v. State, 105 Ark. 28, 150 S. W. 110. CAL.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746. GA.—Saunders v. State, 86 Ga. 717, 12 S. E. 1058. ILL.—Kibs v. People, 81 Ill. 599, 2 Am. Cr. Rep. 114. IND.—Axtell v. State, 173 Ind. 711, 91 N. E. 354. IOWA—State v. Johnson, 49 Iowa 141. KY.—Com. v. Barney, 115 Ky. 475, 74 S. W. 181; Farmer v. Com., 28 Ky. Law Rep. 1369, 91 S. W. 1129. LA.—State v. Roubles, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435; State v. Ives, 128 La. 273, Ann. Cas. 1912C, 901, 54 So. 796. ME.—State v. Stevenson, 91 Me. 107, 39 Atl. 471. TEX.—State v. Johnson, 21 Tex. 775; Griffin v. State, 4 Tex. App. 416; Gilliard v. State, (Tex. Cr. Rep.) 182 S. W. 1136. WYO.—McCann v. United States, 2 Wyo. 274; Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

2 Tally v. State, 105 Ark. 28, 150 S. W. 110; People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746; People v. Goodrich, 142 Cal. 216, 75 Pac. 796; People v. O'Brian, 8 Cal. App. 641, 97 Pac. 679; Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762; State v. Nugent, 182 Ind. 200, 106 N. E. 361; Com. v. Hussey, 111 Mass. 432; State v. Chew Muck You, 20 Ore. 215, 25 Pac. 355; Webb v. York, 25 C. C. A. 133, 79 Fed. 616.

The indictment need not set out all the facts and circumstances of the bailment.—State v. Chew Muck You, 20 Ore. 215, 25 Pac. 355.

Where the indictment charges that the accused was intrusted with money "for the use and benefit" of the person who intrusted the money the nature of the trust is sufficiently averred.—Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762 (indictment for larceny after trust).

The affidavit charging the defendant with embezzlement of money held by him as bailee need not describe the precise charac-

phrase employed in the statute,[3] such as agent;[4] agent and bailee;[5] agent and collector;[6] agent and employee;[7] agent and servant;[8] agent, servant, employee and bailee;[9]

ter of the bailment.—Webb v. York, 25 C. C. A. 133, 79 Fed. 616.

Contra: State v. Griffith, 45 Kan. 142, 25 Pac. 616; Com. v. Smart, 72 Mass. (6 Gray) 15.

The fiduciary relation is sufficiently alleged by an allegation that the property was delivered to the accused on the trust and confidence that he would return it on demand.—Com. v. Hussey, 111 Mass. 432, citing Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Contra: State v. Schoemperlen, 101 Minn. 8, 111 N. W. 577; Territory v. Maxwell, 2 N. M. 250; Goodwyn v. State, (Tex.) 64 S. W. 251.

An allegation that the accused is a bailee of the goods stolen is a conclusion of law and the facts constituting the bailment and the purpose or breach of the bailment must be set forth.—Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

3 People v. Dorthy, 20 App. Div. (N. Y.) 308, 13 N. Y. Cr. Rep. 173, 46 N. Y. Supp. 970; affirmed, 156 N. Y. 237, 13 N. Y. Cr. Rep. 30, 50 N. E. 800.

4 ALA.—Wall v. State, 2 Ala. Cr. 157, 56 So. 57. ARK.—Fleener v. State, 58 Ark. 98, 23 S. W. 1; State v. Scoggins, 85 Ark. 43, 106 S. W. 969. CAL.—People v. Tomlinson, 66 Cal. 344, 5 Pac. 509. FLA.—Strobhar v. State, 55 Fla. 167, 47 So. 4. ILL.—People v. O'Farrell, 247 Ill. 44, 93 N. E. 136. IND.—State v. Nugent, 182 Ind. 200, 106 N. E. 361. KY.—Com. v. Clifford, 96 Ky. 4, 16 Ky. Law Rep. 184, 27 S. W. 811. MO.—State v. Myers, 68 Mo. 266; State v. Dodson, 72 Mo. 283. N. C.—State v. Fain, 106 N. C. 760, 11 S. E. 593. PA.—Com. v. Newcomer, 49 Pa. St. 478; Com. v. Kleckner, 45 Pa. Sup. Ct. 179.

"Agent" nomen generalissimum, includes clerks and servants, but is by no means restricted to such persons.—People v. Allen, 5 Den. (N. Y.) 76, 79.

The nature and purposes of the agency need not be set out.—State v. Myers, 68 Mo. 266.

The terms of the agency or contract need not be set out.—State v. Nugent, 182 Ind. 200, 106 N. E. 361.

5 People v. McLean, 135 Cal. 306, 67 Pac. 770.

6 State v. Mohr, 68 Mo. 303, 3 Am. Cr. Rep. 64; State v. Adams, 108 Mo. 208, 18 S. W. 1000.

7 Woodward v. State, 103 Ind. 127, 5 Am. Cr. Rep. 210, 2 N. E. 321; Mitchell v. State, 11 Ohio Cir. Dec. 446, 21 Ohio Cir. Ct. Rep. 24.

8 People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502; Lewis v. State, 54 Fla. 54, 45 So. 998; State v. Larew, 191 Mo. 192, 89 S. W. 1031; State v. Fournier, 12 Mont. 235, 29 Pac. 824.

Where accused was set out as "agent, servant, and bailee," the word bailee may be regarded as surplusage.—State v. Fellows, 98 Minn. 179, 108 N. W. 825.

9 State v. Lillie, 21 Kan. 728.

agent or attorney;[10] assignee;[11] attorney;[12] bailee;[13] bailee and trustee;[14] cashier;[15] clerk;[16] clerk and servant;[17] clerk or agent;[18] commission merchant;[19] con-

10 Characterizing the accused as agent or attorney under a charge of embezzlement by an agent or servant does not invalidate the information, although the word "attorney" does not appear in the statute creating the offense. —Casleton v. State (Mo.), 164 S. W. 492.

11 State v. Nelson, 79 Minn. 373, 82 N. W. 674; State v. Whiteman, 9 Wash. 402, 37 Pac. 659.

12 People v. Tryon, 4 Mich. 665; Casleton v. State, (Mo.) 164 S. W. 492.

13 Storms v. State, 81 Ark. 25, 98 S. W. 678. ARK. — Tally v. State, 105 Ark. 28, 150 S. W. 110. CAL.—People v. Flores, 64 Cal. 426, 1 Pac. 498; People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746; People v. Goodrich, 142 Cal. 216, 75 Pac. 796; People v. O'Brian, 8 Cal. App. 641, 97 Pac. 679. DEL.—State v. Abbott, 5 Penn. 330, 63 Atl. 231. KAN.—State v. Combs, 47 Kan. 136, 27 Pac. 818 (such a designation is sufficient to resist a motion in arrest of judgment). MONT.—State v. Hall, 45 Mont. 498, 125 Pac. 639. TEX.—Gebhard v. State, (Tex.) 27 S. W. 136. UTAH—People v. Hill, 3 Utah 334, 3 Pac. 75. WYO.—Wilburn v. Territory, 3 Wyo. 268, 21 Pac. 698.

Accused need not be named as bailee where indictment or information sets forth facts which clearly show that accused was constituted a bailee, and received the property embezzled in that capacity. — People v. Johnson, 71 Cal. 384, 12 Pac. 261.

Bailment or facts constituting a bailment must be alleged or the indictment will be insufficient.—Wilburn v. State, 3 Wyo. 268, 21 Pac. 698.

14 Peters v. State, 12 Ala. App. 133, 67 So. 723.

15 Ritter v. State, 70 Ark. 472, 69 S. W. 262; Ballew v. State, 11 Okla. Cr. Rep. 598, 149 Pac. 1070.

Information against the cashier of a bank for embezzling a bank deposit can not charge that the embezzlement was made from a depositor and also allege that the transaction was had with the accused as an agent of the bank by a customer of the bank transacting the ordinary business of a depositor.—Ballew v. State, 11 Okla. Cr. Rep. 598, 149 Pac. 1070.

16 State v. Lipscomb, 160 Mo. 125, 60 S. W. 1081; Budd v. State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189.

"Clerk of an individual ledger" does not properly charge the defendant under a statute against embezzlement by a "cashier or any other of the officers, agents, or servants of said corporation." — Budd v. State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189.

17 Davis v. State, 108 Miss. 710, 67 So. 178, 662.

18 State v. Blakemore, 226 Mo. 560, 27 L. R. A. (N. S.) 415, 126 S. W. 429.

19 Bridgers v. State, 8 Tex. App. 145.

signee or factor;[20] employee;[21] executor;[22] guardian;[23] president and director;[24] president, director and agent;[25] public officer;[26] secretary;[27] secretary, treasurer, and officer;[28] servant;[29] surviving partner;[30] and the like.

Particulars of fiduciary relation, or its origin,[31] as a general rule, need not be alleged,[32] or the precise character of the bailment or employment or trust averred,[33]

20 Com. v. Meads, 29 Pa. Sup. Ct. 321, 14 York Leg. Rec. (Pa.) 130.

21 Ritter v. State, 111 Ind. 324, 12 N. E. 501.

22 People v. Gibson, 218 N. Y. 70, 112 N. E. 730.

23 State v. Whitehouse, 95 Me. 179, 49 Atl. 869.

24 Taylor v. Com., 119 Ky. 731, 75 S. W. 244.

25 Jewett v. United States, 41 C. C. A. 88, 53 L. R. A. 568, 100 Fed. 832; United States v. Northway, 120 U. S. 327, 39 L. Ed. 664, 7 Sup. Ct. Rep. 580.

26 People v. Doss, 39 Cal. 428; People v. Mohlman, 82 Cal. 585, 23 Pac. 145; People v. Page, 116 Cal. 386, 48 Pac. 326; State v. Eames, 39 La. Ann. 986, 3 So. 93; State v. Goss, 69 Me. 22, 3 Am. Cr. Rep. 66; State v. Nicholson, 67 Md. 1, 8 Atl. 817; State v. Noland, 111 Mo. 473, 19 S. W. 715; Bode v. State, 80 Neb. 74, 113 N. W. 996; State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

Describing a public officer as "superintendent of common schools," is a sufficient description of his office.—People v. Doss, 39 Cal. 428.

Indictment against public officer need not allege that he was duly elected or appointed or that he was duly qualified as such.—State v. Goss, 69 Me. 22, 3 Am. Cr. Rep. 66.

27 State v. Wise, 186 Mo. 42, 84 S. W. 954.

28 Com. v. Leisenring, 11 Phila. (Pa.) 392, 32 Leg. Int. 168.

29 Strobhar v. State, 55 Fla. 167, 47 So. 4; Gravatt v. State, 25 Ohio St. 162.

30 State v. Matthews, 129 Ind. 281, 28 N. E. 703.

31 People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

32 People v. Johnson, 71 Cal. 384, 12 Pac. 261; People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746; People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Goodrich, 142 Cal. 216, 75 Pac. 796; People v. O'Brian, 8 Cal. App. 641, 97 Pac. 677; Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762.

Larceny after trust charged, alleging accused was intrusted with specified lawful money for the use and benefit of a person named, was held to be sufficient on objection that the trust was not sufficiently described.—Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762.

33 State v. Jamison, 74 Iowa 602, 38 N. W. 508; State v. Chew Muck You, 20 Ore. 215, 25 Pac. 355; Webb v. York, 49 U. S. App. 163, 25 C. C. A. 133, 79 Fed. 616.

or the duties of the agent or servant or the purposes for which employed given.[34] One line of cases holds that the purpose for which the money or securities or other property was given or intrusted to the accused need not be pleaded,[35] while under another line of cases the indictment or information should not merely state the bailment or trust reposed in the accused, but should in addition aver the facts and circumstances which make the case one of embezzlement, and in order to do this must state the purpose for which the accused was intrusted with the money or property.[36]

§ 587. —— RECEIPT OF PROPERTY BY ACCUSED. That accused received the money or other property alleged to have been embezzled, and that it came into his possession by virtue of his fiduciary relation at the time of the appropriation must be distinctly and positively averred in the indictment or information,[1] must not be left to be

34 Strobhar v. State, 55 Fla. 167, 47 So. 4; State v. Myers, 68 Mo. 266.

35 De Leon v. Territory, 9 Ariz. 161, 80 Pac. 348; Territory v. Maxwell, 2 N. M. 250; State v. Turner, 10 Wash. 94, 38 Pac. 864; Goodwyn v. State, (Tex.) 64 S. W. 251; Woodell v. Arizona, 109 C. C. A. 487, 187 Fed. 739.

36 State v. Griffith, 45 Kan. 142, 25 Pac. 616; Com. v. Smart, 72 Mass. (6 Gray) 15; State v. Gresham, 90 Mo. 163, 2 S. W. 223; State v. Meins, 26 Minn. 191, 2 N. W. 492; State v. Holt, 88 Minn. 171, 92 N. W. 541; State v. Schoemperlin, 101 Minn. 8, 111 N. W. 577; Gaddy v. State, 8 Tex. App. 127; Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

California rule was formerly in harmony with this contention (see People v. Cohn, 8 Cal. 42; People v. Peterson, 9 Cal. 313; People v. Poggi, 19 Cal. 600), and is often quoted in support of the contention (as in State v. Griffith, supra), but that rule has been changed by the Penal Code (adopted February 14, 1872) which was designed to work the same change in pleading and practice in criminal actions as that wrought by the Code of Civil Procedure in civil actions, and for that reason it is not necessary, under the Penal Code, to state the facts constituting the offense with the same particularity before required. See People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Cronin, 34 Cal. 191; Webb v. York, 49 U. S. App. 163, 25 C. C. A. 133, 79 Fed. 616.

1 ALA.—Britton v. State, 77 Ala. 202. ARIZ.—Hinds v. Terr., 8 Ariz. 372, 76 Pac. 469; Thomas v. Terr., 9 Ariz. 180, 80 Pac. 320.

surmised or inferred,[2] and must be alleged with the same degree of certainty as is required in a charge of larceny.[3] It is sufficient to employ the words of the statute in setting out the fiduciary relationship of the accused,[4] but it is also sufficient to use words of substantially the same import.[5]

ARK.—Ritter v. State, 70 Ark. 472, 69 S. W. 262. FLA. — Alden v. State, 18 Fla. 187; Grant v. State, 35 Fla. 581, 17 So. 225. GA.—Sanders v. State, 86 Ga. 717, 12 S. E. 1058. IND. — State v. Hebel, 72 Ind. 361; Ritter v. State, 111 Ind. 324, 12 N. E. 501; State v. Matthews, 129 Ind. 281, 28 N. E. 703; Dean v. State, 147 Ind. 215, 46 N. E. 528; State v. Windstanley, 155 Ind. 290, 55 N. E. 71; Axtell v. State, 173 Ind. 711, 91 N. E. 354. IOWA.—State v. Jamison, 74 Iowa 602, 38 N. W. 508. KY.—Com. v. Barney, 24 Ky. L. Rep. 2352, 74 S. W. 181. LA.—State v. Washington, 41 La. Ann. 778, 6 So. 633; State v. Roubles, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435. MASS. — Com. v. Merrifield, 45 Mass. (4 Metc.) 468; Com. v. Wyman, 49 Mass. (8 Metc.) 247. MICH.—People v. Tryon, 4 Mich. 468; People v. McKinney, 10 Mich. 54. MINN.—State v. Farrington, 59 Minn. 147, 28 L. R. A. 395, 60 N. W. 1088; State v. Nelson, 79 Minn. 376, 82 N. W. 674. MO.—State v. Noland, 111 Mo. 473, 19 S. W. 715. NEV.—Ricord v. Central Pac. R. Co., 15 Nev. 167. N. M.—State v. Aurandt, 15 N. M. 292, 27 L. R. A. (N. S.) 415, 107 Pac. 1064. N. Y.—People v. Allen, 5 Den. 76. N. C.—State v. Keith, 126 N. C. 1114, 36 S. E. 169. TEX.—State v. Johnson, 21 Tex. 775; State v. Longworth, 41 Tex. 162; Gibbs v. State, 41 Tex. 492; Griffin v. State, 4 Tex. App. 412; Baker v. State, 6 Tex. App. 344; Gaddy v. State, 8 Tex. App. 127; Taylor v. State, 29 Tex. App. 466, 16 S. W. 302. FED.—Moore v. United States, 160 U. S. 268, 40 L. Ed. 422, 10 Am. Cr. Rep. 283, 16 Sup. Ct. Rep. 294; United States v. Allen, 150 Fed. 152; Shaw v. United States, 91 C. C. A. 208, 165 Fed. 174.

The words of description employed must be certain to a certain intent, certainty to a common intent being insufficient. — United States v. Forrest, 3 Cranch C. C. 56, 25 Fed. Cas. No. 15131.

An allegation that the property came into the hands of the accused "as such employee" is not equivalent to the words "by virtue of such employment."—Wright v. State, 168 Ind. 643, 81 N. E. 660.

2 See State v. Johnson, 21 Tex. 775; Wise v. State, 41 Tex. 139; State v. Longworth, 41 Tex. 162; Gibbs v. State, 6 Tex. App. 344; Gaddy v. State, 8 Tex. App. 127.

3 State v. Roubles, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435.

4 As to pleading in language of statute in charging embezzlement, see, supra, § 585.

5 State v. Scoggins, 85 Ark. 43, 106 S. W. 969; Fields v. United States, 27 App. Cas. (D. C.) 433; writ of error dismissed in 205 U. S. 292, 51 L. Ed. 807, 27 Sup.

Instances: Thus, where a bailee is charged with having converted to his own use the proceeds of property intrusted to him to be sold, the indictment must allege not only that accused sold the property and converted the proceeds, but also distinctly allege that accused received the money which was the proceeds of the sale;[6] also, where a state treasurer is charged to have embezzled state funds, he must be charged with having received the money by virtue of his office,[7] and that the embezzlement was committed by accused while the money was in his official custody and control, not merely that it had been received by him into the state treasury;[8] and where a tax-collector is charged with failure to forward "tax-money in his hands," it must be averred that the money alleged to have been embezzled was at the time in his hands.[9] Bank officer charged with embezzlement of funds of bank, the rule does not apply, and the indictment need not charge that the money was in his actual custody or possession at the time of the embezzlement.[10]

Receipt from other than master or employer, by virtue of position or employment, being charged, it is sufficient to allege that accused while he was employed in a named fiduciary capacity, did, by virtue of employment, receive into his possession designated moneys or other property, in the name and on account of the employer,

Ct. Rep. 543; Strobhar v. State, 55 Fla. 167, 47 So. 6; State v. Jamison, 74 Iowa 602, 38 N. W. 508; State v. Washington, 41 La. Ann. 778, 6 So. 633; Gebhardt v. State, (Tex.) 27 S. W. 136; Evans v. State, 40 Tex. Cr. Rep. 54, 48 S. W. 194.

6 Grant v. State, 35 Fla. 581, 17 So. 225; Ritter v. State, 111 Ind. 324, 12 N. E. 501; State v. Jamison, 74 Iowa 602, 38 N. W. 508; State v. Roubles, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435; Com. v. Wyman, 49 Mass. (8 Metc.) 247; State v. Farrington, 59 Minn. 147, 28 L. R. A. 395, 60 N. W. 1088.

7 State v. Noland, 111 Mo. 473, 19 S. W. 715.

8 People v. McKinney, 10 Mich. 54.

9 Britton v. State, 77 Ala. 202.

10 See State v. Palmer, 32 La. Ann. 565; United States v. Northway, 120 U. S. 327, 30 L. Ed. 664, 7 Sup. Ct. Rep. 580.

without setting out the name of the person from whom the money or other property was received.[11]

Receipt of goods out of ordinary course of employment and possession thereof as servant of the owner, in pursuance of special direction of master to receive them, being charged, and a subsequent embezzlement alleged, the indictment or information will be sufficient, because the goods came into accused's possession by virtue[12] of his employment.[13] Thus, one employed by a merchant to sweep out and to wait about the store, but who was not a clerk in the store, being authorized to take a lot of shoes with him to a neighboring town and sell them during his visit there, which he did, converting the proceeds to his own use, indictment for embezzlement of the proceeds of the sale of the shoes alleged to have been received by virtue of his employment was held good.[14] Goods or other property not received by virtue of a general or special employment, the case will, of course, be different, and embezzlement of the goods or property, or of the proceeds thereof, can not be predicated.[15] Thus, in a case where accused was furnished with sewing machines, to be sold in various towns by general canvass, he to account to his principal in money, or in purchase-money notes, payable to the principal, but, by a contract

11 State v. Broughton, 71 Miss. 90, 13 So. 885; State v. Lanier, 89 N. C. 517.

12 **"By virtue"** of employment, used in statute, is a phrase of broad import, and serves well to effectuate the object for which employed. — State v. Costin, 89 N. C. 511, 4 Am. Cr. Rep. 169. See People v. Dalton, 15 Wend. (N. Y.) 581.

13 People v. Dalton, 15 Wend. (N. Y.) 581; State v. Costin, 89 N. C. 511, 4 Am. Cr. Rep. 169; R. v. Hughes, 1 Moo. 370; R. v. Smith, 1 Russ. & R. 516.

14 State v. Costin, 89 N. C. 511, 4 Am. Cr. Rep. 169.

15 **Employee excavating for mill-site,** for his employer, upon government land, finding and taking possession of gold, did not find the gold by virtue of his employment within the statute (Cal. Civil Code, § 1985), since he was employed to excavate dirt and not to search for gold, and the employer had no interest in the gold found. —Burns v. Clark, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12.

outside of the terms of the agency, accused was authorized to sell machines for live-stock, on condition that he would sell the live-stock and account to his principal for the money. Accused tendered his principal horses which he had taken in exchange for sewing machines, which his principal refused to accept; whereupon accused sold the horses and retained the money. On indictment for embezzlement it was held that the money was not the property of the principal, and that the law of embezzlement did not apply.[16]

§ 588. —— DESCRIPTION OF PROPERTY, GENERALLY. The indictment or information should describe the property alleged to have been embezzled with such certainty[1] as to identify it;[2] so that it may appear to the court whether the property in question was a subject of embezzlement;[3] so that the jury may be able to decide whether the property alleged to have been embezzled is the very same

16 Webb v. State, 8 Tex. App. 310.

1 People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 213; People v. Burr, 41 How. Pr. (N. Y.) 293, 299.

"Description fairly accurate can usually be obtained from the person from whose possession it came to the accused, and in case of a large number of chattels, some one or more, at all events, can be described with sufficient accuracy."—Territory v. Maxwell, 2 N. M. 250.

2 Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225; Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369; State v. Edson, 10 La. Ann. 229; State v. Muston, 21 La. Ann. 442; Com. v. Merrifield, 45 Mass. (4 Metc.) 468; Com. v. Gately, 126 Mass. 52; Moore v. United States, 160 U. S. 268, 40 L. Ed. 422, 10 Am. Cr. Rep. 283, 16 Sup. Ct. Rep. 294.

Failure to describe property is a fatal defect to which objection may be taken at any stage of the proceedings, either before or after verdict.—Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225. See People v. Cox, 40 Cal. 275; Carter v. State, 53 Ga. 326; Com. v. Smart, 73 Mass. (6 Gray) 15; State v. Stimson, 24 N. J. L. (4 Zab.) 9.

"Pieces of paper" charged to have been embezzled in connection with mortgages and notes, the pieces of paper need not be so described as to identify them.—Com. v. Pratt, 137 Mass. 98.

3 Sanders v. State, 86 Ga. 717, 12 S. E. 1058; State v. Edson, 10 La. Ann. 229; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

as that upon which the indictment is founded;[4] and so that the accused may be enabled to plead an acquittal or a conviction in bar of a subsequent indictment for the embezzlement of the same property.[5] The standard of certainty in the description required of the property is the accuracy required in an indictment charging larceny,[6] no greater particularity than that being required.[7] Where it is impossible or impracticable to give a definite description of the property embezzled, the best description possible should be set out, and the reason why a better description is not given should be stated.[8] Thus, an allegation that the property is in possession of the accused will excuse the lack of a minute description;[9] and it has been said that where, necessarily, the "knowledge of the character, kind, amount and value . . . rests solely in the accused, there is no reason, beyond that furnished by authority, for applying the rule."[10]

Officer embezzling public property or money, it seems that the rule requiring the indictment to set out a description of the property does not apply, for manifest reasons. No one but the person in possession knows, or can know, the details regarding such property or money.[11]

4 State v. Edson, 10 La. Ann. 229.

5 Id.

6 Britton v. State, 77 Ala. 202; State v. Thompson, 42 Ark. 517; People v. Cox, 40 Cal. 275; Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225; Com. v. Bradley, 132 Ky. 512, 116 S. W. 761; State v. Edson, 10 La. Ann. 229; Com. v. Smart, 72 Mass. (6 Gray) 15; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65; Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121; Rex v. McGregor, 3 Bos. & P. 102.

7 Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369; Com. v. Concannon, 87 Mass. (5 Allen) 502; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Bank-bills need not be more fully described than is necessary in an indictment for larceny.— Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369.

8 Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225.

9 Leonard v. State, 7 Tex. App. 417.

10 State v. Munch, 22 Minn. 67.

11 State v. Carrick, 16 Nev. 120; United States v. Bornemann, 36 Fed. 257; Dimmick v. United States, 57 C. C. A. 664, 121 Fed.

Instances of sufficiency of description of property charged to have been embezzled, within the rules above laid down, may be given as follows: "A deed of mortgage of certain lands situated in" a designated place, executed by a named person to a designated party, and delivered to him by the named grantee, the property of, etc.;[12] bank-bills by their denomination, bank issuing them, by whom signed and countersigned, and their owner;[13] "bonds of the United States of America for the payment of money, issued by authority of law, and of the aggregate value of one thousand dollars";[14] "certain books, letter files, knives, bank shears, slates, and sealing wax, to about the value of forty dollars";[15] "certain United States five-twenty government bonds, which were valuable securities, of the value of," stating the amount;[16] check sufficiently described by giving the amount for which drawn and the name of the owner thereof,[17] need not state in whose favor or on whom the check was drawn,[18] or from whom received;[19] "fifteen head of beef cattle, worth fifteen dollars per head";[20] "fifty pieces of paper of the value of," giving it;[21] "for the purpose of collecting certain money on a lottery ticket";[22] "gold metal, of the value of thirty-three thou-

638, distinguishing Moore v. United States, 160 U. S. 268, 40 L. Ed. 422, 16 Sup. Ct. Rep. 294.

12 Com. v. Concannon, 87 Mass. (5 Allen) 502.

13 Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369.

14 Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65

15 Mayo v. State, 30 Ala. 32.

16 State v. Myers, 68 Mo. 266.

17 State v. Farley, 71 W. Va. 100, 42 L. R. A. (N. S.) 498, 76 S. E. 134.

18 State v. Burks, 159 Mo. 568, 60 S. W. 1100.

19 Id.

20 Sanders v. State, 86 Ga. 717, 12 S. E. 1058.

21 Com. v. Parker, 165 Mass. 526, 43 N. E. 499.

22 Woodward v. State, 103 Ind. 127, 5 Am. Cr. Rep. 210, 2 N. E. 321.

Lottery ticket entrusted to accused to collect thereon need not be described in the indictment or information charging embezzlement of the money received thereon, because the charge against the accused is not predicated upon the lottery ticket, and the lottery ticket does not constitute the basis of the prosecu-

sand dollars";[23] "railroad tickets" of a named value;[24] "thirteen thousand and twenty pairs of shoes, of the value of one dollar per pair," the property of, etc.;[25] "three thousand dollars currency of the United States, of the value of three thousand dollars,"[26] and the like.

Instances of insufficiency of description of property charged to have been embezzled, within the rules above laid down, are: "Certain lot of lumber," and a "certain lot of furniture," and "certain tools";[27] charging accused had possession of a "mule" under a contract of hiring, and "did then and there convert said horse to his own use";[28] "furs of various kinds, of the value of six hundred and ninety-five dollars";[29] "moneys, goods, and chattels, of the value of four hundred dollars," without specifying particular articles, or alleging the value to be in lawful currency of the United States;[30] "the proceeds" of certain lumber alleged to have been sold by the accused,[31] and the like.

§ 589. ——— MONEY, AND ITS VALUE. In those cases in which the property alleged to have been embezzled and

tion. If the felonious act charged against the accused had immediate connection with the lottery ticket, or if it were something unlawfully done by him of or concerning such ticket, then the ticket should be described with certainty. But where the reference to the lottery ticket is made for the purpose of indicating how the accused, as agent and employee of the owner and holder of the lottery ticket, had access to, control and possession of the money which it is charged he embezzled and appropriated to his own use, a specific description of the lottery ticket is not necessary; the indictment would be complete and sufficient without any reference to the lottery ticket. —Woodward v. State, 103 Ind. 127, 5 Am. Cr. Rep. 210, 2 N. E. 321.

23 United States v. Jones, 69 Fed. 973.

24 Com. v. Parker, 165 Mass. 526, 43 N. E. 499.

25 Com. v. Shaw, 145 Mass. 349, 14 N. E. 159.

26 Butler v. State, 46 Tex. Cr. Rep. 287, 81 S. W. 743.

27 State v. Edson, 10 La. Ann. 229.

28 Duncan v. State, (Tex.) 70 S. W. 543.

29 State v. Silverman, 76 N. H. 309, 82 Atl. 536.

30 People v. Cohen, 8 Cal. 42.

31 Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225.

converted to his own use by the accused consists of money, the statutes of the various states of the Union are so variant in their provisions and wording as to make it impossible to frame rules equally applicable alike in all jurisdictions; the pleader must be governed by the provisions and wording of the particular statute under which the prosecution is instituted. In the absence of statutory provisions to the contrary, the description of money charged to have been embezzled must be fully and particularly described, in accordance with the rules already set out,[1] and the best description possible should be given by alleging the character and denomination of the money,[2] or excuse a lack of a full and definite description by averring that a fuller and more accurate description of the money is to the grand jury unknown, or is to the prosecuting witness and informant unknown, where the prosecution is by information,[3] it not being sufficient simply to allege the embezzlement of a designated number of dollars.[4]

1 See, supra, § 588.

2 Noble v. State, 59 Ala. 73; State v. Ward, 48 Ark. 36, 2 S. W. 191; Datson v. State, 51 Ark. 119, 10 S. W. 18; Silvie v. State, 117 Ark. 108, 173 S. W. 857; People v. Cox, 40 Cal. 275; Territory v. Maxwell, 2 N. M. 250.

Best description of the bills or coins that circumstances will permit is all that is required.—State v. Maxwell, 2 N. M. 250.

California rule has been changed by the Penal Code. See People v. Treadwell, 69 Cal. 226, 7 **Am. Cr. Rep.** 152, 10 Pac. 502.

3 Barton v. State, 29 Ark. 68; State v. Thompson, 42 Ark. 517; State v. Ward, 48 Ark. 36, 3 **Am. St. Rep.** 213, 3 S. W. 191; Fleener v. State, 58 Ark. 98, 23 S. W. 1; State v. Combs, 47 Kan. 136, 27 Pac. 818; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142.

Allegation of a specified number of dollars followed by an allegation that more particular description of the money is unknown to the grand jury is sufficient.—Strobhar v. State, 55 Fla. 167, 47 So. 4.

4 State v. Thompson, 42 Ark. 517; State v. Ward, 48 Ark. 36, 3 **Am. St. Rep.** 213, 3 S. W. 191; People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313; People v. Cox, 40 Cal. 275; State v. Stimson, 24 N. J. L. (4 Zab.) 9.

"Certain money, to a large amount, to wit, to the amount of one hundred dollars," held to be an insufficient description in State v. Thompson, 42 Ark. 517.

Statutes in a majority of the states have been passed liberalizing the former rule and providing what description of money charged to have been embezzled shall be deemed to be sufficient. Under these statutes it is generally sufficient to allege the embezzlement and conversion of money, without specifying any particular kind of coin number or kind of money.[5] The following descriptions of money have been held to be sufficient under these various statutes: "Bank notes";[6] "bills of exchange";[7]

[5] See: ALA.—Lowenthal v. State, 32 Ala. 589; Noble v. State, 59 Ala. 73; Huffman v. State, 89 Ala. 33, 8 So. 28; Lang v. State, 97 Ala. 41, 12 So. 183; Walker v. State, 117 Ala. 42, 23 So. 149. CAL.—People v. Treadwell, 69 Cal. 226, 5 Am. Cr. Rep. 152, 10 Pac. 502; People v. Mohlman, 82 Cal. 585, 23 Pac. 145; People v. Cobler, 108 Cal. 538, 41 Pac. 401. GA.—Cody v. State, 100 Ga. 105, 28 S. E. 106. IND.—Crawford v. State, 155 Ind. 692, 57 N. E. 931. IOWA—State v. Alverson, 105 Iowa 152, 74 N. W. 770. KY.—Jones v. Com., 76 Ky. (13 Bush) 356. LA.—State v. Palmer, 32 La. Ann. 565; State v. Thompson, 32 La. Ann. 796. MASS.—Com. v. Wyman, 49 Mass. (8 Metc.) 247; Com. v. Bennett, 118 Mass. 443; Com. v. Pratt, 137 Mass. 98. MICH.—People v. Bringard, 39 Mich. 22, point omitted in 33 Am. Rep. 344. MINN.—State v. Kortgaard, 62 Minn. 7, 64 N. W. 51. MO.—State v. Pratt, 98 Mo. 482, 11 S. W. 977; State v. Pratt, 111 Mo. 473, 19 S. W. 715. MONT.—State v. Hall, 45 Mont. 498, 125 Pac. 639. NEB.—State v. Knox, 17 Neb. 683, 24 N. W. 382. N. J.—State v. Barr, 61 N. J. L. 131, 38 Atl. 817. N. Y.—People v. Hearne, 66 Hun 626, 10 N. Y. Cr. Rep. 188, 20 N. Y. Supp. 806. N. C.—State v. Fain, 106 N. C. 760, 11 S. E. 593. PA.—Com. v. Leisenring, 11 Phila. 392, 32 Leg. Int. 168. S. C.—State v. Shirer, 20 S. C. 392. TEX.—State v. Brooks, 42 Tex. 68; Crump v. State, 23 Tex. App. 615, 5 S. W. 182; Lewis v. State, 28 Tex. App. 140, 12 S. W. 736; Taylor v. State, 29 Tex. App. 466, 16 S. W. 302; Dowdy v. State, 64 S. W. 253; Butler v. State, 46 Tex. Cr. Rep. 287, 81 S. W. 743. WASH.—State v. Bogardus, 36 Wash. 297, 78 Pac. 942; State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163. WYO.—Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

"Money" includes deposits, gold, silver, copper and other coins, bank-bills, government notes or other circulating medium current as money.—Taylor v. State, 29 Tex. App. 466, 16 S. W. 302.

Compare: Block v. State, 44 Tex. 620, restricting the term "money" to legal tender coins or to the legal tender treasury notes of the United States. See Lewis v. State, 28 Tex. App. 140.

[6] Long v. State, 97 Ala. 41, 12 So. 183; State v. Stimson, 24 N. J. L. (4 Zab.) 9.

[7] Long v. State, 97 Ala. 41, 12 So. 183.

"certain money, to-wit, the sum of," stating the amount as so many dollars;[8] "check";[9] "current money, a more particular description of which said jurors have not and can not give," is not sufficient, because too indefinite;[10] "certain money to the amount and of the value of" a named number of dollars;[11] "lawful money of the United States";[12] "paper currency of the United States";[13] "money to about the amount of one hundred and fifty dollars";[14] "ninety dollars of paper money, of the value of ninety dollars, and two dollars in silver money, of the value of two dollars";[15] "of the coin of the United States," not necessary where designated as "money," the amount in dollars given;[16] "one hundred dollars in paper currency of the United States";[17] "one twenty-dollar note, being of the United States currency called greenbacks";[18] "three hundred ninety-five dollars, law-

8 State v. Palmer, 32 La. Ann. 565; State v. Barr, 61 N. J. L. 131, 38 Atl. 817; People v. Hearne, 66 Hun (N. Y.) 626, 10 N. Y. 188, 20 N. Y. Supp. 806.

See, also, footnote 14, this section.

Compare: State v. Thompson, 42 Ark. 517; Bork v. People, 16 Hun (N. Y.) 476; affirmed, 83 N. Y. 609.

9 Long v. State, 97 Ala. 41, 12 So. 183; State v. Griswold, 73 Conn. 95, 46 Atl. 829.

Check held not to be money within embezzlement statute in Bartley v. State, 53 Neb. 310, 73 N. W. 744.

10 State v. Denton, 74 Md. 517, 22 Atl. 306.

11 Com. v. Bennett, 118 Mass. 443; State v. Knox, 17 Neb. 683, 24 N. W. 382.

12 State v. Noland, 111 Mo. 473, 19 S. W. 715.

"Lawful money of the United States of America" is sufficient without specifying any particular coin, note, or bill. — Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

13 State v. Shonhausen, 26 La. Ann. 421.

14 Huffman v. State, 89 Ala. 33, 8 So. 28. See Lang v. State, 97 Ala. 41, 12 So. 183; State v. Alverson, 105 Iowa 152, 74 N. W. 770; Com. v. Pratt, 137 Mass. 98.

See, also, footnote 8, this section.

15 Cody v. State, 100 Ga. 105, 28 S. E. 106. See Dowdy v. State, (Tex.) 64 S. W. 253; Butler v. State, 46 Tex. Cr. Rep. 287, 81 S. W. 743.

16 People v. Poggi, 19 Cal. 600; People v. Cobler, 108 Cal. 538, 41 Pac. 401.

17 State v. Carro, 26 La. Ann. 377.

18 Jones v. Com., 76 Ky. (13 Bush) 356.

ful currency of the United States, of denomination and issue to the jurors aforesaid unknown.'"[19]

Lawful money of the United States, or other similar allegation regarding the character of the money alleged to have been embezzled, need not be made under the liberalizing statutes above referred to,[20] and it seems that it is better that no such allegation be made, because where made the prosecution may be called upon to prove it as a fact.[21]

Value of money alleged to have been embezzled must be specifically alleged in the indictment or information under the old rule above alluded to,[22] but this value may be stated approximately;[23] under the liberalized rule under statute, above discussed, it is not necessary to plead the money value of the money alleged to have been embezzled,[24] unless the punishment is made by statute to depend upon the value, in which case it seems to be nec-

19 State v. Shirer, 20 S. C. 392.

20 People v. Winkler, 9 Cal. 236; People v. Poggi, 19 Cal. 600; Watson v. State, 64 Ga. 61; State v. Pratt, 98 Mo. 482, 11 S. W. 977; State v. Noland, 111 Mo. 473, 19 S. W. 715; People v. Hearne, 66 Hun (N. Y.) 626, 10 N. Y. Cr. Rep. 188, 20 N. Y. Supp. 806.

Compare: People v. Cohen, 8 Cal. 42; Williams v. State, 5 Tex. App. 118; Reside v. State, 10 Tex. App. 675.

21 Watson v. State, 64 Ga. 61; Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

22 See State v. Thompson, 42 Ark. 517; People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313; People v. Cox, 40 Cal. 275; Bork v. People, 16 Hun (N. Y.) 476; affirmed, 83 N. Y. 609; Reside v. State, 10 Tex. App. 675.

As to necessity of alleging value, see, also, infra, § 591.

23 Britton v. State, 77 Ala. 202; State v. Alverson, 105 Iowa 152, 84 N. W. 770; State v. Palmer, 32 La. Ann. 565; People v. Donald, 48 Mich. 491, 12 N. W. 669; Gerard v. State, 10 Tex. App. 690.

24 See: GA.—Cody v. State, 100 Ga. 105, 28 S. E. 106. KY.—Com. v. Smith, 26 Ky. L. Rep. 517, 82 S. W. 236. MASS.—Com. v. Warner, 173 Mass. 541, 54 N. E. 353. MISS.—Richberger v. State, 90 Miss. 806, 44 So. 772. NEB.—Mills v. State, 53 Neb. 263, 73 N. W. 761; Bartley v. State, 53 Neb. 310, 73 N. W. 744; Nelson v. State, 86 Neb. 856, 126 N. W. 518. N. J.—State v. Stimson, 24 N. J. L. (4 Zab.) 9; State v. Barr, 61 N. J. L. 131, 38 Atl. 817; State v. Clement, 80 N. J. L. 669, 77 Atl. 1067. N. M.—United States v. Fuller, 5 N. M. 80, 20 Pac. 175; Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 583. WYO.—Edelhoff

essary to allege and prove the money value of the money embezzled.[25]

§ 590. ——— Corporate or public money. In those cases in which a corporation[1] or public officer,[2] or a de facto officer,[3] is charged with the embezzlement of corpo-

v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

Allegation of value is necessary where the money or property is not legal tender.—State v. Knox, 17 Neb. 683, 24 N. W. 382.

Court judicially knows that bank-bills have a commercial value equal to that imputed on their face.—Gady v. State, 83 Ala. 51, 3 So. 429.

Stating amount in dollars sufficiently alleges the value of the money.—Hamer v. State, 60 Tex. Cr. Rep. 341, 131 S. W. 813.

When applied to money the words "amount" and "value" are synonymous.—Richberger v. State, 90 Miss. 806, 44 So. 772.

25 Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225; Brown v. People, 173 Ill. 34, 50 N. E. 106; Bork v. People, 16 Hun (N. Y.) 476; writ of error, 78 N. Y. 346; Reside v. State, 10 Tex. App. 675.

1 **Bank officer** charged with embezzlement from the bank, indictment may describe bank-bills by amount, value, by what bank issued, and by whom signed and countersigned, without specifying the number of the bills or the dates of issue thereof.—Bulloch v. State, 10 Ga. 407, 54 Am. Dec. 369.

National banks being necessarily under the jurisdiction of the federal courts, prosecution of officers thereof for embezzlement must be in the federal courts. See State v. Tuller, 34 Conn. 280; Com. v. Fuller, 49 Mass. (8 Metc.) 313, 41 Am. Dec. 509; Com. v. Felton, 101 Mass. 204; People v. Fonda, 62 Mich. 401, 29 N. W. 26; Com. v. Ketner, 92 Pa. St. 372, 37 Am. Rep. 692.

—Teller of national bank may be convicted in state court for an offense as teller which was indictable at common law.—Com. v. Seeberg, 94 Pa. St. 85.

2 **"Public officer,"** in the statute, includes any official who is properly within the definition of that term. See Shelby v. Alcorn, 36 Mo. 273, 72 Am. Dec. 169, and notes 179-189.

3 See Diggs v. State, 49 Ala. 311; Noble v. State, 59 Ala. 73; State v. Spaulding, 24 Kan. 1; State v. Goss, 69 Me. 22; Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 583; State v. McIntyre, 25 N. C. (3 Ired. L.) 171; R. v. Barratt, 9 Car. & P. 387, 38 Eng. C. L. 231.

Compare: State v. Flint, 62 Mo. 393.

Custom existing for years and well known, under which city clerk receives license-money, he is liable for its embezzlement, notwithstanding the fact a city ordinance requires the license-money to be paid to the city treasurer.—State v. Spaulding, 24 Kan. 1.

Oath prescribed need not have been taken to fix status as public

rate or public money or funds coming into his possession by virtue of his office or position, it is unnecessary to specify in the indictment or information with certainty the particular kind of money embezzled and converted; that is, to state whether it was gold or silver coin or legal tender or bank-notes, or to give the denomination of each coin or note, specifying from whom or the time when the money was received, or to set out the specific money alleged to have been embezzled,[4] or the particular fund to which it belonged;[5] it being sufficient to allege and prove the conversion to his own use, or the appropriation of it to an improper purpose, by the accused, of the money that came into his possession, or was under his control, by virtue of his office and position.[6] It is not necessary to allege or prove, in the case of a public officer, that the money was actually paid into the public treasury, because the money became public money as soon

officer.—State v. Goss, 69 Me. 22; Foutenberry v. State, 56 Miss. 286.

Qualification by bond executed as required by law is not necessary to fix status as a public officer in charge of embezzlement of public funds coming into hands of accused by virtue of his position and office.—State v. Goss, 69 Me. 22; State v. Meins, 26 Minn. 183.

4 See, supra, § 588, footnote 11, and text going therewith.

5 State v. Smith, 13 Kan. 274; State v. Carrick, 16 Nev. 120.

6 ALA.—Lowenthal v. State, 32 Ala. 589; Britton v. State, 77 Ala. 202. CAL.—People v. Hamilton, 3 Cal. Unrep. 825, 32 Pac. 526. COLO.—Adams v. People, 25 Colo. 536, 55 Pac. 808. GA.—Jackson v. State, 76 Ga. 551. IND.—Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490. KAN.—State v. Smith, 13 Kan. 274; State v. Graham, 13 Kan. 299. ME.—State v. Walton, 62 Me. 109. MICH.—People v. McKinney, 10 Mich. 54. MINN.—State v. Munch, 22 Minn. 67; State v. Ring, 29 Minn. 78. MO.—State v. Flint, 62 Mo. 393; State v. Hays, 78 Mo. 600; State v. Arnold, 2 S. W. 269. NEB.—State v. Knox, 17 Neb. 683, 24 N. W. 382. NEV.—State v. Carrick, 16 Nev. 120. N. J.—State v. Bertholomew, 69 N. J. L. 160, 54 Atl. 231. N. M.—Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 583. N. Y.—Bork v. People, 16 Hun 476; affirmed, 83 N. Y. 609. TEX.—Riley v. State, 32 Tex. 763; State v. Brooks, 42 Tex. 62; Malcolmson v. State, 25 Tex. App. 267, 8 S. W. 469. WASH.—State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163. FED.—United States v. Bornemann, 36 Fed. 257; Dimmick v. United States, 57 C. C. A. 664, 121 Fed. 638.

as collected or received by him;[7] but it must be alleged that the money charged to have been embezzled came into the possession of, or under the control of, the accused by virtue of his position and in his official capacity.[8]

Reason for the rule has been well stated to be because no one but the person in possession and control of such moneys knows, or can know, the details regarding the same;[9] and also the further fact that it would be wholly impracticable to trace or identify the particular pieces of money, currency or bank-bills, or to determine whether the sum or sums of money embezzled was or were coin or paper, or both; and because it would be equally impracticable to show that any particular sum embezzled was the same money or funds received from any specified source or person, because, even though the amounts corresponded, this would by no means establish their identity. And even if the kind of funds or money received in a particular transaction, or from a specified person, whether credited upon the books or not, could be identified as having been received by the accused from that particular source, the fact that it was not found in the public treasury at a subsequent time would not prove that the particular money had been embezzled, because it might have been honestly paid out by the accused to public creditors, and an equal amount embezzled from moneys coming from another source or sources, person or persons.[10]

7 People v. Gray, 66 Cal. 271; People v. McKinney, 10 Mich. 54; State v. Walton, 62 Mo. 106; Bork v. People, 91 N. Y. 5, 1 N. Y. Cr. Rep. 379.

8 Moore v. United States, 160 U. S. 275, 40 L. Ed. 425, 16 Sup. Ct. Rep. 297.

Alleging receipt in official capacity fixes the status of the money as public money.—People v. Hamilton, 3 Cal. Unrep. 825, 32 Pac. 526.

9 See authorities in footnote 11, supra, § 588.

10 See People v. McKinney, 10 Mich. 91; State v. Carrick, 16 Nev. 120.

§ 591. —— VALUE OF PROPERTY OR MONEY. The general rule is that an indictment or information charging embezzlement must allege the value of the property[1] or money[2] embezzled with the same certainty as in charging larceny,[3] and with certainty to a common intent;[4] but this may be done by charging simply the taking and conversion of a stated number of dollars,[5] or by averring

1 ALA.—Noble v. State, 59 Ala. 73. CAL.—People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313. FLA.—Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225. GA.—Cody v. State, 100 Ga. 105, 28 S. E. 106. MICH.—People v. Donald, 48 Mich. 491, 12 N. W. 669. TEX.—Reside v. State, 10 Tex. App. 675.

Alleging damage resulting to owner of property by reason of the embezzlement is not sufficient.—People v. Cohen, 8 Cal. 42; Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225.

2 **As to alleging value of money,** see, supra, § 589.

Bank-notes averred to have been embezzled, they must be alleged to have a specified value.—State v. Stimson, 24 N. J. L. (4 Zab.) 9.

Certificates of deposit and checks charged to have been embezzled, under an indictment charging embezzlement of money, must state the value, there being no presumption in a legal prosecution that they were worth the sums called for on their face, or in fact any sum whatever.—People v. Donald, 48 Mich. 491, 12 N. W. 669.

Coin of the government need not be averred to have a stated value. — State v. Stimson, 24 N. J. L. (4 Zab.) 9.

State treasurer charged with embezzling state moneys, the amount embezzled need not be alleged, nor an excuse entered for not doing so by stating that the amount was unknown to the grand jury, under Minnesota statute.—State v. Munch, 22 Minn. 67.

3 People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313; Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225; Reside v. State, 10 Tex. App. 675.

As to stating value in larceny, see, infra, title "Larceny," this chapter.

4 "One hundred and eighty dollars or other large sum of money," was held to be bad for want of certainty to a common intent.—Noble v. State, 59 Ala. 73.

5 GA. — Cody v. State, 100 Ga. 105, 28 S. E. 106. IOWA.—State v. Alverson, 105 Iowa 152, 74 N. W. 770. KY.—Com. v. Smith, 26 Ky. L. Rep. 517, 82 S. W. 236. NEB.—State v. Knox, 17 Neb. 683, 24 N. W. 382; Mills v. State, 53 Neb. 263, 73 N. W. 763; Bartley v. State, 53 Neb. 310, 73 N. W. 744. N. J.—State v. Stimson, 24 N. J. L. (4 Zab.) 9; State v. Barr, 61 N. J. L. 131, 38 Atl. 817. N. M.—United States v. Fuller, 5 N. M. 80, 20 Pac. 175; Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 583. TEX.—Reside v. State, 10 Tex. App. 675.

Compare: Bork v. People, 16

the value approximately,[6] as "about"[7] or "more than"[8] a specified amount or number of dollars. Value may also be stated in the aggregate,[9] in those cases where more than one article, or more than one sum of money, is taken, it not being necessary to allege the value of each separate article, or give the amount of each parcel of money, taken.[10]

Punishment not depending on value, however, as where the statute prohibits the taking and conversion absolutely, and punishes the same without any regard to value, it is not necessary that any value should be alleged or proved.[11]

Hun (N. Y.) 476; affirmed, 83 N. Y. 609, holding to be insufficient an indictment alleging that accused embezzled "a large amount of money, to wit, the sum of," naming the amount, because it failed to state the value of the money.

"Being then and there the bailee of four hundred thousand dollars," etc., was held bad because the court could not know that lawful money of the United States was meant, the court remarking: "For aught we know, it is the currency of some other state or nation, and not sufficient in amount to charge the defendant, under our statute, with grand or petit larceny." — People v. Cohen, 8 Cal. 42. See Smith v. State, 33 Ind. 150; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314.

6 ALA.—Britton v. State, 77 Ala. 202; Walker v. State, 117 Ala. 42, 23 So. 149. CAL.—People v. Salorse, 62 Cal. 139. ILL.—McDaniels v. People, 118 Ill. 301, 8 N. E. 687. KAN. — State v. Small, 26 Kan. 209. N. J.—State v. Clement, 80 N. J. L. 669, 77 Atl. 1067.

7 Britton v. State, 77 Ala. 202; R. v. Grove, 1 Moo. C. C. 447; R. v. Carson, 1 Russ. & R. C. C. 303.

8 State v. Ring, 29 Minn. 78; Gerard v. State, 10 Tex. App. 690.

9 Mayo v. State, 30 Ala. 32; Peters v. State, 12 Ala. App. 133, 67 So. 723; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65; State v. Bickford, 28 N. D. 36, 147 N. W. 407; State v. Moak, 40 Ohio St. 588; State v. Neilon, 43 Ore. 168, 73 Pac. 321.

Aggregate sums charged, these sums may be shown to consist of smaller sums.—R. v. Balls, L. R. 1 C. C. 328.

10 State v. Moak, 40 Ohio St. 588.

11 ALA. — Washington v. State, 72 Ala. 272. CAL.—People v. Leehey, 2 Cal. Unrep. 56; People v. Salorse, 62 Cal. 139. ILL. — McDaniels v. People, 118 Ill. 301, 8 N. E. 687. KAN.—State v. Small, 26 Kan. 209. N. Y.—Bork v. People, 96 N. Y. 188, 2 N. Y. Cr. Rep. 177, reversing 31 Hun 360, 2 N. Y. Cr. Rep. 56.

§ 592. —— Ownership of property or money. Except in those jurisdictions in which the rule is modified by the statute under which the prosecution is had, and indictment or information charging embezzlement must allege the ownership of the property or money charged to have been embezzled[1] at the time of its delivery to

1 ALA.—Washington v. State, 72 Ala. 272. ARK.—Silvie v. State, 117 Ark. 108, 173 S. W. 857. CAL.—People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502. FLA.—Alden v. State, 18 Fla. 187; Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225. ILL.—People v. Brander, 244 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341, 91 N. E. 59. LA.—State v. Palmer, 32 La. Ann. 565. MASS.—Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65. MINN.—State v. Butler, 26 Minn. 90, 1 N. W. 821. MO.—State v. Mohr, 68 Mo. 303, 3 Am. Cr. Rep. 64. N. J.—State v. Lyon, 45 N. J. L. (16 Vr.) 272. N. D.—State v. Collins, 4 N. D. 433, 61 N. W. 467. ORE.—State v. Stearns, 28 Ore. 262, 42 Pac. 615. S. C.—State v. Shirer, 20 S. C. 392. TEX.—Wise v. State, 41 Tex. 139; State v. Longworth, 41 Tex. 162; Griffin v. State, 4 Tex. App. 390; Leonard v. State, 7 Tex. App. 435.

Compare: State v. Fricker, 45 La. Ann. 646, 12 So. 755.

Embezzlement by an agent charged, the principal's name must be alleged, although the name of the owner of the property need not be alleged. — Washington v. State, 72 Ala. 272.

Express agency charged with the embezzlement of a package of money entrusted to the express company for carriage, an indictment alleging the money embezzled to be the property of the bank consigning it to the express company, but failing to allege that the express company had any property therein, or to allege any fiduciary relation between the bank and the accused, was held fatally defective.—Griffin v. State, 4 Tex. App. 390.

Insurance agent charged with embezzlement of money received as premiums for insurance which he failed to pay over, indictment or information which fails to allege that the money received was the money of the insurance company is insufficient. — State v. Stearns, 28 Ore. 262, 42 Pac. 615. See, also, Griffin v. State, 4 Tex. App. 390.

In State v. Stearns, supra, the court say: "It is true the indictment alleges that as agent of the States Insurance Company the defendant received for premiums for insurance for the company from divers persons certain sums of money, which he failed to pay over or account for according to the nature of his trust; but this is not an allegation that the money which he received was in fact the property of the company. For aught that appears in the indictment, it may have been understood between the defendant and the company that the specific money received by him for insur-

the accused,[2] but an absolute ownership need not be alleged,[3] with the same certainty required in an indictment or information charging larceny;[4] and all ownership in the accused must be negative.[5] The business in which the principal is engaged need not be set out.[6] No particular words or form of allegation are necessary to describe the ownership of the property, and following the language of the statute is ordinarily sufficient.[7] The terms "of the money of," etc., and "of the property of," etc., are usually employed; but the words "belonging to" have been held to be sufficient,[8] as have also the words "certain money of A."[9] The indictment need allege only that the accused was intrusted with the property or money for the use of another, and that he fraud-

ance was not to be turned over to the company, but that he was authorized, and expected, to mingle and mix it with his own, and it should thus become a matter of account between him and his principal. If such was the case he could not be punished criminally for failing to pay over the balance due the company, however morally wrong it may have been."

2 Title in prosecutor down to the time alleged embezzlement committed need not be averred, it being sufficient if the ownership at the date of delivery to the accused is aptly alleged, with the further averment that the crime was committed during the continuance of the trust upon which the property was received and held.—Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Better practice said to be to specifically allege the ownership and the agency at the time of the commission of the offense in separate averments, apart from the inference of the ownership and agency alleged.—Wall v. State, 2 Ala. App. 157, 56 So. 57.

3 People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502; State v. Palmer, 32 La. Ann. 565.

4 Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 So. 225; People v. Brander, 244 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341, 91 N. E. 59; Com. v. Bradley, 132 Ky. 512, 116 S. W. 761; State v. Roubles, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435.

5 State v. Ensley, 177 Ind. 483, Ann. Cas. 1914D, 1306, 97 N. E. 113.

6 State v. Blackmore, 226 Mo. 560, 27 L. R. A. (N. S.) 415, 126 S. W. 429.

7 State v. Butler, 26 Minn. 90, 1 N. W. 821; State v. Mohr, 68 Mo. 303, 3 Am. Cr. Rep. 64.

8 Strobhar v. State, 55 Fla. 167, 47 So. 4.

9 Com. v. Bennett, 118 Mass. 443

ulently appropriated it to another purpose;[10] the particular use or purpose need not be alleged.[11]

Ownership must be laid in the real owner or one having a special property or interest therein, and as the particular statute under which the prosecution is had requires and as the facts in the case warrant. Thus, under a statute defining and punishing embezzlement of the property or money of an individual, corporation, or partnership, and the like, the indictment or information must allege that the property or money belonged to an individual, corporation, or partnership, as the case may be.[12] Neither absolute ownership[13] nor exclusive ownership is required, and in the case of property jointly owned the ownership may be laid in any one of the tenants in common.[14] Ownership may also be laid in a bailee from whom the property is taken;[15] in the person in actual possession and entitled thereto at the time of the crime;[16] in the assignor of an account,[17] or of a promissory note,[18]

10 DeLeon v. Territory, 9 Ariz. 161, 80 Pac. 348; State v. Dudenhefer, 122 La. 288, 47 So. 614; Jeffreys v. State, 51 Tex. Cr. Rep. 566, 103 S. W. 886.

11 DeLeon v. Territory, 9 Ariz. 161, 80 Pac. 348; Wooddell v. Territory, 109 C. C. A. 487, 187 Fed. 739.

12 State v. Patterson, 159 Mo. 98, 59 S. W. 1104.

13 People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502; State v. Palmer, 32 La. Ann. 565.

14 State v. Probert, 19 N. M. 13, 140 Pac. 1108.

Ownership in wife can not be alleged where property jointly owned with her husband, even though she was using it as if her own.—Ranguth v. People, 186 Ill. 93, 57 N. E. 832.

15 Waters v. State, 15 Ga. App. 342, 83 S. E. 200.

Cashier of bank charged with embezzling a bank deposit, ownership must be laid in the bank and not in the depositor. — Ballew v. State, 11 Okla. Cr. Rep. 598, 149 Pac. 1070.

Guest depositing money with hotel clerk, which latter embezzles, ownership properly laid in proprietor of hotel.—Manovitch v. State, 50 Tex. Cr. Rep. 260, 96 S. W. 1.

16 Waters v. State, 15 Ga. App. 342, 83 S. E. 204.

17 State v. Cavanaugh, 67 Mo. App. 261.

18 **Absolute indorser of promissory note,** not being relieved from liability upon it, still has an interest in it to see that any agent of his authorized to collect and

when he has been charged with the collection thereof; or, under statute, in a joint stock association without alleging ownership in the members.[19]

Association averred owner, the indictment or information must allege facts which show the right of such association to own property in its own name; that is, must set out whether the company is a corporation, a partnership, and the like, and in case of a corporation must allege that it is incorporated,[20] or set out such facts as to show that the company may own and hold property by its own right and in its own name;[21] but it has been said that alleging the property as that of a certain company, "an incorporated company," is sufficient.[22] The charter or act of incorporation need not be alleged, neither need it be stated that the company was incorporated under the laws of any particular state or foreign power.[23] In the case of an unincorporated association or

pay over performs his duty; and where the indorsee redelivers to him possession and control of the note for purposes of collecting interest upon it for the indorsee's benefit, or to otherwise control the note, this will constitute such "ownership" of the note in the indorser as to sustain an indictment for embezzlement against one deputed by such indorser to collect such note laying ownership in such indorser. — People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502.

19 Kossakowski v. People, 177 Ill. 563, 53 N. E. 115.

20 People v. O'Brian, 8 Cal. App. 641, 97 Pac. 679; People v. Brander, 244 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341, 91 N. E. 59; Meredith v. State, (Tex. Cr.) 184 S. W. 204.

An averment of ownership by "American Express Company, an association," is insufficient.—People v. Brander, 244 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341, 91 N. E. 59.

21 People v. Brander, 224 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341, 91 N. E. 59; State v. Patterson, 159 Mo. 98, 59 S. W. 1104; White v. State, 24 Tex. App. 489, 5 Am. St. Rep. 875, 5 S. W. 857.

Where the funds were embezzled from a society there must be an allegation whether it was a corporation, partnership, or stock company.—Reese v. State, 55 Tex. Cr. 429, 116 S. W. 1147.

22 Garner v. State, 51 Tex. Cr. Rep. 578, 105 S. W. 187; Reese v. State, 55 Tex. Cr. Rep. 429, 116 S. W. 1147.

23 See Gray v. State, 160 Ala. 107, 49 So. 678; Leonard v. State, 7 Tex. App. 417; Stallings v. State, 29 Tex. App. 220, 15 S. W. 700; Smith v. State, 34 Tex. Cr. Rep.

society, ownership may be laid in the trustees, naming them.[24]

This is the old rule of criminal pleading in charging embezzlement; but this old rule requiring great particularity in the description of persons, under which it is or was necessary to allege the incorporation of the company in order to show right to own property, has been relaxed in many jurisdictions, in which latter jurisdictions it is held that where the name of the company itself imports an association or a corporation, there need be no specific allegation that it is such.[25] This is a modern principle in criminal pleading which is thought to be abundantly supported by the decided cases laying down the rule as to the sufficiency of the pleading of ownership of property in other branches of criminal law.[26] Thus, it has

265, 30 S. W. 236; Garner v. State, 51 Tex. Cr. Rep. 578, 105 S. W. 187.

24 R. v. Hall, 1 Moo. C. C. 474; R. v. Bull, 1 Cox C. C. 137; R. v. Woolley, 4 Cox C. C. 255; R. v. Marks, 10 Cox C. C. 367.

25 People v. Mead, 200 N. Y. 15, 140 Am. St. Rep. 616, 25 N. Y. Cr. Rep. 179, 92 N. E. 1051, affirming 125 App. Div. (N. Y.) 7, 22 N. Y. Cr. Rep. 225, 109 N. Y. Supp. 163. See Johnson v. State, 65 Ind. 204; Fisher v. State, 40 N. J. L. (11 Vr.) 169.

Contra: State v. Ames, 119 Iowa 680, 94 N. W. 231.

"The People's Mutual Insurance Association and League" raises a presumption that it is a corporation or association. — People v. Mead, 200 N. Y. 15, 140 Am. St. Rep. 616, 25 N. Y. Cr. Rep. 179, 92 N. E. 1051, affirming 125 App. Div. (N. Y.) 7, 22 N. Y. Cr. Rep. 225, 109 N. Y. Supp. 163.

President of corporation charged with embezzlement, indictment or information alleging that accused had the general management of the business and control of the corporation's funds, and having in his trust, custody and control large sums of money belonging to the corporation, charges the ownership of the money with sufficient certainty. — Jackson v. State, 76 Ga. 551.

26 See People v. Henry, 77 Cal. 445, 19 Pac. 830 (charging burglary of a building of the "San Diego and Coronado Water Company"), practically overruling People v. Schwartz, 32 Cal. 160; People v. Goggins, 80 Cal. 229, 22 Pac. 206 (larceny of the property of "Townsend and Carey"); People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 8 Am. Cr. Rep. 147, 22 Pac. 190 (counterfeiting notes of "Bank of England"); People v. Rogers, 81 Cal. 209, 22 Pac. 592 (burglary of store of "Jones and Harding"); State v.

been said that under a comprehensive statute prohibiting and punishing embezzlement from associations, incorporated or otherwise, and indictment or information laying the ownership of the property in any one of the associations named in the statute,[27] without averring incorporation,[28] or mentioning the names of the persons composing the association,[29] is sufficient. And under statutes prohibiting and punishing embezzlement by an agent, employee, servant, and the like, of property or money coming into his possession and control by virtue of his employment or position, without any provision as to the ownership, an indictment or information charging such with embezzlement of property or money which "came into his possession by virtue of his employment," has been held to be sufficient without an allegation as to ownership.[30]

Partnership property alleged to have been embezzled, the old and strict rule[31] requires that the name of each

Watson, 102 Iowa 650, 72 N. W. 283 (burglary of office of a certain "railroad company"); State v. Fogerty, 105 Iowa 32, 74 N. W. 754 (larceny of goods from a corporation); State v. Golden, 86 Minn. 206, 90 N. W. 299 (burglary of warehouse of a certain company charged, incorporation need not be alleged); State v. Simas, 25 Nev. 432, 62 Pac. 242 (burglary of a room occupied by the "Nevada Hardware and Supply Company"); Noaks v. People, 25 N. Y. 380 (forging with intent to defraud the "Meriden Cutlery Company"); State v. Massio, 105 Tenn. 218, 58 S. W. 216 (receiving stolen goods alleged to be the property of a certain railroad).

27 State v. Skinner, 210 Mo. 373, 109 S. W. 38; State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

28 State v. Skinner, 210 Mo. 373, 109 S. W. 38; State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

29 People v. Mahlman, 82 Cal. 585, 23 Pac. 145; Kossakowski v. People, 177 Ill. 563, 53 N. E. 115; State v. Skinner, 210 Mo. 373, 109 S. W. 38; State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

Treasurer of trade organization charged with embezzling funds belonging to the organization and received by him as treasurer thereof, sufficiently alleges ownership of the funds without treating the members as partners, because the statute includes embezzlement by officer of any trade organization, whether incorporated or not. —State v. Skinner, 210 Mo. 373, 109 S. W. 38.

30 Willis v. State, 134 Ala. 429, 33 S. E. 226.

31 **As to old and strict rule of pleading in embezzlement, see,**

individual partner be set out in the indictment or information, with the statement that they are the owners, and where all the partners are not known, it must be stated to be the property of one of the partners, naming him, and of others unknown;[32] but under the more liberal rule above referred to,[33] it is sufficient to allege the ownership in the firm by the name under which it is known, without setting out the names of the persons composing the firm.[34]

Public officer charged with embezzlement, it is not necessary to allege the ownership of the funds. Thus, it has been said that an indictment against a county treasurer for the embezzlement of public funds need not specify the particular funds and name the several owners thereof,[35] and an indictment charging a prison clerk with embezzlement of moneys belonging to different convicts has been said to be sufficient without setting out the names of the convicts whose money had been deposited and embezzled.[36]

§ 593. —— Manner of conversion. An indictment or information charging accused with embezzlement need not allege the means or the manner in which the offense

supra, § 589, and first three paragraphs in this section.

32 McCowan v. State, 58 Ark. 19; Hogg v. State, 3 Blackf. (Ind.) 326; Com. v. Trimmer, 1 Mass. 476.

33 See, supra, § 589, footnotes 5 et seq., and text going therewith; also, footnotes 25 et seq., this section, and text going therewith.

34 Hughes v. State, 109 Ark. 403, 160 S. W. 209; People v. Ah Sing, 19 Cal. 598; State v. Mohr, 68 Mo. 303, 3 Am. Cr. Rep. 64.

35 Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; State v. Ensley, 177 Ind. 483, Ann. Cas. 1914D, 1306, 97 N. E. 113.

County treasurer charged with embezzlement, indictment averring that the money alleged to have been embezzled came into his hands as treasurer by virtue of his office, and that at the expiration of his term he had said money in his hands as such treasurer, sufficiently alleges the ownership of the money; it not being necessary to describe the fund alleged to have been embezzled, and name the several owners thereof, as county fund, school fund, township fund, and so forth.—State v. Ensley, 177 Ind. 483, Ann. Cas. 1914D, 1306, 97 N. E. 113.

36 Roland v. Com., 134 Ky. 170, 119 S. W. 760.

was committed,[1] it being sufficient to allege that the same are unknown to the grand jury.[2] It need not be alleged that the property or money was embezzled without the consent of the master or owner;[3] or that it was fraudulently embezzled, where it is alleged that accused feloniously and unlawfully appropriated and converted it to his own use.[4]

1 Gassenheimer v. United States, 26 App. D. C. 432; State v. Dudenhefer, 122 La. 288, 47 So. 614; Cole v. State, 16 Tex. App. 461; Jewett v. United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

Bank officer charged with embezzlement, under U. S. Rev. Stats., § 5209 (5 Fed. Stats. Ann., 1st ed., p. 145), indictment alleging that the accused did unlawfully, fraudulently, and wilfully misapply and convert to his own use the assets of the bank, with the intent then and thereby to injure and defraud the association, is sufficient.—Jewett v. United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568. See Batchelor v. United States, 156 U. S. 426, 429, 39 L. Ed. 478, 479, 15 Sup. Ct. Rep. 446; United States v. Eastman, 132 Fed. 553; Dickinson v. United States, 86 C. C. A. 625, 159 Fed. 802; Geiger v. United States, 89 C. C. A. 516, 162 Fed. 846; United States v. Mason, 177 Fed. 558.

Fraudulent intent to embezzle may be consummated in any manner capable of effecting the conversion.—Golden v. State, 22 Tex. App. 14, 2 S. W. 531.

2 Jewett v. United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

Settled rule, not only of the common law, but also of the supreme court of the United States and in most of the states, that the grand jury is entitled to set out in its indictment that certain facts, ordinarily necessary to be alleged, are to it unknown. — Jewett v. United States, supra.

Nothing appearing to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed.—Coffin v. United States, 156 U. S. 432, 451, 39 L. Ed. 481, 490, 15 Sup. Ct. Rep. 394.

This rule has been applied to the description of the persons whom it was intended to defraud (United States v. Britton, 107 U. S. 655, 665, 27 L. Ed. 520, 524, 2 Sup. Ct. Rep. 512); to the description of the excess amount received by an agent engaged in the prosecution of a claim for a pension over that permitted by statute (Frisbie v. United States, 157 U. S. 160, 167, 39 L. Ed. 657, 659, 15 Sup. Ct. Rep. 686; with reference to the names of persons defrauded or intended to be defrauded. — Durland v. United States, 161 U. S. 306, 314, 40 L. Ed. 709, 712, 16 Sup. Ct. Rep. 508.

3 State v. Rue, 72 Minn. 296, 75 N. W. 235; State v. Skinner, 210 Mo. 373, 109 S. W. 38.

4 In re Grin, 112 Fed. 790; affirmed, sub nom. Grin v. Shine, 187 U. S. 181, 47 L. Ed. 130, 23 Sup. Ct. Rep. 98.

Where the statute makes it the

Intent being one of the essential elements in the crime of embezzlement under the statute upon which the prosecution is founded,[5] the indictment or information charging the accused must aver an intent to deprive his master, employer or the owner of the property or money;[6] but where intent is not one of the elements of the offense and the statute upon which the prosecution is founded,[7] it

offense to "fraudulently embezzle," the indictment is insufficient where it used the word "feloniously" instead of "fraudulently." —United States v. Forrest, 3 Cr. C. C. 56, Fed. Cas. No. 15131.

5 See: CAL.—People v. Treadwell, 69 Cal. 226, 7 **Am. Cr. Rep.** 152, 10 Pac. 502. GA.—Robinson v. State, 109 Ga. 564, 77 **Am. St. Rep.** 392, 35 S. E. 57. IND.—Beaty v. State, 82 Ind. 228. LA.—State v. Smith, 47 La. Ann. 432, 16 So. 938. MICH.—People v. Gilland, 55 Mich. 628, 22 N. W. 81; People v. Hurst, 62 Mich. 276, 28 N. W. 838; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99. MINN.—State v. Kortgaard, 62 Minn. 7, 64 N. W. 51. MO.—Gordon v. Evans, 97 Mo. 587, 11 S. W. 64; State v. Schilb, 159 Mo. 130, 60 S. W. 82; State v. Reilly, 4 Mo. App. 392. N. J.—State v. Temple, 63 N. J. L. 375, 43 Atl. 697.

Conversion of money paid by mistake to accused, does not constitute embezzlement under the Massachusetts statute. — Com. v. Hays, 80 Mass. (14 Gray) 62, 74 **Am. Dec.** 662.

Honest mistake on part of accused in believing he was entitled to use the money until time of settlement, his use of the money does not constitute embezzlement, even though his construction of the contract is a mistaken one.—State v. Wallick, 87 Iowa 369, 54 N. W. 246.

Intent to fraudulently convert money to his own use by the accused, or to the use of another, is a question for the jury.—Eggleston v. State, 129 Ala. 80, 87 **Am. St. Rep.** 17, 30 So. 582.

Intent to restore the money to the principal knowingly used by an agent in violation of his duty, does not relieve the act of use of its criminal character.—Metropolitan Life Ins. Co. v. Miller, 114 Ky. 754, 71 S. W. 921.

Intention to restore property entrusted to accused as bailee, is no defense, unless the property was actually restored before information filed charging the embezzlement. — People v. McLean, 135 Cal. 306, 67 Pac. 770.

Mere failure to pay over is not enough; intent must be alleged and proved.—People v. Hurst, 62 Mich. 276, 28 N. W. 838.

6 People v. Treadwell, 69 Cal. 226, 7 **Am. Cr. Rep.** 152, 10 Pac. 502.

7 See: CAL.—People v. Jackson, 138 Cal. 462, 71 Pac. 566. ILL.—Meadowcroft v. People, 163 Ill. 56, 54 **Am. St. Rep.** 447, 35 **L. R. A.** 176, 45 N. E. 991. GA.—Hoyt v. State, 50 Ga. 313. IND.—Stropes v. State, 120 Ind. 562, 22 N. E. 773. KY.—Com. v. Wilson, 7 Ky. Law Rep. 666. MASS.—Com. v. Pratt,

is not necessary to allege intent.[8] Some of the cases, however, hold that a guilty criminal intent is an essential element of the crime of embezzlement whether the statute so declares or not,[9] on the ground that embezzlement is malum in se—bad in itself and not merely bad because prohibited by statute.[10] In those jurisdictions where such doctrine prevails, intent should be alleged, although the statute defining embezzlement fails to declare intent an element of the offense.

Demand and failure to comply not being made an element of the offense by the statute, the indictment need not allege demand of the accused and his refusal or failure to comply therewith,[11] and where a demand and re-

132 Mass. 246. N. J.—State v. Lyon, 45 N. J. L. (16 Vr.) 272. OHIO—State v. Keith, 91 Ohio St. 132, 110 N. E. 188.

Criminal intent is not an element under a statute making it larceny for one who, having possession of state funds, converts them to his own use. — State v. Ross, 55 Ore. 450, 42 **L. R. A.** (N. S.) 601, 104 Pac. 596, 106 Pac. 1022; appeal dismissed, 227 U. S. 150, 57 **L. Ed.** 458, 33 Sup. Ct. Rep. 220.

Sufficient to allege that the defendant "did unlawfully, fraudulently, and feloniously" convert and embezzle. — State v. Noland, 111 Mo. 471, 19 S. W. 715.

[8] D. C. — O'Brien v. United States, 27 App. 263. FLA.—Thalheim v. State, 38 Fla. 169, 20 So. 938. GA.—Cason v. State, 16 Ga. App. 820, 86 S. E. 644. ILL. — Meadowcroft v. People, 163 Ill. 56, 54 **Am. St. Rep.** 447, 35 **L. R. A.** 176, 45 N. E. 991. KAN.—State v. Patterson, 66 Kan. 447, 71 Pac. 860. MO. — State v. Larew, 191 Mo. 192, 89 S. W. 1031; State v. McWilliams, 267 Mo. 437, 184 S. W. 96. N. J.—State v. Stimson, 24 N. J. L. (4 Zab.) 9; Reynolds v. State, 65 N. J. L. 424, 47 Atl. 644. NEV.—State v. Trolson, 21 Nev. 419, 32 Pac. 930. N. C.—State v. Hill, 91 N. C. 561. OHIO—Mitchell v. State, 21 Ohio C. C. 24. TEX.—Purcelley v. State, 29 Tex. App. 1, 13 S. W. 993.

[9] See State v. Eastman, 60 Kan. 557, 57 Pac. 109; State v. Cunningham, 154 Mo. 161, 55 S. W. 282.

[10] State v. Eastman, 60 Kan. 557, 57 Pac. 109.

[11] ARIZ. — Terr. v. Munroe, 10 Ariz. 53, 85 Pac. 651. ARK.—Wallis v. State, 54 Ark. 611, 16 S. W. 821. CAL.—People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524; People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; People v. Gordon, 133 Cal. 328, 85 **Am. St. Rep.** 174, 65 Pac. 746. FLA.—Teston v. State, 50 Fla. 137, 39 So. 787; Lewis v. State, 55 Fla. 54, 45 So. 998. GA. — Alderman v. State, 57 Ga. 367; Keys v. State, 112 Ga. 392, 81 **Am. St. Rep.** 63, 37 S. E. 762; Goodman v. State, 2 Ga. App. 438,

fusal or failure to pay over are alleged they may be treated as surplusage.[12] But where, under the statute upon which the prosecution is founded, demand and refusal are essential elements of the offense of embezzlement, the indictment or information must properly allege a demand and a failure or refusal to pay, or it will be insufficient.[13]

—— *Public officer* or custodian of public money charged with embezzlement, the indictment or information must be, and is, sufficient where it does aver his failure or refusal to account for or pay over public moneys or funds in the manner provided by law.[14] As regards

58 S. E. 558; Hagood v. State, 5 Ga. App. 80, 62 S. E. 641; Lewis v. State, 17 Ga. App. 667, 87 S. E. 1087. IND. — Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; State v. Sarlls, 135 Ind. 195, 34 N. E. 1129; Dean v. State, 147 Ind. 217, 46 N. E. 528; State v. Ensley, 177 Ind. 483, **Ann. Cas.** 1914D, 1306, 97 N. E. 113; State v. Nugent, 182 Ind. 200, 106 N. E. 361. IOWA — State v. Hoffman, 134 Iowa 587, 112 N. W. 103. KY.— Com. v. Fisher, 113 Ky. 491, 68 S. W. 855; Com. v. Kelly, 125 Ky. 245, 15 **Ann. Cas.** 573, 101 S. W. 315. LA.—State v. Tompkins, 32 La. Ann. 623; State v. Flournoy, 46 La. Ann. 1518, 16 So. 454. ME.—State v. Shuman, 101 Me. 158, 63 Atl. 665. MASS.—Com. v. Hussey, 111 Mass. 432; Com. v. Mead, 160 Mass. 319, 35 N. E. 1125. MINN.—State v. New, 22 Minn. 76. MISS.—State v. Journey, 105 Miss. 516, 62 So. 354. MO.—State v. Porter, 26 Mo. 201. NEB. — Bartley v. State, 53 Neb. 310, 73 N. W. 744. N. J.—State v. Reynolds, 65 N. J. L. 424, 47 Atl. 644. N. D.—State v. Hoff, 29 N. D. 620, 150 N. W. 929. S. D.—State v. Millard, 30 S. D. 169, 138 N. W. 366. WYO.—Edelhoff v. State, 5 Wyo. 19, 9 **Am. Cr. Rep.** 256, 36 Pac. 627.

12 Com. v. King, 35 Pa. Sup. Ct. 454.

13 ILL.—Dreyer v. People, 176 Ill. 590, 52 N. E. 372. IND.—State v. Adamson, 114 Ind. 216, 16 N. E. 181; State v. Ensley, 177 Ind. 483, **Ann. Cas.** 1914D, 1306, 97 N. E. 113. IOWA—State v. McKinney, 130 Iowa 374, 106 N. W. 931. KAN.—State v. Hayes, 59 Kan. 63, 51 Pac. 905. MINN. — State v. Munch, 22 Minn. 75. N. M.—Territory v. Abeytia, 14 N. M. 56, 89 Pac. 254.

14 ARK. — State v. Govan, 48 Ark. 76, 2 S. W. 347. IND.—State v. Hebel, 72 Ind. 361; State v. Adamson, 114 Ind. 216, 16 N. E. 181; State v. Ensley, 177 Ind. 483, **Ann. Cas.** 1914D, 1306, 97 N. E. 113. IOWA—State v. Parsons, 54 Iowa 405, 6 N. W. 579; State v. Hoffman, 134 Iowa 587, 112 N. W. 103. MD.—State v. Nicholson, 67 Md. 1, 8 Atl. 317. MISS.—Hemingway v. State, 68 Miss. 371, 8 So. 317. N. M.—Territory v. Abeytia, 14 N. M. 56, 89 Pac. 254.

Compare: Goodhue v. People, 94 Ill. 37.

money or property other than that of the public, coming into the hands of a public officer, by virtue of his office, and converted by him, the fact of demand and failure or refusal to pay over or turn over may be material in order to establish the conversion, but it does not seem to be necessary to plead such demand and the failure or refusal of the accused to comply therewith.[15]

§ 594. —— TIME OF CONVERSION. The time when accused received money or property, charged to have been embezzled, need not be given,[1] but the indictment or information must fix as nearly as may be the date of the conversion,[2] which may be laid as between two given dates,[3] and is not required to be proved as laid,[4] it being sufficient to show the commission of the offense at any time before the bar of the statute of limitations intervenes.[5]

15 See State v. Hoffman, 134 Iowa 587, 112 N. W. 103.

Goods delivered in trust to be returned upon demand charged to have been embezzled, indictment or information which fails to allege a demand is not bad because of that failure.—Com. v. Hussey, 111 Mass. 432.

1 State v. Noel, 5 Blackf. (Ind.) 548.

2 Bridges v. State, 103 Ga. 21, 29 S. E. 859; State v. Davis, (R. I.) 97 Atl. 818. See State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

Time sufficiently set forth where it alleged that the accused on Jan. 1, 1894, and on divers other days since that date, being custodian of certain funds, "did at divers times between Jan. 1, 1894, and March 21, 1896," embezzle, etc.—Bridges v. State, 103 Ga. 21, 29 S. E. 859.

3 People v. Bidleman, 104 Cal. 608, 38 Pac. 502; Bridges v. State, 103 Ga. 21, 29 S. E. 859; People v. Hawkins, 106 Mich. 479, 64 N. W. 736.

4 People v. Bidleman, 104 Cal. 608, 38 Pac. 502; State v. New, 22 Minn. 76; State v. Kortgaard, 62 Minn. 7, 64 N. W. 51.

While the time need not be proven as laid, it must be shown to have been before the date of the finding of the indictment and within the statute of limitations. —State v. Davis, (R. I.) 97 Atl. 818.

5 People v. Bidleman, 104 Cal. 608, 38 Pac. 502; Hoyt v. State, 50 Ga. 313; Jackson v. State, 76 Ga. 551; State v. Noel, 5 Blackf. (Ind.) 548; State v. Lyon, 45 N. J. L. (16 Vr.) 272.

§ 595. —— Place of conversion. An indictment or information charging embezzlement must allege where the conversion occurred,[1] and show that the offense was committed in the county where the grand jury organized and the indictment returned;[2] but this is sufficiently done where the county and state are properly laid and thereafter averring that accused "in the county aforesaid,"[3] or "then and there,"[4] committed the act complained of.[5] But under a statute providing that "the offense of embezzlement may be prosecuted in any county in which the person charged had possession of the property alleged to have been embezzled," the above rule does not apply, and property or money embezzled in another state may be prosecuted in any county in which accused had possession of such money or property, or any portion thereof.[6]

§ 596. Joinder. The general rule[1] according to which the accused can not be charged with two distinct offenses, not of the same family of crimes, in one indictment, but that the same offense, or the same species of offense, may be charged in several different ways in order to meet the evidence at the trial,[2] applies in the case of a prosecu-

1 State v. Mayberry, 9 Wash. 193, 37 Pac. 284. See State v. Knowles, 185 Mo. 141, 83 S. W. 1083.

2 See People v. Horton, 62 Hun (N. Y.) 610, 10 N. Y. Cr. Rep. 104, 17 N. Y. Supp. 1.

3 Leach v. State, 46 Tex. Cr. Rep. 507, 81 S. W. 733.

4 People v. Amer, 8 Cal. App. 137, 96 Pac. 401.

5 Jackson v. State, 76 Ga. 551; Com. v. Concannon, 87 Mass. (5 Allen) 502; People v. Horton, 62 Hun (N. Y.) 610, 10 N. Y. Cr. Rep. 104, 17 N. Y. Supp. 1; State v. Mayberry, 9 Wash. 193, 37 Pac. 284. See Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63, 37 S. E. 762.

Venue is sufficiently laid where after alleging the time and the fact that the accused was county treasurer of a certain named county and had in his possession funds of such county, the same "then and there being public funds of said county," appropriated, etc.—People v. Amer, 8 Cal. App. 137, 96 Pac. 401.

6 Com. v. Parker, 165 Mass. 526, 43 N. E. 499.

1 See, supra, §§ 292 et seq.

2 Supra, § 340.

A general rule applicable to indictments for all crimes. See,

tion on a charge of embezzlement.[3] Thus, in an indictment or information charging embezzlement and larceny, it is permissible to allege that the property taken was moneys, funds or securities, to meet the facts in the case as they may be disclosed by the evidence, and the proof of the taking and conversion of either moneys, funds or securities will be sufficient to warrant a conviction.[4] Where the embezzlement consists of a series of acts,[5] consisting in the taking of small sums of money systematically, the accused being charged in a single count with taking the gross sum of all these embezzlements, which is permissible,[6] he can not be convicted for each separate embezzlement;[7] and though each taking and con-

among other cases: ALA.—Henry v. State, 33 Ala. 389. ARK.—Baker v. State, 4 Ark. 56. IND.—McGregor v. State, 16 Ind. 9; Griffith v. State, 36 Ind. 406; Mershon v. State, 51 Ind. 14. IOWA—State v. House, 55 Iowa 466, 8 N. W. 307. LA.—State v. Cazeau, 8 La. Ann. 109. ME.—State v. Flye, 26 Me. 312. MISS.—Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; State v. Pitts, 58 Miss. 556. MO.—State v. Porter, 26 Mo. 201; State v. Turner, 63 Mo. 436. NEB.—Caudy v. State, 1 N. W. 110. N. H.—State v. Canterbury, 28 N. H. 195; State v. Lincoln, 49 N. H. 464. N. Y.—People v. White, 55 Barb. 606; affirmed, 32 N. Y. 465; Tatlor v. People, 12 Hun 212; La Beau v. People, 33 How. Pr. 66, 6 Park. Cr. Rep. 371; affirmed, 34 N. Y. 223. N. C.—State v. Morrison, 85 N. C. 561. S. C.—State v. Scott, 15 S. C. 434. TEX.—Gonzales v. State, 12 Tex. App. 657. VA.—Dowdy v. Com., 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314. ENG.—Young v. R., 3 T. R. 98, 100 Eng. Repr. 475; R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986; R. v. Davis, 3 Fost. & F. 19; R. v. Fussell, 3 Cox C. C. 291.

Counts must be so drawn as to show clearly upon the face of the indictment or information that the matters and things set forth in the different counts are descriptive of one and the same transaction. — State v. Malim, 14 Nev. 288.

[3] Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369.

[4] See Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225.

[5] As to series of embezzlements and continuous acts of embezzlements, see, infra, § 598.

[6] See Brown v. State, 18 Ohio St. 496, 513; Gravatt v. State, 25 Ohio St. 162; Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

[7] Clerk of corporation whose duty it was to collect rents for

version was separate and distinct, and in no manner depending upon another, the jury may convict for the aggregate amount alleged to have been converted.[8]

§ 597. DUPLICITY AND MISJOINDER. We have already seen[1] that two distinct offenses can not be charged in the same indictment, but that the same offense, that is to say the same species or family of the offense, may be charged in different ways in several counts, to meet the evidence.[2] Thus it has been said that an indictment or information charging the secreting of money with the fraudulent intent to appropriate it to the use of the accused and the fraudulent appropriation is not duplicitous;[3] and an in-

the use of the company's houses, and remit the collections monthly, collected $8.75 monthly, as rent of a certain house, for eighteen months, and each month reported it to be vacant, and did not remit the money thus collected. The court held that the offense of embezzlement was complete each month, and defendant being charged with the embezzlement of the gross sum for the eighteen months in one count, could not be convicted of eighteen distinct embezzlements, treated as one offense.—Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

8 See authorities in footnote 6, supra.

1 See, supra, § 596.

2 Id. Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369.

Bill of particulars setting out different sums public officer was entrusted with at specified dates, and that on a given subsequent date he failed to account for those sums, does not show that more than one embezzlement is to be proved.—State v. Dix, 33 Wash. 405, 74 Pac. 570.

3 People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097.

Series of two or more acts constituting an offense prohibited and made punishable by statute, the accused may be charged conjunctively with two or more of the prohibited acts, and the indictment will not be open to attack on the ground of duplicity.—People v. Thompson, 111 Cal. 242, 43 Pac. 748. See: CAL.—People v. Frank, 28 Cal. 507; People v. De La Guerra, 31 Cal. 459; Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96; People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Gosset, 93 Cal. 641, 29 Pac. 246. GA.—Wingard v. State, 13 Ga. 396. IOWA—State v. Cooster, 10 Iowa 454. KY.—Hinckle v. Com., 34 Ky. (4 Dana) 519. ME.—State v. Nelson, 29 Me. 329. MASS.—Stevens v. Com., 47 Mass. (6 Metc.) 241. MO.—State v. Murphy, 47 Mo. 274. PA.—Hunter v. Com., 79 Pa. St. 503, 21 Am. Rep. 83; Com. v. Miller, 107 Pa. St. 276. VA.—Angel v. Com., 3 Va. (1 Va. Cas.) 231.

dictment alleging in different counts the different means of embezzlement of public funds, is not open to the objection of duplicity.[4] But where by statute embezzlement by trustees is different from embezzlement by agents or servants, a count in an indictment or information charging accused with embezzlement "as trustees and agents," has been said to charge two distinct offenses, and therefore is bad for duplicity;[5] and it is duplicitous to charge the accused with different embezzlements in the same count.[6] Thus, the embezzlement of personal property and the embezzlement of the proceeds thereof are two separate and distinct offenses which can not be joined in the same count of an indictment. They may be joined in separate counts, but evidence in proof under one count is inadmissible to prove the other count;[7] but in a late case where, in one count, the indictment charged the embezzlement of a check and in another count charged the embezzlement of the proceeds of the check, the court submitted both counts to the jury.[8]

Simultaneous embezzlements, that is, the conversion of several different things at the same time and as a part of the same transaction, may be treated as a single offense and included in a single count of the indict-

4 State v. Bickford, 28 N. D. 36, 147 N. W. 407.

5 Hutchinson v. Com., 82 Pa. St. 472, 2 Am. Cr. Rep. 362.

Compare: State v. Little, 21 Kan. 728, holding indictment charging accused with embezzlement "as agent, servant, employee and bailee," did not charge two crimes, one as "agent, servant and employee," and one as "bailee," the word "bailee" being treated as surplusage.

6 State v. Hodges, 45 Kan. 389, 26 Pac. 676; State v. Palmer, 32 La. Ann. 565; Com. v. Mentzer, 162 Pa. St. 646, 29 Atl. 720.

7 State v. Adams, 108 Mo. 208; State v. Crosswhite, 130 Mo. 359, 51 Am. St. Rep. 571, 32 S. W. 991.

Commission merchant charged with embezzling goods consigned to him on sale, he can not in the same indictment or information, or at least in the same count, be charged also with the embezzlement of the proceeds of the sale of the embezzled goods. See State v. Crosswhite, 130 Mo. 359, 51 Am. St. Rep. 571, 32 S. W. 991.

8 Messner v. State, (Tex. Cr. Rep.) 182 S. W. 329.

ment, according to one line of cases,[9] or, according to another line of cases, the accused may be separately indicted and convicted of the embezzlement of each.[10] Where an agent or servant, authorized to collect money, receives from various persons different sums of money, all of which he retains and converts to his own use at one and the same time, he commits but one embezzlement, and must be so charged;[11] but where such servant or agent converts and embezzles the various sums as they are received, each conversion is a separate embezzlement, and must be charged in a separate count.[12]

§ 598. —— Continuing embezzlements. In those cases where the circumstances are such that, unless the prosecution is allowed to aggregate a continued systematic peculation on the part of an agent or employee, it might be impossible to secure a conviction, because the separate and distinct acts of conversion may not be susceptible of direct proof, the conversions may be charged in a lump sum without being duplicitous, and proof of such continued taking made.[1] Thus, if one commits an em-

9 See Ex parte Ricord, 11 Nev. 287, 293; State v. Malim, 14 Nev. 288.

10 Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Thus where the accused was indicted, in several counts, charging the embezzlement of "bonds of the United States of America for the payment of money issued by authority of law, and of the aggregate value of one thousand dollars," the court say: "It was not necessary to show that the several bonds were misappropriated by separate acts, or at different times, in order to justify a conviction on each of the counts in which the bonds are separately described. In this respect the law of larceny and embezzlement is alike. And it is an ancient and well-established rule that the taking of divers articles at one time may be treated as constituting a distinct larceny of each article stolen.—2 Russell on Crimes, 4th Eng. ed., 127; 2 Hale P. C. 246."—Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65. See, also, Com. v. Sullivan, 104 Mass. 552.

11 See Ex parte Ricord, 11 Nev. 287; Ricord v. Central Pac. R. Co., 15 Nev. 167.

12 Ex parte Ricord, 11 Nev. 287.

1 GA.—Jackson v. State, 76 Ga. 551. ILL.—Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup.

bezzlement by a series of transactions, from day to day[2] or month to month,[3] a charge of embezzlement on a single day will cover and admit evidence of the whole. An information charging that the accused on the fifteenth day of August, 1900, and on divers dates and days from thence continuously to the tenth day of January, 1901, did then and there convert to his own use certain moneys amounting in the aggregate to a named sum, is not defective for duplicity, but charges one continuous offense.[4]

Public officer charged with embezzlement of small sums of money received by him in virtue of his office and position, consisting of a series of continuous peculations, an allegation of a particular gross amount is held by the weight of authority to be good and sufficient.[5] Thus, a public officer charged with the embez-

Ct. Rep. 225. OHIO — Brown v. State, 18 Ohio St. 496. ORE.— State v. Reinhart, 26 Ore. 466, 38 Pac. 822. WASH.—State v. Dix, 33 Wash. 405, 74 Pac. 570. WYO.— Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

Regulated by statute in California (People v. Treadwell, 69 Cal. 226, 7 Am. Cr. Rep. 152, 10 Pac. 502); Louisiana (State v. Thompson, 32 La. Ann. 796); Massachusetts (Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65; Com. v. Bennett, 118 Mass. 443); England (R. v. Grove, 1 Moo. C. C. 447), and perhaps elsewhere.—Moore v. United States, 160 U. S. 268, 275, 40 L. Ed. 422, 426, 10 Am. Cr. Rep. 283, 16 Sup. Ct. Rep. 294.

2 Brown v. State, 18 Ohio St. 496.

3 Edelhoff v. State, 5 Wyo. 19, 9 Am. Cr. Rep. 256, 36 Pac. 627.

4 State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

5 See: COLO.—Adams v. People, 25 Colo. 532, 55 Pac. 806. FLA.—Sigsbee v. State, 43 Fla. 524, 30 So. 816. IND.—Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490. KAN.—State v. Smith, 13 Kan. 274; State v. Graham, 13 Kan. 299. MICH.—People v. McKinney, 10 Mich. 54. MINN.— State v. Munch, 22 Minn. 67; State v. Ring, 29 Minn. 78, 11 N. W. 233. MO.—State v. Flint, 62 Mo. 393; State v. Arnold, 2 S. W. 269. NEB.—State v. Knox, 17 Neb. 683, 24 N. W. 832. NEV.— State v. Carrick, 16 Nev. 120. N. H.—State v. Boody, 53 N. H. 613. N. M.—Territory v. Hale, 13 N. M. 181, 13 Ann. Cas. 551, 81 Pac. 583. N. Y.—Bork v. People, 16 Hun 476; affirmed, 83 N. Y. 609. TEX.—State v. Brooks, 42 Tex. 62. FED.—Moore v. United States, 160 U. S. 268, 40 L. Ed. 422, 10

zlement of one hundred and sixty-five dollars paid in for hunters' licenses in sums ranging, under statute, from one dollar to fifty dollars, is not duplicitous in that it charges more than one offense.[6]

§ 599. —— False pretenses and larceny. Under the rule permitting the pleader to state the same offense, or offenses of the same species or family of offenses, in several different ways to meet the varying phases of the evidence,[1] it has been held that a count charging embezzlement may be joined with a count charging obtaining money by false pretenses[2] or a count charging larceny or grand larceny,[3] because they are of the same general nature and are triable in the same mode,[4] and the nature of the punishment is also the same, although with different degrees of severity.[5] But there are cases

Am. Cr. Rep. 283, 16 Sup. Ct. Rep. 294; United States v. Bornemann, 37 Fed. 257; McBride v. United States, 42 C. C. A. 38, 101 Fed. 821; Dimmick v. United States, 57 C. C. A. 664, 121 Fed. 638; United States v. Mason, 177 Fed. 552.

6 State v. Leonard, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

1 See, supra, § 596; Bulloch v. State, 10 Ga. 47, 54 Am. Dec. 369; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; State v. Noland, 111 Mo. 473, 119 S. W. 715.

2 State v. Lincoln, 49 N. H. 464.

3 ALA.—Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Mayo v. State, 30 Ala. 32; Wooster v. State, 55 Ala. 217; Butler v. State, 91 Ala. 87, 9 So. 191. ILL.—Murphy v. People, 104 Ill. 528; Ker v. People, 110 Ill. 646, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225. IND.—Griffith v. State, 36 Ind. 406. MISS.—State v. Howell, 106 Miss. 461, 64 So. 159. MO.—State v. Porter, 26 Mo. 201; State v. Owens, 78 Mo. 367; State v. Harmon, 106 Mo. 635, 18 S. W. 128. N. J.—Stephens v. State, 53 N. J. L. 245, 21 Atl. 1038. ENG.—R. v. Johnson, 3 Maule & S. 550.

"Is but the exercise of a prudent foresight in anticipation of a possible variance in the evidence from the allegations in the indictment" as to the embezzlement charge.—Griffith v. State, 36 Ind. 406.

Larceny at common law and embezzlement under the statute may be charged in one count.—State v. Howell, 106 Miss. 461, 64 So. 159.

4 Stephens v. State, 53 N. J. L. 245, 21 Atl. 1038.

5 Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383. See, among other cases: ALA.—Henry v. State, 33 Ala. 389; Quinn v. State, 49 Ala. 353; Tanner v. State, 92 Ala. 1, 9 So. 613; Lowe v. State, 134 Ala.

which hold that larceny and embezzlement, or statutory larceny, are distinct offenses[6] and can not be joined in the same indictment;[7] and even where, by statute, a count for embezzlement may be joined with a count for larceny, a charge of embezzlement can not be joined with other charges of fraudulent appropriation of property, or with offenses constituting merely misdemeanors

154, 32 So. 273. ARK.—Baker v. State, 4 Ark. 56; Orr v. State, 18 Ark. 540. COLO.—Parker v. People, 13 Colo. 155, 4 L. R. A. 803, 21 Pac. 1120. GA.—Hoskins v. State, 11 Ga. 92. ILL.—Herman v. People, 131 Ill. 594, 9 L. R. A. 182, 22 N. E. 471. IND. — Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494. KAN.—State v. Blakesley, 43 Kan. 250, 23 Pac. 570. LA.—State v. Pierce, 38 La. Ann. 91; State v. Morgan, 39 La. Ann. 214, 1 So. 456; State v. McDonald, 39 La. Ann. 959, 3 So. 92; State v. Edmunds, 49 La. Ann. 273, 21 So. 266. ME.—State v. Frazier, 79 Me. 95, 8 Atl. 347. MASS. — Carlton v. Com., 46 Mass. (5 Metc.) 532; Josslyn v. Com., 47 Mass. (6 Metc.) 140; Com. v. Costello, 120 Mass. 358; Com. v. Brown, 121 Mass. 69. MO.—State v. Kirby, 7 Mo. 317. N. Y.—Kane v. People, 8 Wend. 203, affirming 3 Wend. 368; People v. Rynders, 12 Wend. 425. N. C.—State v. Haney, 19 N. C. (2 Dev. & B. L.) 390; State v. Williams, 31 N. C. (9 Ired. L.) 140. OHIO — Cline v. State, 43 Ohio St. 332, 1 N. E. 22. PA.—Edge v. Com., 7 Pa. St. 275; Mills v. Com., 13 Pa. St. 631. TENN.—Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599. FED. — Pointer v. United States, 151 U. S. 396, 38 L. Ed. 208, 14 Sup. Ct. Rep. 410; United States v. O'Callahan, 8 McL. 596, Fed. Cas. No. 15910; United States v. Peterson, 1 Woodby & M., 305, Fed. Cas. No. 16037. ENG.—R. v. Johnson, 3 Maule & S. 550; R. v. Fussell, 3 Cox C. C. 291.

Punishment different, e. g., one by fine and the other by fine and imprisonment, joinder is error (Norvell v. State, 50 Ala. 174). Thus burglary and petit larceny can not be joined. — Adams v. State, 55 Ala. 143.

[6] "Although the party, in the language of the statute, 'shall be deemed to have committed the crime of simple larceny,' yet it is a larceny of a peculiar character, and must be set forth in its distinctive character." — Fulton v. State, 13 Ark. 168.

Trespass is essential to constitute larceny, while in embezzlement this is not necessary, but a fiduciary relation must be shown. — State v. Finnegean, 127 Iowa 286, 4 Ann. Cas. 628, 103 N. W. 155.

"The two offenses of larceny and embezzlement are so far distinct in character that, under an indictment charging merely larceny, evidence of embezzlement is not sufficient to authorize conviction."—Com. v. Simpson, 50 Mass. (9 Metc.) 138.

[7] State v. Finnegean, 127 Iowa 286, 4 Ann. Cas. 628, 103 N. W. 155.

or malfeasance in office.[8] Where two or more counts are joined in one indictment charging offenses of the same class or family, growing out of one and the same transaction, there can be but one conviction and punishment, even though accused is found guilty on all the counts in the indictment.[9]

§ 600. —— ELECTION. In the case of a charge of embezzlement, as in the case of the charge of any other crime or offense, where the indictment or information consists of two or more counts which do not charge distinct offenses, but are introduced solely for the purpose of meeting the evidence as it may transpire on the trial, both or all counts being substantially for the same offense, the prosecution can not be compelled to elect on which count it will proceed to trial.[1] Thus, on an indictment charging embezzlement and larceny of money, funds, and securi-

8 Com. v. Bradley, 132 Ky. 512, 116 S. W. 761.

9 See Mayo v. State, 30 Ala. 32; Wooster v. State, 55 Ala. 217; Butler v. State, 91 Ala. 87, 9 So. 191; State v. Lincoln, 49 N. H. 464.

1 State v. Bell, 27 Md. 675, 92 Am. Dec. 658. See, also: ARK.—Baker v. State, 4 Ark. 56. IND.—McGregor v. State, 16 Ind. 9; Griffith v. State, 36 Ind. 406; Mershon v. State, 51 Ind. 14. IOWA—State v. House, 55 Iowa 466, 8 N. W. 307. LA.—State v. Cazeau, 8 La. Ann. 109. ME.—State v. Flye, 26 Me. 312. MISS.—Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; State v. Pitts, 58 Miss. 556. MO.—State v. Porter, 26 Mo. 201; State v. Turner, 63 Mo. 436. N. H.—State v. Canterbury, 28 N. H. 195; State v. Lincoln, 49 N. H. 464. N. Y.—People v. White, 55 Barb. 606; affirmed, 32 N. Y. 465; Taylor v. People, 12 Hun 212; La Beau v. People, 33 How. Pr. 66, 6 Park. Cr. Rep. 371; affirmed, 34 N. Y. 223. N. C.—State v. Morrison, 85 N. C. 561. S. C.—State v. Scott, 15 S. C. 434. TEX.—Gonzales v. State, 12 Tex. App. 657. VA.—Dowdy v. Com., 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314. ENG.—R. v. Trueman, 8 Car. & P. 727, 34 Eng. C. L. 986; Young v. R., 3 T. R. 98, 100 Eng. Repr. 475; R. v. Davis, 3 Fost. & F. 19; R. v. Fussell, 3 Cox C. C. 291.

Joinder tending to embarrass accused in his defense, court, in exercise of its discretion, may require prosecution to elect, is the general rule applicable in the trial of all crimes. See Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; State v. Abraham, 6 Iowa 117, 71 Am. Dec. 399; State v. McPherson, 9 Iowa 53; State v. Cazeau, 8 La. Ann. 109; State v. Porter, 26 Mo. 206; Kane v. People, 8 Wend. (N. Y.) 203, affirming 3 Wend. 363; State v. Lincoln, 49

ties, the court will not compel the prosecution to elect upon which alleged act of embezzlement or larceny a conviction will be asked.[2] In those states in which larceny and embezzlement are regarded as distinct crimes,[3] in those cases in which they are joined in the indictment an election will be required.[4] While it is duplicitous to charge in the same indictment the embezzlement of personal property and also the embezzlement of the proceeds thereof,[5] and an election may be required,[6] yet the court may submit both counts to the jury.[7]

N. H. 464; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

2 Ker v. People, 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Cr. Rep. 211; affirmed, 18 Fed. 167, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225.

The Illinois supreme court say, in the above case, that "it is difficult, if at all possible, to prove with certainty when or how the embezzlement was effected. It is, of course, done with a view to avoid detection, and the confidential relations existing ward off suspicion. Embezzlement may, and most often does, consist of many acts done in a series of years, and the fact at last disclosed that the employer's money and funds are embezzled is the crime against which the statute is leveled. In such cases, should the prosecution be compelled to elect, it would claim a conviction for only one of the many acts of the series that constitute the corpus delicti, it would be doubtful if a conviction could be had, under sections 75 and 76 of the Criminal Code, against a clerk of a bank or other corporation, or a partnership, although the accused might be conceded to be guilty of embezzling large sums of money in the aggregate. It might be different, under section 74 of the Criminal Code, where distinct sums of money or articles of personal property are or may be delivered to the accused on different occasions wide apart. Such distinct acts might very readily be susceptible of direct proof, for the act of delivery implies actual knowledge in some one who could be a witness. But no such opportunity is afforded to make direct proof as to acts done, under sections 75 and 76, defining embezzlement. The body of the crime consists of many acts done by virtue of the confidential relation existing between the employer and the employee, with funds, moneys, or securities over which the servant is given care or custody, in whole or in part, by virtue of his employment."

3 See, supra, § 599, footnote 3.

4 State v. Finnegean, 127 Iowa 286, 4 Ann. Cas. 628, 103 N. W. 155. See, also, State v. Norris, 122 Iowa 154, 97 N. W. 999.

5 See, supra, § 597, footnote 6.

6 Messner v. State, (Tex. Cr. Rep.) 182 S. W. 329.

7 Id.

CHAPTER XL.

INDICTMENT—SPECIFIC CRIMES.

Embracery.

§ 601. FORM AND SUFFICIENCY OF INDICTMENT.[1] An indictment or information charging accused with the crime of embracery is sufficient if it follows the language of the statute under which the prosecution is had,[2] where the statute sufficiently specifies the nature and contains all the elements of the offense sought to be charged;[3] but where the statute does not set out all the elements necessary to constitute the offense, an indictment or information following the language of the statute merely will not be sufficient,[4] because the offense sought to be charged must be set out with reasonable definiteness and certainty.[5] The acts constituting the offense should be alleged,[6] and the words used by the accused to the juror may be set out without any innuendo.[7] The name of the juror should be given, inasmuch as the essential element of the offense is the attempt to corrupt a juror, and that he was a juror regularly drawn or duly impaneled in a

1 **As to form of indictment**—Where accused party to suit. See Forms Nos. 908, 909.

—Where accused not a party to the suit. See Forms Nos. 910-912.

2 State v. Williams, 136 Mo. 293, 38 S. W. 75.

3 State v. McCrystal, 43 La. Ann. 907, 9 So. 922; State v. Claudi, 43 La. Ann. 914, 9 So. 925.

4 State v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

Essential elements not charged, and the defect appearing upon the face of the indictment or information, the question is open to determination for the first time on appeal.—State v. Nunley, 185 Mo. 102, 83 S. W. 1074.

5 State v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

6 State v. Brown, 95 N. C. 685.

7 State v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

named cause can be known by allegation of his name only;[8] there need be no allegation that the person named as a juror had been summoned[9] or impaneled,[10] or that the panel, upon which the juror approached had been summoned, was summoned by order of the court,[11] or any direct averment that the accused knew that the person named as a juror was in fact a juror;[12] but that the term of court, at which the offense is alleged to have been committed, was duly organized must be alleged and proved on the trial.[13]

Attempt to commit embracery: Person accused must be charged with a direct personal attempt to influence a juror; to charge that he attempted to procure others to attempt to influence the juror named fails to state facts showing that the accused attempted to influence the juror named or any of the jurors in the panel of the designated cause.[14] There is no such crime specifically recognized, either at common law or under statute, as that of an attempt to commit embracery. The crime itself consists

8 State v. Nunley, 185 Mo. 102, 83 S. W. 1074.

9 Grand juror's name drawn from box and published, but he not yet summoned when the attempt to influence him was made, held to be immaterial in People v. Glen, 64 App. Div. (N. Y.) 167, 15 N. Y. Cr. Rep. 547, 71 N. Y. Supp. 893; affirmed, 173 N. Y. 395, 17 N. Y. Cr. Rep. 225, 68 N. E. 112.

10 Caruthers v. State, 74 Ala. 408.

11 State v. Williams, 136 Mo. 293, 38 S. W. 75.

12 Under the universal rule that an indictment is sufficient if it can be understood therefrom that the act charged is stated with such a degree of certainty as to enable a person of common understanding to know what is intended, an indictment charging the defendant with unlawfully and feloniously attempting to improperly influence a juror by requesting him to see that right was done, that it would not be to his loss, is not insufficient even though the words are in themselves innocent. The allegation that the words were used for an improper purpose negatives that they were innocent and used with a proper intent. — State v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

13 State v. Freeman, 15 Vt. 723.

14 Gandy v. State, 13 Neb. 445, 14 N. W. 143.

of an attempt to do an act or accomplish a result; there can not be an attempt to commit an attempt.[15]

§ 602. JOINDER OF COUNTS AND CONSOLIDATION OF CAUSES. An indictment or information charging embracery may join a count for embracery with a count charging an attempt to influence an officer in charge of the jury by permitting the accused to approach the jurors.[1] When several indictments are preferred at different times, but alleging the same state of facts in different forms, these various indictments will be consolidated and treated as separate counts of one indictment.[2]

15 State v. Sales, 2 Nev. 268.

1 State v. Brown, 95 N. C. 685.

2 State v. Brown, 95 N. C. 685.

CHAPTER XLI.

INDICTMENT—SPECIFIC CRIMES.

Escape.

§ 603. FORM AND SUFFICIENCY OF INDICTMENT.[1] An indictment or information charging escape must allege every essential element of the offense with clearness and reasonable certainty.[2] Inasmuch as lawful imprisonment is an essential element in an escape to render the accused liable criminally,[3] the indictment or information must set

1 As to forms of indictment for escape in its various phases, see Forms Nos. 915-927.

2 Smith v. State, 81 Ala. 74, 1 So. 83.

3 CAL.—People v. Ah Teung, 92 Cal. 421, 15 L. R. A. 190, 28 Pac. 577. CONN. — State v. Leach, 7 Conn. 452, 18 Am. Dec. 118. FLA.—King v. State, 42 Fla. 260, 28 So. 206. GA.—Hebersham v. State, 56 Ga. 61; Adams v. State, 121 Ga. 164, 48 S. E. 910. HAWAII—Rex v. Sin Fook, 8 Hawaii 185. ILL.—Housh v. People, 75 Ill. 487. KAN. — State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93; State v. King, 71 Kan. 287, 80 Pac. 606. KY.—Saylor v. Com., 122 Ky. 776, 93 S. W. 48. MASS. — Com. v. Barker, 133 Mass. 399. NEV.—Ex parte Ah Bau, 10 Nev. 264; State v. Clark, 32 Nev. 153, Ann. Cas. 1912C, 754, 104 Pac. 593. N. J.—State v. Williams, 10 N. J. Law J. 293. N. C. — State v. Jones, 78 N. C. 420. ENG.—R. v. Waters, 12 Cox C. C. 390.

Departure from an unlawful imprisonment or custody is not an escape within the meaning of the law; mere confinement within the walls of a prison, in violation of the law of the state, is not an imprisonment from which it is a crime to escape. — People v. Ah Teung, 92 Cal. 421, 15 L. R. A. 190, 28 Pac. 570.

Finding of court without judgment made or given thereon, that a Chinaman had unlawfully come into the United States through Mexico, is not the equivalent of an order or direction given by the commissioner or by a court of the district that the Chinaman should

out such facts as show the imprisonment to have been lawful,[4] but it need not be alleged that the accused had been convicted of or was guilty of any crime;[5] due and regular commitment is all that is required.[6] A general

be removed from the district and held in custody elsewhere for the purpose of returning him to the country from whence he came; and in the absence of such an order the marshal has no authority to imprison him.—People v. Ah Teung, 92 Cal. 421, 15 **L. R. A.** 190, 28 Pac. 577.

4 State v. Jones, 78 N. C. 420. But see Com. v. Ramsey, 1 Brewst. (Pa.) 422.

5 See Gunyon v. State, 68 Ind. 79; State v. Lewis, 19 Kan. 260, 27 **Am. Rep.** 113; Ex parte Ah Bau, 10 Nev. 264; State v. Daly, 41 Ore. 515, 70 Pac. 706; Com. v. Miller, 2 Ashm. (Pa.) 61; Com. v. Ramsey, 1 Brewst. (Pa.) 422.

Guilt of crime committed, or conviction on accusation, are neither necessary to a lawful imprisonment in the county jail; under many circumstances innocent persons may be lawfully imprisoned by legal process; and one thus imprisoned, though innocent, is criminally liable for an escape, and so are all persons aiding in such escape.—Ex parte Ah Bau, 10 Nev. 264. See 2 Hawk. P. C. 185 et seq.; 1 Hale P. C. 610; 1 Russ. on Cr. 428.

6 State v. Murray, 15 Me. 100; Com. v. Morihan, 86 Mass. (4 Allen) 586; Com. v. Miller, 2 Ashm. (Pa.) 61.

Absence of commitment for prisoner convicted and sentenced and in hands of sheriff, does not render the imprisonment unlawful, for the reason that the conviction and sentence are the original authority, for which the certified copy in the commitment is merely the evidence. See Ex parte Gibson, 31 Cal. 619, 91 **Am. Dec.** 546; Sennott's Case, 146 Mass. 489, 4 **Am. St. Rep.** 344, 16 N. E. 448; People ex rel. Trainor v. Baker, 89 N. Y. 460; People ex rel. Johnson v. Nevins, 1 Hill (N. Y.) 154; Ex parte Kellogg, 6 Vt. 511; In re Thayer, 69 Vt. 314, 37 Atl. 1042; State v. Hatfield, 65 Wash. 550, **Ann. Cas.** 1913B, 895, 118 Pac. 893; State v. Workman, 66 Wash. 658, 120 Pac. 522; Ex parte Wilson, 114 U. S. 422, 29 **L. Ed.** 91, 5 Sup. Ct. Rep. 935; Howard v. United States, 21 C. C. A. 586, 75 Fed. 986, 34 **L. R. A.** 509.

Contra: State v. Hollon, 22 Kan. 580.

Absence of evidence or oath to support charge on which accused is committed, where the magistrate has jurisdiction and power to commit without such evidence, will not justify an escape or a prison breach.—R. v. Waters, 12 Cox C. C. 300.

"Difference must necessarily exist between an imprisonment without any process, and wholly without authority of law, and an imprisonment under a process which is simply irregular in form; and this distinction is clearly recognized."—People v. Ah Teung, 92 Cal. 421, 15 **L. R. A.** 190, 28 Pac. 577. See Dunford v. Weaver, 84 N. Y. 445, affirming 21 Hun

averment, in the language of the statute, that a prisoner was in the lawful custody of an officer[7] is sufficient to meet all the requirements,[8] and on an allegation that the prisoner was imprisoned under an order of a designated court, the jurisdiction of which is fixed by public statute, it is not necessary to further allege that the court had jurisdiction to make the order.[9]

Intent being an element, under the particular statute, in an attempt to escape[10] or in an escape,[11] such intent is an essential ingredient which must be alleged in the indictment and proved at the trial beyond a reasonable doubt;[12] but this intent is sufficiently alleged where the facts are set out showing an attempt to escape, or an actual escape, because the charge of an attempt, or the

(N. Y.) 341; Goodwin v. Griffis, 88 N. Y. 629.

Informality or irregularity in commitment or proceedings does not justify an escape. — State v. Nauerth, 62 Kan. 869, 64 Pac. 69; State v. Murray, 15 Me. 103; Com. v. Morihan, 86 Mass. (4 Allen) 586.

Lawfulness of commitment does not depend upon the actual guilt or innocence of a prisoner; even though innocent it is his duty to remain until discharged by authority of law.—State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113.

Thus a committing magistrate before whom one accused of crime is taken may remand him for three days or more for his examination, and if he escapes before the date fixed for the hearing he is liable for such escape, even though he duly appears for the hearing on the day fixed.—R. v. Waters, 12 Cox C. C. 390.

7 **Private individual** employed by under-sheriff, in whose hands the commitment was placed, to guard the prisoner pending his transfer to jail, the prisoner is in lawful custody. — State v. Lawrence, 43 Kan. 125, 23 Pac. 157.

8 Houpt v. State, 100 Ark. 409, 140 S. W. 294; King v. State, 42 Fla. 260, 28 So. 206.

9 Daniel v. State, 114 Ga. 533, 40 S. E. 805; State v. Whalen, 98 Mo. 222, 11 S. W. 576.

Location of court need not be stated.—Daniel v. State, 114 Ga. 533, 40 S. E. 805. See Com. v. Ramsey, 1 Brewst. (Pa.) 422.

Magistrate issuing order of arrest, indictment should allege that he had jurisdiction to do so. — Martin v. State, 32 Ark. 124.

10 **As to attempt to escape,** see, infra, § 605.

11 **As to the escape,** see, infra, § 604.

12 State v. Rodriguez, 31 Nev. 342, 102 Pac. 863; State v. Clark, 32 Nev. 145, Ann. Cas. 1912C, 754, 104 Pac. 593.

actual escape, necessarily includes and is equivalent to a charge of an intent.[13] But where the act is forbidden by statute, which is silent concerning the intent with which the act is done, a person doing the unlawful act forbidden is guilty of the crime charged, even though he had no wrongful intent beyond that which is involved in the doing of the act prohibited,[14] and intent, not being an element in such case, need not be charged in the indictment.

Language of the statute,[15] or the substantial language of the statute,[16] being followed in the indictment or information, it will usually be sufficient, where the statute contains all the essential elements of the offense sought to be charged, without adding the details comprised within the statutory definition,[17] and without setting forth the cause for which the accused was imprisoned or under guard[18] at the time when he made his attempt to escape or did escape;[19] but it is otherwise in those cases in which the statute does not set forth all the essential elements of the offense sought to be charged, in which case the acts

13 State v. Clark, 32 Nev. 145, **Ann. Cas.** 1912C, 754, 104 Pac. 503; State v. Daly, 41 Ore. 515, 70 Pac. 707. See Prince v. State, 35 Ala. 367; Johnson v. State, 14 Ga. 55.

14 State v. Zichfeld, 23 Nev. 304, 62 **Am. St. Rep.** 800, 34 **L. R. A.** 784, 46 Pac. 802; State v. Clark, 32 Nev. 145, **Ann. Cas.** 1912C, 754, 104 Pac. 593.

15 See: ALA.—Smith v. State, 76 Ala. 69; Hurst v. State, 79 Ala. 55; Romey v. State, 9 Ala. App. 51, 64 So. 168. ARK.—Houpt v. State, 100 Ark. 409, 140 S. W. 294. KY.—Hinkle v. Com., 23 Ky. L. Rep. 1988, 66 S. W. 816. MICH.—People v. Murray, 57 Mich. 396, 24 N. W. 118. MO.—Desoto v. Brown, 44 Mo. App. 148. NEV.—State v. Angelo, 18 Nev. 425, 5 **Am. Cr. Rep.** 62, 4 Pac. 1080. TEX.—Barthelow v. State, 26 Tex. 175; State v. Hendrick, 35 Tex. 485.

16 Dickens v. State, 109 Ark. 425, 160 S. W. 218.

17 Porter v. State, 34 Tex. Cr. Rep. 364, 30 S. W. 791.

18 See State v. Lawrence, 43 Kan. 125, 23 Pac. 157.

19 Harris v. Com., 23 Ky. L. Rep. 775, 64 S. W. 434.

An allegation that the accused "unlawfully" escaped from a named chain gang dispenses with the further allegation that the chain gang was a lawful place of confinement.—Daniel v. State, 114 Ga. 533, 40 S. E. 805.

of the accused bringing him within the purview of the statute must be set out.[20]

"*Feloniously and unlawfully*" being a provision in the statute, these words must be used in the indictment or information,[21] otherwise they are not essential to a valid indictment.[22]

§ 604. THE ESCAPE. We have already seen that before there can be a criminal escape there must be a lawful custody,[1] and for this reason the indictment or information should set forth facts from which the court can see that the accused was, at the time of the acts complained of, in lawful custody;[2] because if he be not in lawful custody, as

20 See King v. State, 42 Fla. 260, 28 So. 206; State v. Lawrence, 43 Kan. 125, 23 Pac. 157; Com. v. Filburn, 119 Mass. 297; State v. Hilton, 26 Mo. 199; Vaughan v. State, 9 Tex. App. 563.

21 "Feloniously," in an indictment for an escape, in any of its phases, means that the act complained of was done with the intent to commit the crime and with a design on the part of the perpetrator to commit the offense with which he is charged. — State v. Clark, 32 Nev. 145, Ann. Cas. 1912C, 754, 104 Pac. 503.

This is the general rule of criminal pleading. See: IDA.—People v. Butler, 1 Ida. 231. IND.—Hamilton v. State, 142 Ind. 276, 41 N. E. 588. IOWA—State v. Boyle, 28 Iowa 522. KAN.—State v. Douglas, 53 Kan. 669, 37 Pac. 172. MASS.—Com. v. Adams, 127 Mass. 15, 17. MONT. — State v. Rechnitz, 20 Mont. 488, 52 Pac. 264. MO.—State v. Noland, 111 Mo. 473, 19 S. W. 715. NEV. — State v. Slingerland, 19 Nev. 135, 7 Pac. 280; State v. Hughes, 31 Nev. 270, 102 Pac. 652. N. Y. — Phelps v. People, 72 N. Y. 334, 2 Con. Cr. Rep. 383; People v. Conroy, 97 N. Y. 62, 68, 2 N. Y. Cr. Rep. 565, affirming 33 Hun 119, 2 N. Y. Cr. Rep. 247; People v. Willett, 102 N. Y. 251, 4 N. Y. Cr. Rep. 200, 6 N. E. 301; People v. Hartwell, 166 N. Y. 361, 15 N. Y. Cr. Rep. 377, 59 N. E. 929; People v. Mosier, 73 App. Div. 5, 16 N. Y. Cr. Rep. 541, 76 N. Y. Supp. 65; People v. Dumar, 42 Hun 80, 5 N. Y. Cr. Rep. 55; reversed on another point, 106 N. Y. 502, 8 N. Y. Cr. Rep. 263, 13 N. E. 325; In re Van Orden, 35 Miss. 215, 15 N. Y. Cr. Rep. 79, 65 N. Y. Supp. 720. S. D.—State v. Halpin, 16 S. D. 170, 91 N. W. 605. WASH.—State v. Smith, 31 Wash. 248, 71 Pac. 767. ENG.—Holloway's Case, 1 Den. Cr. Cas. 376.

22 Randall v. State, 53 N. J. L. 488, 22 Atl. 46.

1 See, supra, § 603, footnote 3.

2 People v. Ah Teung, 92 Cal. 421, 15 L. R. A. 190, 28 Pac. 577; King v. State, 42 Fla. 260, 28 So. 206; Ex parte Ah Bau, 10 Nev. 264.

Under a statute denouncing and

where he is confined in a jail or other prison under a void warrant, he may liberate himself from such prison without being guilty of the crime of escaping from prison.[3] An indictment or information charging that the accused was in lawful custody sufficiently alleges the lawfulness of the arrest from which he escaped.[4] Charging that accused did unlawfully break away and escape from a deputy sheriff, while being committed lawfully to jail, is sufficient;[5] and charging accused with breaking away from the custody of a constable, the latter having, upon a warrant issued by a justice of the peace, arrested accused for a

punishing any person confined "in prison" who escapes therefrom, where the indictment states or the evidence on the trial shows that the accused at the time of the alleged breaking of prison and escaping were working outside of the prison walls, in charge of an officer, and dropped into a crevice in the earth, which they covered with stone and remained hid for a couple of days, and until the officers departed, when they removed the stone and walked forth without restraint and regained their liberty without opposition, an escape from prison is not charged or established (State v. King, 114 Iowa 413, 89 **Am. St. Rep.** 371, 87 N. W. 282), because a prison breach implies acts constituting the breaking of a prison, and these acts are not different from those essential to be charged and shown in burglary or other criminal breaking. — Randall v. State, 53 N. J. L. 488, 22 Atl. 46.

Escape from chain gang sent to commissioner to work on city streets, held not to be a criminal escape.—State v. Owens, 268 Mo. 481, 187 S. W. 1189.

Jurisdiction of the person and the offense on the part of the court, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction of the court, and does not render the sentence void, but voidable o n l y. — Sennott's Case, 146 Mass. 489, 4 **Am. St. Rep.** 344, 16 N. E. 448. See Kirby v. State, 62 Ala. 51; Lark v. State, 55 Ga. 435; In re Phinney, 32 Me. 440; Ross' Case, 19 Mass. (2 Pick.) 165; Feeley's Case, 66 Mass. (12 Cush.) 598; Ex parte Shaw, 7 Ohio St. 81, 70 **Am. Dec.** 55; Ex parte Van Hagan, 25 Ohio St. 426; In re Semler, 41 Wis. 517.

[3] State v. Leach, 7 Conn. 452, 18 **Am. Dec.** 118.

Warrant void, prisoner may liberate himself by breaking the prison, provided he uses no more force than is necessary to enable him to effect his liberation.—State v. Leach, 7 Conn. 452, 18 **Am. Dec.** 118.

[4] King v. State, 42 Fla. 260, 28 So. 206.

[5] State v. Miller, 95 Kan. 310, 147 Pac. 844.

misdemeanor, is sufficient, without alleging that the commitment issued by the justice was directed to the constable.[6]

That accused did escape from custody,[7] or from prison, must be distinctly alleged, but this allegation may be made in the language of the statute,[8] in technical words or phrases,[9] or in ordinary words, such as "breaking out," which is equivalent to "breaking prison,"[10] but the phrase "breaking from jail," does not necessarily mean a completed act;[11] "duly committed";[12] "feloniously" or "unlawfully" did escape,[13] and the like. But it is not necessary to allege that the accused was in custody by virtue of a warrant;[14] that commitment, or a copy of the judgment, was in the custodian's hands,[15] or that the custodian was an officer,[16] or that he received the prisoner in the capacity of jailer;[17] or state the crime

6 State v. Shirley, 233 Mo. 335, 135 S. W. 1.

7 See footnotes 5 and 6, this section.

An indictment or information alleging that the accused, while lawfully confined in the state prison under a judgment of a court of competent jurisdiction for a designated crime, "did unlawfully, forcibly and feloniously break out of the cell in said prison in which he was confined, and out of the building in which said cell was and is," charges an overt attempt to escape, and contains a sufficient statement of facts to show the commission of the crime sought to be charged.—State v. Angelo, 18 Nev. 425, 5 Am. Crim. Rep. 62, 4 Pac. 1080.

8 See, supra, § 603, footnotes 15 et seq.

9 "Exivit ad largum" sufficiently expresses the act and fact.—State v. Maberry, 3 Strobh. (S. C.) 144.

10 Randall v. State, 53 N. J. L. 488, 22 Atl. 46.

11 State v. Angelo, 18 Nev. 425, 5 Am. Cr. Rep. 62, 4 Pac. 1080.

12 Com. v. Mitchell, 66 Ky. (3 Bush) 30; State v. Baldwin, 80 N. C. 390.

13 Daniel v. State, 114 Ga. 533, 40 S. E. 805.

14 State v. Sparks, 78 Ind. 166.

15 State v. Angelo, 18 Nev. 425, 5 Am. Cr. Rep. 62, 4 Pac. 1080; State v. Hatfield, 65 Wash. 550, Ann. Cas. 1913C, 895, 118 Pac. 893; followed in State v. Workman, 66 Wash. 658, 120 Pac. 522.

A different rule seems to prevail in Kansas. See State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93; State v. Hollon, 22 Kan. 580.

16 Smith v. State, 76 Ala. 69; State v. Lawrence, 43 Kan. 125, 23 Pac. 157.

17 Weaver v. Com., 29 Pa. St. 445

for which accused was convicted, or the term for which he had been sentenced to prison,[18] or state that he was sentenced to hard labor;[19] or allege the jurisdiction of the court trying and sentencing the accused;[20] or give any of the particulars regarding the crime, the arrest, the trial, or the conviction.[21]

§ 605. ATTEMPT TO ESCAPE. We have already seen that lawful imprisonment is a necessary element in escape,[1] and that there must be a lawful custody before there can be an escape,[2] from which it follows that a valid commitment or lawful custody is an essential element in an attempt to escape. One who is confined in a jail or other prison, or otherwise restrained of his liberty, under a void warrant may attempt to liberate himself from such imprisonment or restraint without being guilty of the crime of attempting to escape.[3] One indicted for "escaping" from prison may be convicted of, or plead guilty to, an "attempt to escape," where the latter is made a felony by the statute, because the latter is included in the former on the principle that the greater includes the lesser crime.[4] Where an attempt to escape is charged,

18 Harris v. Com., 23 Ky. L. Rep. 775, 64 S. W. 434.

19 "Hard labor": An information for escape while serving a sentence of imprisonment for being intoxicated and while employed without the walls of the jail, need not allege that accused was sentenced to hard labor, that not being a part of the penalty of the offense.—State v. Wright, 81 Vt. 281, 69 Atl. 761.

20 Daniel v. State, 114 Ga. 533, 40 S. E. 805; State v. Whalen, 98 Mo. 222, 11 S. W. 756.

Facts to show authority of magistrate issuing warrant of arrest on charge of crime are required to be set forth in some states.—Martin v. State, 32 Ark. 124.

21 State v. Johnson, 93 Mo. 317, 6 S. W. 77; State v. Hedrick, 37 Tex. 485.

1 See, supra, § 603, footnote 3.

2 See, supra, § 604, footnote 2.

3 State v. Leach, 7 Conn. 452, 18 Am. Dec. 118.

4 Ex parte Cook, 13 Cal. App. 399, 110 Pac. 352.

Attempt to escape from jail charged, the indictment concluding "that the defendant then and there did fail in the perpetration of said offense, and was intercepted and prevented in the execution of the same," held to plainly

the indictment or information need not aver that at the time of the alleged attempt the custodian or officer having the accused in charge had in his possession a warrant or commitment for the imprisonment of the accused,[5] in the absence of statutory provisions so requiring.[6]

Intent to escape being a necessary element[7] in a charge of an attempt to escape from jail or other prison, or from lawful custody and control, an indictment alleging that the accused "did wilfully, unlawfully, and feloniously attempt to break out of said county jail, and in pursuance of said attempt did wilfully, unlawfully, and feloniously break out of a cell in said county jail in which they and each of them were confined," sufficiently alleges the intent of the accused,[8] because it sufficiently charges that the accused did those things made criminal and forbidden by law,[9] and for the further reason that "a charge of an

indicate that the accused failed to perpetrate the breaking and not that he failed to perpetrate the attempt.—Com. v. Rodman, 34 Pa. Sup. Ct. Rep. 607.

Plea of guilty to an attempt to escape from prison under an indictment charging an escape is a waiver of any defects in the indictment which would have rendered it vulnerable to demurrer.—In re Cook, 13 Cal. App. 399, 110 Pac. 352, following In re Myrtle, 2 Cal. App. 383, 84 Pac. 335.

5 State v. Angelo, 18 Nev. 425, 5 **Am. Cr. Rep.** 62, 4 Pac. 1080; State v. Hatfield, 65 Wash. 550, **Ann. Cas.** 1913C, 895, 118 Pac. 893; State v. Workman, 66 Wash. 658, 120 Pac. 522. See, also, authorities cited to first reading paragraph in footnote 6, § 603, supra.

Reason for the rule being that the statute does not make that an essential fact to be proved.—State v. Angelo, 18 Nev. 425, 5 **Am. Cr. Rep.** 62, 4 Pac. 1080.

6 State v. Beebe, 13 Kan. 589, 19 **Am. Rep.** 93; State v. Hollon, 22 Kan. 580.

7 See, supra, § 603, footnotes 10 et seq.

8 State v. Clark, 32 Nev. 145, **Ann. Cas.** 1912C, 754, 104 Pac. 593.

9 CONN.—Myers v. State, 1 Conn. 502. IND.—Hood v. State, 56 Ind. 263, 26 **Am. Rep.** 21. KY.—Davis v. Com., 66 Ky. (3 Bush) 318. ME.—State v. Goodenow, 65 Me. 30. MASS.—Com. v. Marsh, 48 Mass. (7 Metc.) 472; Com. v. Connelly, 163 Mass. 539, 4 N. E. 862. NEV.—State v. Anderson, 3 Nev. 256; State v. Johnson, 9 Nev. 178; State v. Angelo, 18 Nev. 425, 4 Pac. 1080; State v. Clark, 32 Nev. 145, **Ann. Cas.** 1912C, 754, 104 Pac. 593. N. C.—State v. Voight, 90 N. C. 741.

attempt to escape necessarily includes and is equivalent to a charge of an intent to accomplish what was intended" and need not specifically allege the intent.[10]

§ 606. Aiding and abetting escape or attempt to escape. We have already seen that criminal liability for escape depends upon the legality of the imprisonment,[1] and this rule of law applies also in the case where one is charged with aiding and assisting a prisoner to escape, or in his attempt to escape.[2] We have already seen that where a person is unlawfully imprisoned or restrained of his liberty under a void warrant, he may liberate or attempt to liberate himself therefrom, using such force as may be necessary to accomplish that purpose, without rendering himself criminally liable;[3] and another may lawfully assist therein; but the fact that the prisoner is innocent of any crime[4] will not justify him in escaping or any one in aiding and assisting him in an attempt to escape,[5] except in those cases where the officer making the arrest, and from whom the escape is aided, was not acting in the line of his duty at the time of making the arrest.[6] A mere irreg-

10 State v. Clark, 32 Nev. 145, Ann. Cas. 1912C, 754, 104 Pac. 593; State v. Daly, 41 Ore. 515, 70 Pac. 707. See Prince v. State, 35 Ala. 367; Johnson v. State, 14 Ga. 55.

1 See, supra, § 603, footnote 4; § 604, footnote 3.

2 CAL.—People v. Ah Teung, 92 Cal. 421, 15 L. R. A. 190, 28 Pac. 577. GA.—Habersham v. State, 56 Ga. 61. ILL.—Housh v. People, 75 Ill. 478. IND.—Redman v. State, 28 Ind. 205. KAN.—State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93. MICH.—People v. Hamaker, 92 Mich. 11, 52 N. W. 82. CANADA—R. v. Trapnell, 22 Ont. L. Rep. 219.

3 See, supra, § 604, footnote 3; § 605, footnote 3.

One who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape.—People v. Ah Teung, 92 Cal. 421, 15 L. R. A. 190, 28 Pac. 577.

4 See, supra, § 603, footnote 5.

5 See Maxey v. State, 76 Ark. 276, 88 S. W. 1009; Habersham v. State, 56 Ga. 61; State v. Bates, 23 Iowa 96; State v. Johnson, 136 Iowa 228, 113 N. W. 832; Holland v. State, 60 Miss. 939.

6 People v. Hochstim, 76 App. Div. (N. Y.) 25, 17 N. Y. Cr. Rep. 117, 78 N. Y. Supp. 638.

ularity in the proceedings and imprisonment[7] will not justify another in aiding or assisting the prisoner to escape;[8] and the same is true where the officer having the prisoner in charge is merely a de facto officer[9] or a person delegated by an officer to take temporary custody of the prisoner.[10]

Facts showing lawful custody[11] must be set out in the indictment or information, but the facts constituting the offense for which the prisoner was confined need not be set out.[12] The indictment or information will be sufficient where it alleges lawful detention in a stated place of confinement,[13] and charges the accused with specified acts in which he attempted to assist the prisoner to escape therefrom, without specifically averring that the acts alleged to have been done, and of which complaint is made, were useful to aid the prisoner, in those cases where the acts set out, by their very nature, import such usefulness.[14] Thus, charging accused unlawfully set at liberty a prisoner then and there under lawful arrest, by aiding him to escape from a deputy marshal by detaining the deputy marshal when the prisoner was making his escape, is sufficient.[15]

7 See, supra, § 603, footnote 6.

8 Com. v. Horihan, 86 Mass. (4 Allen) 585.

9 Robinson v. State, 82 Ga. 535, 9 S. E. 528.

10 State v. Lawrence, 43 Kan. 125, 23 Pac. 157.

11 State v. Jones, 78 N. C. 420.

An indictment or information charging accused with obstruction of an officer, and alleging that the prisoner was in lawful custody of the sheriff, is sufficient.—King v. State, 42 Fla. 265, 28 So. 206.

12 State v. Daly, 41 Ore. 515, 70 Pac. 706.

13 State v. Daly, 41 Ore. 515, 70 Pac. 706.

14 Johnson v. State, 7 Ala. App. 88, 60 So. 973.

A charge that defendant intentionally assisted a prisoner lawfully confined "on a charge of misdemeanor, to escape therefrom by drilling or prizing out a hole through the walls of said jail," is sufficient without averring that the act was done with the intention to facilitate the escape.—Marshall v. State, 120 Ala. 390, 25 So. 208.

15 Dickens v. State, 109 Ark. 425, 160 S. W. 218.

Charging in the language of the statute aiding and assisting a prisoner in escaping, or in an attempt to escape, or charging in the substance of the language of the statute, within the rule above set out,[16] has been held to be sufficient,[17] although there is authority to the contrary,[18] where accompanied by a statement of the facts out of which the offense arose;[19] and some of the cases hold there need be no allegation that the accused knew of the arrest and that the prisoner was in custody, or that accused intended to aid in his escape[20]—but this is not the general rule, as we show in the next paragraph.

Knowledge by the accused that the person assisted was in legal custody is an indispensable ingredient of the offense of assisting him in escaping, or in an attempt to escape, unless the acts charged to have been done by the accused necessarily imply knowledge; and unless such knowledge is alleged, or the acts charged to have been done by the accused necessarily imply knowledge on his part, the indictment or information will be insufficient to adequately state the offense charged.[21] The acts done by

16 See, supra, § 603, footnotes 15-20, and text going therewith

17 Ramey v. State, 9 Ala. App. 51, 64 So. 168.

"Unto" the jail instead of "into" the jail, held bad and could not be amended, under How. Ann. Mich. Stats., § 8537. — People v. Rathbun, 105 Mich. 699, 63 N. W. 973.

18 King v. State, 42 Fla. 260, 28 So. 206.

19 People v. Murray, 57 Mich. 396, 6 Am. Cr. Rep. 31, 24 N. W. 118.

20 Id.

21 State v. Lawrence, 43 Kan. 125, 23 Pac. 157; Com. v. Filburn, 119 Mass. 297; State v. Hilton, 26 Mo. 199.

Reason for the ruling is that a person may do many things which would aid a prisoner in an escape without any criminal intent or liability. Thus if he should receive and entertain one for a night, in ignorance that his hospitality was extended to a fugitive criminal, or if he should overtake him on a highway and innocently give him a ride, he might thus materially aid the prisoner to escape, but certainly he would not be guilty of wrong, nor punishable under the statute. A well-meant hospitality, or an innocent charity, should not subject a person to criminal prosecution and punishment; and for that reason, before the act can be held to be criminal, it must be done with a criminal intent. — State v. Law-

the accused to aid the prisoner in his escape should be set out,[22] and the intent of the accused should be alleged.[23] Where the acts done by way of assistance are alleged, they may be of such a character that guilty knowledge would necessarily be inferred, and thereby excuse an express allegation of knowledge on the part of the accused.[24] The fact that a prisoner is in custody of an officer is notice of a lawful custody to any one assisting him in escaping, or in attempting to escape,[25] but the legal character of the custody need not be positively known, it being sufficient if the accused has good reason to believe that it is legal.[26]

Intent of prisoner to escape[27] and of accused to assist him therein[28] is essential to the offense of aiding and

rence, 43 Kan. 125, 23 Pac. 157; State v. Fry, 40 Kan. 311, 19 Pac. 742.

22 State v. Lawrence, 43 Kan. 125, 23 Pac. 157.

23 Jenkins v. State, 49 Tex. Cr. Rep. 470, 93 S. W. 554.

24 State v. Lawrence, 43 Kan. 125, 23 Pac. 157, in which case the court say: "If the defendant had furnished a prisoner confined in the jail instruments which could only have been intended to facilitate an escape, or had broken the prison door, or had forcibly assaulted or obstructed an officer who had a prisoner in charge, an express allegation of knowledge that the prisoner was in custody might not be necessary; but where the acts done are in their nature innocent, such knowledge should be stated."

25 Newberry v. State, 15 Ohio Cir. Ct. 208, 7 Ohio Cr. Dec. 622.

26 Habersham v. State, 56 Ga. 61.

27 Under a statute prohibiting and punishing one who aids or assists any prisoner "in an intent to escape," the indictment or information charging the offense which alleges that the accused unlawfully and feloniously assisted the prisoner "in an attempt to escape" from jail, sufficiently alleges an intent on the part of the prisoner to escape, and is good after verdict.—State v. Daly, 41 Ore. 515, 70 Pac. 706.

28 Intent an ingredient of the crime charged against the accused, and that it should be averred is unquestioned, but this intent is substantially alleged where it is charged that the accused assisted a designated prisoner in an attempt to escape, by doing certain specific acts, as he could not assist in an attempt to escape unless such attempt was actually made; and the fact that the prisoner attempted to escape, and, as an attempt to escape necessarily involves an intent to do so, it follows that the prisoner making the attempt had such an intent. The court say: "There

abetting in an escape, or in an attempt to escape; consequently an indictment or information charging aiding and abetting a prisoner legally confined in jail to escape therefrom which does not allege that the accused did the acts complained of with the intent to aid in the escape of such prisoner is insufficient,[29] except in those cases in which the acts of accused as set out in the indictment disclose a manifest intention on his part,[30] in which case it is not necessary to allege intent on the part of the prisoner.

§ 607. NEGLIGENT ESCAPE. The statutes in some of the states, as in North Carolina,[1] and Texas,[2] and perhaps elsewhere, draw a distinction in the action of an officer in negligently permitting a prisoner to escape and voluntarily allowing him to go at large, making them separate and distinct offenses. In all the states negligent and voluntary escapes are recognized, but the general rule is that a voluntary escape always embraces an element of negligence and therefore includes a negligent escape, on the ground that the greater crime includes the lesser, so that under an indictment for a voluntary escape, an officer may be convicted of a negligent escape.[3] Under the statutes making the two classes of escapes separate and distinct offenses, the procedure is not uniform, some of the cases holding that an indictment charging that the

is, of course, a distinction between an intention and an attempt. Intent is a quality of the mind, which implies a purpose only, while an attempt implies an effort to carry that purpose into execution; but there can be no attempt until there has been an intent."—State v. Daly, 41 Ore. 515, 70 Pac. 706.

29 Jenkins v. State, 49 Tex. Cr. Rep. 470, 93 S. W. 554.

30 Marshall v. State, 120 Ala. 390, 25 So. 208 (in which case accused drilled a hole in the wall of the prison in which the person sought to be aided was confined); Johnson v. State, 7 Ala. App. 88, 60 So. 973 (in which case the accused pried open the bars of a window in the jail in which the prisoner was confined).

1 N. C. Code, 1889, § 1022.

2 State v. Dorsett, 21 Tex. 656.

3 See, infra, § 608, footnote 5, and text going therewith.

accused "unlawfully and negligently" permitted a prisoner to escape is good,[4] while other cases hold that such an allegation charges two distinct offenses, and is for that reason bad for duplicity.[5] A de facto officer, equally with a legally qualified officer, is liable criminally for suffering a negligent escape.[6] The form and the sufficiency of a criminal pleading charging suffering either a negligent or a voluntary escape are substantially the same, and are treated in the following section.

§ 607a. Voluntary escape. A regularly and duly appointed or elected officer and a de facto officer[1] are equally criminally liable for suffering either a negligent or a voluntary escape[2] of a prisoner duly and lawfully committed to their charge; mere irregularity in the proceedings and imprisonment[3] not furnishing any justification therefor;[4] and on an indictment charging an officer with suffering a voluntary escape, he may be convicted of suffering a negligent escape, because the former offense is of a higher grade and includes the latter offense,[5] unless it be

4 State v. McLain, 104 N. C. 857, 12 S. E. 251.

5 State v. Dorsett, 21 Tex. 656.

6 Kavanaugh v. State, 41 Ala. 399; Pentecost v. State, 107 Ala. 81, 18 So. 146; State v. Mayberry, 3 Strobh. L. (S. C.) 144.

1 Kavanaugh v. State, 41 Ala. 399; Pentecost v. State, 107 Ala. 81, 18 So. 146; State v. Mayberry, 3 Strobh. L. (S. C.) 144.

2 **Doctrine of voluntary escape,** which prohibits the party being retaken and continued in imprisonment, applicable in civil cases, as in imprisonment for debt, in which the creditor, and not the people, is interested in the prisoner's detention, does not apply in criminal cases, in which the people of the whole state have an interest in the due and proper detention and punishment of the violators of the criminal law; the public interest can not be made subservient to the illegal acts of those officers having charge of persons convicted of crime, and whose duty it is to execute the sentence of the court in accordance with its final process.—People v. Mallary, 195 Ill. 582, 596, 88 Am. St. Rep. 212, 221, 63 N. E. 588.

3 See, supra, § 603, footnote 6.

4 State v. Garrell, 82 N. C. 580; R. v. Fell, 1 Ld. Raym. 424, 91 Eng. Repr. 1181; R. v. Shuttleworth, 22 Up. Can. Q. B. 372.

5 Nall v. State, 34 Ala. 362. See Henry v. State, 33 Ala. 389; Skinner v. White, 9 N. H. 204; Fair

otherwise in those states in which a voluntary escape and a negligent escape are made separate and distinct offenses.[6]

Facts showing that accused had the legal custody of the prisoner named should be set forth in an indictment charging either a negligent or a voluntary escape,[7] but it is not necessary to allege the particulars regarding the prisoner's crime, arrest, trial, or sentence;[8] that accused received the prisoner as such, the commitment, his office, and the custody, necessarily including the reception;[9] or to allege or prove that the accused, as the keeper of a common jail, had knowledge of the guilt of the prisoner committed to his charge.[10] Thus, an indictment or information charging that the accused, as sheriff and common jailer, permitted the escape of one in his lawful custody under a warrant issued by a coroner charging the crime of murder, sufficiently charges that the escaped prisoner was in the lawful custody of the accused.[11] It must be distinctly averred that the designated prisoner went at large.[12]

child v. Case, 24 Wend. (N. Y.) 381, 383; Smith v. Hart, 1 Brev. (S. C.) 146.

6 See State v. Dorsett, 21 Tex. 656.

7 See: ALA.—Kavanaugh v. State, 41 Ala. 399. ARK.—Martin v. State, 34 Ark. 129. N. C.—State v. Baldwin, 80 N. C. 390; State v. Shaw, 38 N. C. (3 Ired. L.) 20; State v. Jones, 78 N. C. 420; State v. Ritchie, 107 N. C. 857. PA.—Weaver v. Com., 29 Pa. St. 445. ENG.—R. v. Boothie, 2 Burr. 864, 97 Eng. Repr. 65; R. v. Fell, 1 Ld. Raym. 424, 91 Eng. Repr. 1181; 1 Salk. 272, 91 Eng. Repr. 237.

Constable arresting without warrant, under his authority as a peace officer, indicted for permitting an escape, it need not be averred that accused had the prisoner in his custody by virtue of a warrant.—State v. Sparks, 78 Ind. 166. See R. v. Boothie, 2 Burr. 864, 97 Eng. Repr. 65.

8 State v. Hedrick, 35 Tex. 486.

9 Weaver v. Com., 29 Pa. St. 445.

10 "It matters not whether the escape be suffered before or after the guilt has been judicially ascertained."—Weaver v. Com., 29 Pa. St. 445.

11 Houpt v. State, 100 Ark. 409, Ann. Cas. 1913C, 690, 140 S. W. 294, distinguishing Martin v. State, 32 Ark. 124.

12 2 Hawk. P. C., ch. 19, § 14; 1 Russ. on Cr. (9th ed.) 588.

An indictment or information drawn substantially in the language of the statute is generally sufficient.[13] Inapt use of words will not vitiate the indictment; such as using the term "feloniously" in charging an escape on imprisonment for a misdemeanor,[14] or using the word "offense" for the word "crime" in charging sheriff with permitting trespass," where the content of the indictment shows that the voluntary escape of a person convicted of "wilful "offense" was used in the sense of "criminal."[15]

13 See, supra, § 603, footnotes 15 et seq.

Better practice to follow exact language of statute, where the statute embraces all of the necessary elements of the crime sought to be charged.—State v. Sparks, 78 Ind. 166, 3 Crim. L. Mag. 884.

14 State v. Sparks, 78 Ind. 166, 3 Crim. L. Mag. 884.

15 Com. v. Shields, 50 Pa. Sup. Ct. Rep. 194.

CHAPTER XLII.

INDICTMENT—SPECIFIC CRIMES.

Extortion.

§ 608. FORM AND SUFFICIENCY OF INDICTMENT.[1] At common law the technical terms did "extort" (extorquere) and "by legal color of office" (colore officii)[2] are necessary to be used in an indictment or information charging the commission of the crime of extortion,[3] but under the statutes and by the practice in this country these terms are not required, it being sufficient to charge that money or other thing of value[4] was "extorsively"

1 **As to forms of indictment** charging extortion, see Forms Nos. 928-937.

2 **Position and public service,** equally with public office, seems to have been included at common law, for we have a case in which a ferryman was indicted on the charge of extorting divers sums, exceeding the ancient rate, for ferrying men and cattle over a river—which indictment was held bad on the ground that it was duplicitous.—R. v. Roberts, Carth. 226.

3 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44.

4 **Completed transaction** and receipt of money or something of value essential to the crime. See 3 Kerr's Whart. Crim. Law, § 1898.

—**Mere agreement to pay,** or the taking of a promissory note which is void, will not be sufficient.—Com. v. Cony, 2 Mass. 523; Com. v. Pease, 16 Mass. 91, 93; Com. v.

taken;[5] and an allegation that the accused "unlawfully, corruptly, deceitfully, extorsively, and by color of his office" took money as fees he was not entitled to by law, was held to be sufficient without the word "wilfully," after verdict.[6] The indictment or information must be certain in every material allegation.[7] While it is necessary to allege that a sum of money or thing of value was received by the accused, it is not necessary to prove the exact sum of money or the exact value of the thing received as laid in the indictment. Thus, if a person be indicted for taking extorsively twenty dollars, and the proof shows such taking was of one dollar only, it will be sufficient.[8] An indictment for conspiracy to extort need not state that the payment was made voluntarily.[9]

Charging in the language of the statute, or substantially in the language of the statute, the crime of extortion, is sufficient where the statute defining the offense contains all the essential elements of the crime sought to be charged,[10] subject to the qualification that the crime sought to be charged must be set forth with such certainty as will apprise the accused of the offense imputed to him.[11] This is the general rule in all the states; but

Dennie, Thatch. C. C. 165, 175; R. v. Burdett, 1 Ld. Raym. 148, 91 Eng. Repr. 996.

Where a note has been taken upon which the money has subsequently been realized, the case will be different, and the extortion complete.—R. v. Higgins, 4 Car. & P. 247, 19 Eng. C. L. 498.

Charge of receiving "lawful money of the state of Tennessee" sustained by proof that accused received a bank-note.—Garner v. State, 13 Tenn. (5 Yerg.) 160.

5 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44; Jacobs v. Com., 29 Va. (2 Leigh) 709.

6 State v. Cansler, 75 N. C. 442.

7 State v. Brown, 12 Minn. 490 (Gil. 393).

8 Com. v. Dennie, Thach. C. C. (Mass.) 165, 175; R. v. Burdett, 1 Ld. Raym. 149, 91 Eng. Repr. 996; R. v. Gillham, 6 T. R. 265, 267, 101 Eng. Repr. 545, 546.

9 Com. v. Brown, 23 Pa. Sup. Ct. 470.

10 People v. Misiani, 148 App. Div. (N. Y.) 797, 27 N. Y. Cr. Rep. 94, 133 N. Y. Supp. 291; State v. Packard, 4 Ore. 157.

11 This is the general rule. See, in addition to authorities cited in last footnote, State v. Perham, 4 Ore. 188; State v. Dougherty, 4 Ore. 200; State v. Ah Sam, 14 Ore.

in the Schmitz case,[12] the supreme court of California held that the offense of extortion can not be charged in the language of the statute, notwithstanding the fact that the California statute sets forth all the essential elements of the crime, stating that an indictment under a statute making it extortion to do an unlawful injury to the person or property of the individual threatened, must allege how it was proposed to accomplish the injury, and that where the accused were public officers [although the statute does not distinguish between a private individual and a public officer], there must be an allegation as to what was the official capacity of the accused, and also that he had the power to execute the threat.[13]

§ 609. Description of the offense. An indictment or information charging extortion must conform to the general rules governing indictments and informations requiring that the charge of the commission of the crime alleged shall be of such a character and in such language that the defendant will be fully informed of the exact accusation against which he must defend; and will be sufficient where the offense is clearly and distinctly set forth in ordinary and concise language so as to enable a person of common understanding to know what is intended, and to enable the court to pronounce judgment upon conviction.[1] That is to say, the indictment or information must be certain in every material allegation or charge; must contain a definite description of the offense and the facts constituting it;[2] must state the office held by

347, 13 Pac. 303; State v. Light, 17 Ore. 358, 21 Pac. 132; State v. Lee, 17 Ore. 488, 21 Pac. 455.

12 People v. Schmitz, 7 Cal. App. 369, 15 L. R. A. (N. S.) 717, 94 Pac. 419.

13 Id.

1 Lee v. State, 16 Ariz. 291, 145 Pac. 244; Davy v. Baker, 4 Burr. 2471, 97 Eng. Repr. 295.

An indictment for posting a threatening notice should allege where the notice was posted, with sufficient particularity to enable a person of common understanding to know what posting was intended.—Lowe v. Com., 11 Ky. L. Rep. 810.

2 See Seany v. State, 6 Blackf. (Ind.) 403; State v. Packard, 4

the accused, under color of which he committed the crime charged;[3] must state the time when[4] and the place where the crime was committed,[5] the exact amount extorted,[6] state whether it was in excess of the lawful fee, or whether no fee was chargeable;[7] must specifically set forth the merits of the complaint.[8]

§ 610. Allegation as to the service. Under a statute making it a criminal offense "wilfully and knowingly to charge, take, or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed" by an officer, an indictment or information charging the offense should show for what service or duty the charge was made or the money taken,[1] and failing so to show will be insufficient, because under such a statute a simple allegation that

Ore. 157; State v. Fields, 8 Tenn. (Mart. & Y.) 137; Garner v. State, 13 Tenn. (5 Yerg.) 160; Cohen v. State, 37 Tex. Crim. Rep. 118, 38 S. W. 1005.

Circumstances necessary to constitute a complete crime must be stated; and when an act is not criminal, unless done under particular circumstances set out in the statute, the indictment can not describe the offense in the language of the statute unless the statute is direct and certain as to the particular circumstances set out in such statute.—State v. Packard, 4 Ore. 157.

Constable charged with collecting more than due on an execution, the indictment or information should set out the recital in the execution showing the judgment on which same was issued, and set out the names of the parties to the judgment.—Seany v. State, 6 Blackf. (Ind.) 403.

"Oppressively sued out execution" being charged against a constable, the indictment or information must set forth all the facts which constitute the oppression complained of.—State v. Fields, 8 Tenn. (Mart. & Y.) 137.

3 See, infra, § 611.

4 Ferkel v. People, 16 Ill. App. 310; Com. v. Dennie, Thach. C. C. (Mass.) 165; State v. Brown, 12 Minn. 490 (Gil. 393); Halsey v. State, 4 N. J. L. (1 South.) 324; R. v. Roberts, 4 Mod. 101, 87 Eng. Repr. 286.

5 State v. Brown, 12 Minn. 490 (Gil. 393).

6 See, infra, § 613.

7 See, infra, § 613.

8 Oliveira v. State, 45 Ga. 555; Com. v. Brown, 23 Pa. Sup. Ct. 470.

1 State v. Aden, 10 Ind. App. 136, 37 N. E. 731; State v. Couch, 40 Mo. App. 325; State v. Packard, 4 Ore. 157; State v. Perham, 4 Ore. 188.

the money was wilfully and knowingly charged, taken or received for some "official service or duty performed by such officer" and that the fee or compensation was "other than that authorized or permitted by law" for that service, merely states a conclusion.[2]

§ 611. Allegation as to the office. It being essential to the crime of extortion that the accused be a public officer,[1] and that the taking complained of be under the color of an office[2] created by the constitution, statute or other adequate authority,[3] the indictment or information

2 State v. Packard, 4 Ore. 157.

1 Any person clothed with official privileges and duties may be made a defendant in an indictment for extortion. See: GA.—White v. State, 56 Ga. 385. IND.—State v. Burton, 3 Ind. 93. KY.—Com. v. Rodes, 45 Ky. (6 B. Mon.) 171. MASS.—Com. v. Bayley, 24 Mass. (7 Pick.) 279. N. J.—Tanner v. Croxall, 17 N. J. L. (2 Har.) 332; State v. Maires, 32 N. J. L. (4 Vr.) 142; Cutter v. State, 33 N. J. L. (4 Vr.) 125. N. C.—State v. McEntyre, 25 N. C. (3 Ired. L.) 171. PA.—Com. v. Hogan, 9 Phila. (Pa.) 574. TENN.—State v. Merritt, 37 Tenn. (5 Sneed) 67. CANADA—R. v. Tisdall, 20 Up. Can. Q. B. 272. ENG.—Adams v. Tenants of Savage, 1 Holt. 179, 90 Eng. Repr. 997; R. v. Burdett, 1 Ld. Raym. 148, 91 Eng. Repr. 996; Troy's Case, 1 Mod. 5, 86 Eng. Repr. 686; R. v. Baines, 6 Mod. 192, 87 Eng. Repr. 946; R. v. Buck, 6 Mod. 306, 87 Eng. Repr. 1046; R. v. Seymour, 7 Mod. 382, 87 Eng. Repr. 1305; Smythe's Case, Palm. 318, 81 Eng. Repr. 1101; Smith v. Mall, 2 Rob. 263; Hescott's Case, 1 Salk. 330, 91 Eng. Repr. 291.

2 Offense analogous to extortion may be committed by an unofficial person falsely pretending to be an official. — Serlested's Case, Latch. 202, 82 Eng. Repr. 346.

3 Herrington v. State, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 931; Kirby v. State, 57 N. J. L. 320, 31 Atl. 213; Eliason v. Coleman, 83 N. C. 235.

"Irreconcilable conflict of authority upon the proposition as to whether or not it is possible that the doctrine of an officer de facto can be applied to any case without presupposing the existence of an office de jure. Much respectable authority can be produced to the effect that where an office is provided for by an unconstitutional act of the legislature, the incumbent of such an office, for the sake of public policy and the protection of private rights, will be recognized as an officer de jure until the constitutionality of the act has been judicially determined. On the other hand, there is considerable, and perhaps a greater weight of authority, directly the reverse."—Herrington v. State, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 931. See Norton v. Shelby County, 118 W. S. 425, 30 L. Ed. 178, 6 Sup.

should allege that the accused is a duly constituted officer,[4] and will be sufficient where it designates the office held by the accused, and states that, by color of his office and in his official capacity,[5] accused unlawfully took from a named person a specified sum of money or other thing of value which was not his due.[6]

§ 612. Allegation as to person and ownership of the money. An indictment or information charging extortion may allege the money or other thing of value to have been extorted from the principal, when as a matter of fact it was extorted from his agent.[1] When the money was extorted from an officer of the county, which is a body corporate and may own money, it may be alleged that the money was extorted from the county;[2] and an indictment for extortion from a firm is sufficient, under the New York statute, where it is alleged that the money was obtained by a wrongful use of fear[3] induced by a

Ct. Rep. 1121, where the authorities pro and con are discussed.

County policeman created by the commissioners of roads and revenues, without any legislative authority whatever, is an office not in existence even under color of legislative enactment, and the person holding such a position is not for any purpose whatever an officer de facto, and can not be charged with the crime of extortion.—Herrington v. State, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 931.

4 Herrington v. State, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 931; Territory v. McElroy, 1 Mont. 86.

5 **Taking by color of office** must be alleged. See: ARK.—Seeman v. State, 35 Ark. 438, 37 Am. Rep. 44. GA.—Herrington v. State, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 391. MINN.—State v. Brown, 12 Minn. 490 (Gil. 393). MONT.—Territory v. McElroy, 1 Mont. 86. N. J.—Kirby v. State, 57 N. J. 320, 31 Atl. 213. N. C.—State v. Pritchard, 107 N. C. 921, 12 S. E. 50. ORE. — State v. Packard, 4 Ore. 157; State v. Perham, 4 Ore. 188. ENG.—R. v. Holland, 5 T. R. 607, 101 Eng. Repr. 340.

6 Dean v. State, 9 Ga. App. 303, 71 S. E. 597.

1 Com. v. Bagley, 24 Mass. (7 Pick.) 279.

2 State v. Moore, 1 Ind. 548.

3 **Obtaining money through fear** or force, said not to be extortion in People v. Barondess, 61 Hun (N. Y.) 571, 8 N. Y. Cr. Rep. 234, 16 N. Y. Supp. 346; reversed, 133 N. Y. 649, 8 N. Y. Cr. Rep. 376, 31 N. E. 40.

threat to do an unlawful injury to the business of the firm,[4] of which a named person is a member; it is not necessary to allege that the partners were put in fear by means of a threat on the part of the accused.[5]

§ 613. Allegation as to fees. At common law, and under the statutes in some of the states, it is unnecessary to charge the wrongful taking of the money or other thing of value as a fee, or that it was to the officer's own use;[1] but the general rule in this country is that the indictment or information must allege that the fees received were claimed by the accused in his official capacity, that is, by color of his office.[2]

No fee allowed by law, and the charge is that of taking money or a thing of value by the accused for his official services, the indictment or information should allege that fees were not allowed by law;[3] but where it is alleged that the fee was greater than that allowed by law—no

4 Under New York Penal Code, §§ 552, 553, defining "extortion" as procuring the property of another by means of fear, induced by means of threats to injure his "property," a threat to injure "business" is a threat to injure property. — People v. Barondess, 133 N. Y. 649, 8 N. Y. Cr. Rep. 376, 29 N. E. 240, reversing 61 Hun (N. Y.) 571, 8 N. Y. Cr. Rep. 234, 16 N. Y. Supp. 346; People v. Hughes, 64 Hun (N. Y.) 638, 8 N. Y. Cr. Rep. 448, 19 N. Y. Supp. 550; affirmed, 137 N. Y. 29, 9 N. Y. Cr. Rep. 277, 32 N. E. 1105.

5 People v. Lee, 70 Misc. (N. Y.) 446, 25 N. Y. Cr. Rep. 383, 129 N. Y. Supp. 185.

1 Hanley v. State, 125 Wis. 396, 104 N. W. 57.

2 State v. Oden, 10 Ind. App. 136, 9 Am. Cr. Rep. 295, 37 N. E. 731. See: ARK.—Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44. IND.—State v. Moore, 1 Ind. 548; State v. Burton, 3 Ind. 93. MASS.—Runnells v. Fletcher, 15 Mass. 525; Shattuck v. Woods, 18 Mass. 171. N. J.—Lane v. State, 47 N. J. L. 362, 5 Am. Cr. Rep. 215. N. Y.—People v. Whaley, 6 Cow. 661. N. C. — State v. Pritchard, 107 N. C. 921, 12 S. E. 50. TENN.—State v. Critchett, 69 Tenn. (1 Lea) 371, 3 Am. Cr. Rep. 83. TEX. — Hays v. Stewart, 8 Tex. 358.

3 State v. Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; Halsey v. State, 4 N. J. L. (1 South.) 324; State v. Maires, 32 N. J. L. (4 Vr.) 142; Loftus v. State, (N. J.) 19 Atl. 183; affirmed, 52 N. J. L. 223, 20 Atl. 320; State v. Packard, 4 Ore. 157; Poole v. State, 23 Tex. App. 685, 3 S. W. 476.

fee whatever being allowed by law—it need not be alleged how much greater.[4]

Fees allowed by law to officer, the indictment or information must allege that accused was authorized by law to charge fees for his official services,[5] and must also allege what the fee exacted was in excess of the fee allowed him by law;[6] the mere statement that accused exacted and received fees more than allowed him by law is not sufficient, for that fact must be made to appear with explicitness.[7]

Nothing due as fees, that fact must be distinctly averred;[8] and if the charge is that accused took more than was due, the exact amount which was due must be alleged,[9] and also the amount collected.[10]

4 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44.

5 Ferkel v. People, 16 Ill. App. 310.

6 State v. Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; Poole v. State, 22 Tex. App. 685, 3 S. W. 476.

Charging thirty-two cents to have been taken extortionately, but admitting in a later portion of the indictment that sixteen cents were due, the indictment is sufficient.—Emory v. State, 6 Blackf. (Ind.) 106.

7 State v. Maires, 33 N. J. L. (4 Vr.) 142.

"A greater fee than allowed by law" being charged to have been taken unlawfully, and wilfully and extorsively, without additional allegation as to the amount of the fee to which the officer was entitled or whether no fee was allowed by law, was held sufficient in Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44.

8 State v. Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; Halsey v. State, 4 N. J. L. (1 South.) 324; State v. Maires, 33 N. J. L. (4 Vr.) 142; Poole v. State, 22 Tex. App. 685, 3 S. W. 476; Lake's Case, 3 Leon. 268, 74 Eng. Repr. 677; R. v. Tracy, 6 Mod. 30, 87 Eng. Repr. 795.

9 State v. Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; Brackenridge v. State, 27 Tex. App. 513, 4 L. R. A. 360, 11 S. W. 630; Lake's Case, 3 Leon. 268, 74 Eng. Repr. 677.

10 See State v. Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; State v. Brown, 12 Minn. 490 (Gil. 393); Halsey v. State, 4 N. J. L. (1 South.) 324; State v. Maires, 33 N. J. L. (4 Vr.) 142; Lake's Case, 3 Leon. 268, 74 Eng. Repr. 677; R. v. Tracy, 6 Mod. 30, 87 Eng. Repr. 795; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

§ 614. Allegation as to knowledge. At common law it was unnecessary to aver that the offense was committed knowingly by the accused, and this is the general rule in this country, in the absence of special statutory provisions.[1] Where knowledge is made a statutory ingredient of the offense, the indictment or information must allege that the crime charged was committed knowingly by the accused.[2] Thus, under the federal statute[3] making it an offense for an officer to knowingly[4] demand other or greater sums than are authorized by law, or to receive any fee, compensation, or reward, except as by law prescribed, for the performance of any duty, the indictment must charge that the accused knowingly did the act; to charge that he "wilfully and corruptly," under color of his office, did demand, take and receive, is insufficient.[5]

§ 615. Allegation as to intent. At common law an evil or corrupt intent on the part of the official, charged with taking illegal fees, was necessary to constitute the act of extortion,[1] and the general rule is that it is also an essential element under statute,[2] for which reason an

1 State v. Jones, 71 Miss. 872, 15 So. 237.

2 Smith v. Ling, 68 Cal. 324, 9 Pac. 171; United States v. Williams, 76 Fed. 223.

3 U. S. Rev. Stats., § 3169, subd. 2; 3 Fed. Stats. Ann. (1st ed.), p. 574; 3 Fed. Stats. Ann. (2d ed.), p. 991.

4 "Knowingly" means something more than that which is implied in the legal presumption, which the court indulges, that every man must know the law; it involves the element of corruptly intending, and it must be found at the trial that accused knew he was violating the law at the time of the act complained of. — United States v. Highleyman, 22 Int. Rev. Rec. 138, 8 Chi. Leg. News 244, Fed. Cas. No. 15361.

5 United States v. Williams, 76 Fed. 223.

1 ALA.—Cleaveland v. State, 34 Ala. 254. ARK.—Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44. NEB.—Cobbey v. Burks, 11 Neb. 157, 38 Am. Rep. 364, 8 N. W. 386. N. C. — State v. Pritchard, 107 N. C. 921, 12 S. E. 50. PA.—Respublica v. Hannum, 1 Yeates (Pa.) 71. FED.—United States v. Highleyman, 22 Int. Rev. Rec. 138, 8 Chi. Leg. News 244, Fed. Cas. No. 15361.

2 ALA.—Cleaveland v. State, 34 Ala. 254; Collier v. State, 55 Ala.

indictment or information charging the crime of extortion must allege the existence of such an intent,[3] although it seems that such intent need not be proved on the trial.[4] The corrupt intent being an ingredient of the offense under the statute, it must be averred;[5] but such corrupt intent is sufficiently averred by alleging that the accused "extorsively,"[6] or "wilfully and knowingly,"[7] did the act complained of, it not being necessary to allege that the act was "corruptly done."[8]

Under the California statute,[9] it has been said, the indictment must allege that the specific injury threatened in an effort to extort, or in extorting, the money charged to have been taken, was an unlawful injury.[10] In this case the injury set out in the indictment was, that unless the persons from whom the money was extorted complied with the demand made, they could no longer continue in business—because they could not procure the necessary

125. N. J. — State v. Cutter, 36 N. J. L. (7 Vr.) 125. N. C.—State v. Pritchard, 107 N. C. 921, 12 S. E. 50. ENG.—Bowman v. Blythe, 7 El. & B. 26, 90 Eng. C. L. 26.

3 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44; Loftus v. State, (N. J.) 19 Atl. 185; affirmed, 52 N. J. L. 223, 20 Atl. 320; State v. Cansler, 75 N. C. 442; Mann v. State, 47 Ohio St. 556, 11 L. R. A. 656, 26 N. E. 226.

4 State v. Coleman, 99 Minn. 487, 116 Am. St. Rep. 441, 110 N. W. 5.

Wrongful intent on the part of the accused is the gist of the offense charged, and, in Iowa, it is held that intention can not be presumed, but must be proved.—State v. Debolt, 104 Iowa 105, 73 N. W. 499.

—In Minnesota, the statute being different from the Iowa statute, it is not necessary to prove the intent as an independent fact; the intent is presumed.—State v. Coleman, 99 Minn. 489, 116 Am. St. Rep. 441, 110 N. W. 5.

5 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44; Triplett v. Munter, 50 Cal. 644; Loftus v. State, (N. J.) 19 Atl. 183; affirmed, 53 N. J. L. 223, 20 Atl. 320.

6 Leeman v. State, 35 Ark. 438, 37 Am. Rep. 44; Loftus v. State, (N. J.) 19 Atl. 183; affirmed, 53 N. J. L. 223, 20 Atl. 320.

See, also, supra, § 608, footnotes 5 et seq.

7 Ridenhour v. State, 75 Ga. 382.

8 R. v. Tisdale, 20 Up. Can. Q. B. 272.

9 Kerr's Cyc. Cal. Pen. Code, § 519.

10 People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407; rehearing denied by Supreme Court, 7 Cal. App. 369, 15 L. R. A. (N. S.) 717, 94 Pac. 419.

license required to conduct said business—but the court did not consider this an unlawful injury.[11] The soundness of this decision has often been questioned.[12]

§ 616. Attempt to commit extortion. In those cases in which the charge is an attempt to commit the crime of extortion, the indictment or information should set out all the allegations requisite to charge the offense as required for the completed crime;[1] and in charging the attempt, the essentials are (1) an accusation in plain language alleging the crime charged, and (2) a plain and concise statement setting forth how, or in what manner, the accused is charged to have committed such offense.[2] Under the rule heretofore given[3] the crime of an attempt to commit extortion may be charged in the language of the statute.[4]

§ 617. Joinder of causes. In an indictment or information charging extortion, a count ought to charge a single offense only, because every act of extortion from any particular person, or from different persons, whether at the same time or at a different time, is a separate and distinct offense, and each of such offenses requires a separate and distinct punishment; consequently, charging the accused, in one count, with extorting divers sums from divers persons in excess of the legal rate, is bad.[1] Where there are several offenses against the same person

11 Id.

12 See, supra, § 608.

1 See, supra, §§ 609 et seq.

2 Act set forth may be some one of the kinds of threats declared by law to be unlawful.—People v. Vidaver, 60 Misc. Rep. 1, 22 N. Y. Cr. Rep. 434, 112 N. Y. Supp. 606.

An unlawful threat charged, its unlawful character must appear; that it emanated from the defendant and was addressed to the prosecutor, and that it was made with intent to wrongfully obtain property from him with his consent, which was induced by a wrongful use of fear.—People v. Vidaver, 60 Misc. Rep. 1, 22 N. Y. Cr. Rep. 434, 112 N. Y. Supp. 606.

3 See, supra, § 608, footnotes 10 et seq., and text going therewith.

4 People v. Misiani, 148 App. Div. (N. Y.) 797, 27 N. Y. Cr. Rep. 94, 133 N. Y. Supp. 291.

1 See R. v. Roberts, Carth. 226, 90 Eng. Repr. 735.

they should each be particularly and distinctly laid in separate counts;[2] and where a series of offenses of extortion extending over a space of time within the statute of limitations is charged, and these acts affect various persons, it seems that the various extorsive acts may be joined in the same indictment, being each set out in a separate count.[3]

An indictment is not duplicitous, it has been said, where it charges but one offense, although there are four counts, each of which counts is drawn under a separate subdivision of a single section of the statute.[4]

§ 618. JOINDER OF DEFENDANTS. Two or more persons may be jointly indicted on a charge of extortion.[1] Thus, it has been said that two persons may be indicted jointly for extortion where no fee was due, because both are principals, there being no accessories in such a crime, he that is assisting being as guilty as the extortioner;[2] and an indictment against three persons, averring that they, colore officiorum suorum, took a specified amount of money, is good, for they might take so much in gross, and afterward divide it amongst them, of which the party aggrieved would have no notice.[3]

2 R. v. Roberts, 4 Mod. 101, 87 Eng. Repr. 286.

3 See R. v. Douglas, 13 Ad. & E. N. S. (13 Q. B.) 42, 66 Eng. C. L. 41.

4 Ex parte Joyce, 23 Int. Rev. Rec. 297, 25 Pitts. L. J. 17, Fed. Cas. No. 7556.

1 R. v. Atkinson, 2 Ld. Raym. 1248, 92 Eng. Repr. 322, 1 Salk. 382, 91 Eng. Repr. 333.

2 R. v. Loggen, 1 Str. 73, 93 Eng. Repr. 392.

3 Lake's Case, 3 Leon. 268, 74 Eng. Repr. 677.

CHAPTER XLIII.

INDICTMENT—SPECIFIC CRIMES.

False Imprisonment.

§ 619. FORM AND SUFFICIENCY OF INDICTMENT.[1] At common law[2] and under the statute,[3] alike, an indictment or information charging false imprisonment must allege that the act was without legality or authority of law, and the failure to so allege is not cured by the conclusion stating it to be "contrary to the form of the statute in such cases made and provided."[4] The statute under which the indictment or information is drawn should be followed in every essential detail.[5] An information

1 As to forms of indictment, see Forms Nos. 934-937.

2 Redfield v. State, 24 Tex. 133; Smith v. State, 63 Wis. 453, 23 N. W. 879.

An information charging that the defendants "with force and arms did make an assault in and upon one A, then and there unlawfully and injuriously and against the will of her, the said A, and without any legal warrant, authority, or reasonable or justifiable cause whatever, did imprison, and detain so imprisoned, her, the said A, there for the space of one hour next following," etc., sufficiently charges the offense of false imprisonment at common law. — Davis v. State, 72 Wis. 54, 38 N. W. 722.

3 See Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253; Barber v. State, 13 Fla. 675; Waterman v. State, 13 Fla. 683; United States v. Lapoint, 1 Morr. (Iowa) 146; Redfield v. State, 22 Tex. 133; Herring v. State, 3 Tex. App. 108.

"Unlawfully and feloniously imprisoned" implies that the act was done without sufficient legal authority, and is good without the latter allegation. — United States v. Lapoint, 1 Morr. (Iowa) 146.

4 Redfield v. State, 24 Tex. 133.

5 Ross v. State, 15 Fla. 55, in which it was said that a charge that one was forcibly imprisoned without lawful authority and against his will, does not state an offense under a statute (Fla. Act, Aug. 6, 1868, ch. 3, § 43) requiring the acts charged to have been committed "with intent to cause him to be secretly confined or imprisoned," etc.

charging the offense under the common law may be good as to form under the statute.[6]

Intent with which the accused acted in falsely imprisoning another person must be alleged, under a statute providing that the act must have been committed "with intent to cause him," etc., or it will not state an offense under such statute.[7]

Mode or manner in which the detention was effected must be stated, e. g., by actual violence, assault, threats, and the like, but the indictment need not further particularize it.[8]

Joinder of charges of assault and false imprisonment in the same count will not render the indictment or information bad for duplicity;[9] under such indictment the accused may be convicted of the false imprisonment and acquitted on the charge of assault,[10] or vice versa.

6 Davies v. State, 72 Wis. 54, 38 N. W. 722.

7 Ross v. State, 15 Fla. 55.

8 Maner v. State, 8 Tex. App. 361.

9 Francisco v. State, 24 N. J. L. (4 Zab.) 30.

10 Francisco v. State, 24 N. J. L. (4 Zab.) 30; Davies v. State, 72 Wis. 54, 38 N. W. 722.

CHAPTER XLIV.

INDICTMENT—SPECIFIC CRIMES.

False Personation.

§ 620. Form and sufficiency of indictment.[1] An indictment or information charging the crime of false personation in any of its phases must set forth all the facts constituting the crime sought to be charged, in plain and concise language with sufficient particularity to designate the person charged,[2] and to enable the accused to know from the language of the instrument what he is expected to meet on the trial,[3] and with such certainty as to time, place, intent, and means used as will enable him to plead an acquittal or a conviction thereon in bar of another prosecution for the same offense.[4] The indictment or information must conform strictly to the terms of the statute under which the instrument is drawn and the prosecution had.[5] The name of the person falsely personated

1 **As to forms of indictment** for false personation in any of its phases, see Forms Nos. 938-944, 1883-1887.

2 See State v. Toney, 81 Ohio St. 130, 18 **Ann. Cas.** 395, 90 N. E. 142.

3 Kirtley v. State, 38 Ark. 543; State v. Toney, 81 Ohio St. 130, 18 **Ann. Cas.** 395, 90 N. E. 142; Martin v. State, 1 Tex. App. 586.

4 ARK. — Kirtley v. State, 38 Ark. 543. CAL.—People v. Knox, 119 Cal. 73, 51 Pac. 19. TEX.—Martin v. State, 1 Tex. App. 586.

Ambiguous indictment or information, susceptible of widely different constructions, renders it unsatisfactory in the eyes of the law.—People v. Knox, 119 Cal. 73, 51 Pac. 19.

5 See: ARK.—Kirtley v. State, 38 Ark. 543. CAL. — People v. Knox, 119 Cal. 73, 51 Pac. 19. FLA.—Jones v. State, 22 Fla. 532;

must be given,[6] but his residence or whereabouts need not be alleged.[7]

Duplicity may be charged against an indictment or information which charges, in one count, two or more offenses denounced by the statute, e. g., false personation of an officer with intent to extort money, and extorting of money not under the guise of a claim due.[8]

§ 621. ALLEGATION AS TO RELATIONSHIP BETWEEN PARTIES. An indictment or information charging accused with falsely representing himself to A to be B, and thereby, through such false representation as to his personality, obtaining money or property from A, should allege the relationship existing between A and B so as to show upon what ground B had a right to demand and receive money or property from A, and unless such a relationship is made to appear as will confer such right, the indictment or information will be insufficient;[1] but it seems that a consummation of the fraud, with consequent injury to the party defrauded, is not essential to complete the offense.[2]

Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738. MASS.—Com. v. Wolcott, 64 Mass. (10 Cush.) 61. MICH.—People v. Cronin, 80 Mich. 646, 45 N. W. 479. MO.—State v. Miller, 3 Mo. App. 584. N. Y.—McCord v. People, 46 N. Y. 470, 1 Cow. Cr. Rep. 387; People v. Stetson, 4 Barb. 151. TENN.—Edgar v. State, 96 Tenn. 690, 36 S. W. 379. ENG.—R. v. Bent, 2 Car. & K. 179, 61 Eng. C. L. 179.

6 People v. Knox, 16 Cal. 73, 51 Pac. 19.

7 Freeman v. State, 20 Tex. App. 558.

8 United States v. Taylor, 108 Fed. 621.

1 Jones v. State, 22 Fla. 532. See, also, McCord v. People, 46 N. Y. 470, 1 Cow. Cr. Rep. 387; People v. Stetson, 4 Barb. (N. Y.) 151.

2 See United States v. Barnow, 239 U. S. 73, 60 L. Ed. 155, 36 Sup. Ct. Rep. 19, reversing 221 Fed. 140, in which the court held that consummation of the fraud, with consequent injury to the party defrauded, is not essential to complete the crime denounced by the Federal Criminal Code, § 32 (3 Kerr's Whart. Crim. Law, p. 2437), providing for the punishment of any one who, with intent to defraud, falsely assumes or pretends to be an officer or employee of, and acting under the authority of, the United States, or of any department or officer of the government thereof.

§ 622. ALLEGATIONS AS TO PROPERTY. In those cases in which the statute makes it larceny for one person to obtain property from another by falsely personating a third person, the indictment or information charging the crime must describe the property obtained by means of such false personation with the same certainty and particularity required in an indictment charging larceny,[1] and must allege that the property thus fraudulently obtained to be delivered to the accused was intended by the party defrauded to be delivered to the party falsely personated;[2] and should further allege that the property was received by the accused with intent to convert it to his own use.[3]

Ownership of the property obtained by means of false personation should be laid in the indictment or information as in the person who is entitled to maintain a civil action of trespass therefor;[4] but in some states it is held that an erroneous allegation as to the ownership of the property is immaterial.[5]

Value of property obtained by false personation need not be alleged, in the absence of statutory provisions requiring the value to be given.[6]

§ 623. IMPERSONATING ANOTHER—ACKNOWLEDGMENTS, JUDICIAL PROCEEDINGS. An indictment or information charging that accused falsely personated another and authenticated a conveyance for registration, must set out the falsely authenticated instrument, or give a reason for not so doing; it should also describe the property affected, aver the purpose of the acknowledgment, and the authority of the accused to make such acknowledg-

1 See Treadway v. State, 37 Ark. 443; Smith v. State, 33 Ind. 159; Martin v. State, 1 Tex. 586.

2 Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

3 Jones v. State, 22 Fla. 532; Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

4 Jones v. State, 22 Fla. 532.

5 Com. v. Lile, 140 Ky. 558, 131 S. W. 397; Com. v. Vaughn, 140 Ky. 559, 131 S. W. 396.

6 See People v. Stetson, 4 Barb. (N. Y.) 151.

ment should be negatived[1] in such an indictment. It is not necessary to allege the residence or whereabouts of the person falsely impersonated.[2]

Where the statute provides that any person who shall personate another in any legal proceeding, and shall in his assumed character do any act whereby the interest of the party personated is affected, shall be guilty of a criminal offense, an indictment or information charging the offense of falsely personating another in a legal proceeding whereby the latter's rights or interests are affected, is sufficient when it alleges the fact of the false personation in a pending suit in a court of competent jurisdiction, and the facts connected therewith, without stating how the rights and interests of the person falsely personated might be thereby affected.[3]

§ 624. Impersonating an officer. Under a statute making it an offense to falsely assume to be and to act as an officer, an indictment or information charging accused with the commission of that offense must state that accused took it upon himself to act as such officer, it not being sufficient to simply allege that he assumed to be such an officer;[1] but the indictment or information must clearly aver that the accused was not the officer he represented himself to be, and that he did not possess the authority of that office.[2] The name of the officer impersonated need not be stated;[3] and the fact that an indictment or information alleges a false personation of an officer or employee, which officer and employee has no

1 Martin v. State, 1 Tex. App. 586.

2 Freeman v. State, 20 Tex. App. 558.

3 Edgar v. State, 96 Tenn. 690, 36 S. W. 379.

1 People v. Cronin, 80 Mich. 646, 45 N. W. 497.

2 Com. v. Wolfford, 136 Ky. 239, 124 S. W. 288.

3 Butts v. State, 47 Tex. Cr. Rep. 494, 84 S. W. 586; United States v. Brown, 119 Fed. 482.

Compare: People v. Knox, 119 Cal. 73, 51 Pac. 19.

existence, in fact, is not demurrable, as not stating an offense.[4]

[4] United States v. Barnow, 239 U. S. 74, 60 L. Ed. 155, 36 Sup. Ct. Rep. 19, reversing 221 Fed. 140.

Reason for the rule: Mr. Justice Pitney, in delivering the opinion in the above case, said: "One who falsely assumes or pretends to hold an office that has a de jure existence is admittedly within the meaning of the section (Federal Criminal Code, § 32, 3 Kerr's Whart. Crim. Law, p. 2437); that is, where the assumption or pretense is false in part but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? . . . Therefore, it seems to us the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States, or any department or office of the government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character."

CHAPTER XLV.

INDICTMENT—SPECIFIC CRIMES.

False Pretenses.

§ 625. Form and sufficiency of indictment[1]—In general. An indictment or information charging obtaining

[1] As to forms of indictment for false pretenses, see Forms Nos. 825, 947-977.

money or property by false pretenses or false tokens must allege, with certainty and precision, every essential fact and circumstance necessary to constitute the completed offense, and necessary to be proved in order to convict the accused,[2] stating all the facts and circumstances with such particularity as to clearly designate the person charged and apprise him of what he is expected to meet and will be required to answer,[3] and such as will enable

2 ALA.—Tennyson v. State, 97 Ala. 78, 12 So. 391; Cheshire v. State, 8 Ala. App. 253, 62 So. 994. CAL.—People v. Emmons, 13 Cal. App. 487, 110 Pac. 151. CONN.—State v. Jackson, 38 Conn. 229. GA.—Jones v. State, 93 Ga. 547. IND.—Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211; Cruthers v. State, 161 Ind. 139, 67 N. E. 930. KAN.—State v. Ashe, 44 Kan. 84, 24 Pac. 72; State v. Richmond, 96 Kan. 600, 152 Pac. 644. KY.—Glackan v. Com., 60 Ky. (3 Metc.) 232; Com. v. Whitney, 8 Ky. L. Rep. 776, 3 S. W. 533; Hefner v. Com., 18 Ky. L. Rep. 423, 36 S. W. 549; Com. v. Lacey, 158 Ky. 584, 165 S. W. 971. MD.—State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270. MO.—Asher v. State, 106 Mo. 160, 17 S. W. 306. MONT.—State v. Phillips, 36 Mont. 112, 92 Pac. 299. N. H.—State v. Falconer, 59 N. H. 535. N. J.—State v. Murphy, 68 N. J. L. 235, 15 Am. Cr. Rep. 236, 52 Atl. 279. N. Y.—People v. Stone, 9 Wend. 182, 191; People v. Chapman, 4 Park. Cr. Rep. 56; People v. Winner, 80 Hun 130, 9 N. Y. Cr. Rep. 288, 30 N. Y. Supp. 54; People v. Webster, 17 Misc. 410, 11 N. Y. Cr. Rep. 340, 40 N. Y. Supp. 1135. N. C.—State v. Carlson, 89 S. E. 30. OHIO—Ellars v. State, 25 Ohio St. 385; State v. Toney, 81 Ohio St. 130, 18 Ann. Cas. 395, 90 N. E. 142; Horton v. State, 85 Ohio St. 13, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423, 96 N. E. 797. PA.—Com. v. Adley, 1 Pears. 62. TEX.—Maranda v. State, 44 Tex. 442; Hirsch v. State, 1 Tex. App. 393; White v. State, 3 Tex. App. 605. UTAH—State v. Swan, 31 Utah 336, 88 Pac. 12. ENG.—R. v. Martin, 8 Ad. & E. 481, 35 Eng. C. L. 691; R. v. Horne, 2 Cowp. 672, 682, 98 Eng. Repr. 1300, 1306; R. v. Mason, 2 T. R. 581, 100 Eng. Repr. 312.

An information charging the accused with drawing a check, when he had no funds, with intent to defraud "Lesser Bros. Co., a corporation," the check being payable to Lesser Bros. Co., is sufficiently definite to enable a person of common understanding to know with what he was charged.—People v. Russell, 156 Cal. 450, 105 Pac. 416.

3 State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270; State v. Barbee, 136 Mo. 440, 37 S. W. 1119; State v. Henn, 39 Minn. 464, 40 N. W. 564; People v. Winner, 80 Hun 130, 9 N. Y. Cr. Rep. 288, 30 N. Y. Supp. 54; State v. Toney, 81 Ohio St. 130, 18 Ann. Cas. 395, 90 N. E. 142; State v. Hanscom, 28 Ore. 427, 43 Pac. 167.

the court to determine whether the facts alleged, upon the face of the indictment or information, are sufficient to constitute the crime sought to be charged,[4] and will protect the accused against further prosecution for the same alleged offense,[5] and be sufficiently certain to enable the court to determine what evidence is admissible.[6] In those cases in which the representations consist of a series of interdependent statements, the allegation of falsity must not be negatively pregnant.[7] The court will not indulge in any presumptions to aid the indictment or information;[8] that is to say, ambiguity or uncertainty in the language used can not be supplemented by intendment, or by argument, or by implication.[9]

False pretenses must be shown,[10] that they were made

4 People v. Emmons, 13 Cal. App. 487, 110 Pac. 151; People v. Canfield, 28 Cal. App. 792, 154 Pac. 33; State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270; State v. Wohlmouth, (W. Va.) 89 S. E. 7.

5 State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270; State v. Carlson, (N. C.) 89 S. E. 30; State v. Wohlmouth, (W. Va.) 89 S. E. 7.

6 Horton v. State, 85 Ohio St. 13, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423; 96 N. E. 797.

7 State v. Murphy, 68 N. J. L. 235, 15 Am. Cr. Rep. 236, 52 Atl. 279.

8 People v. Canfield, 28 Cal. App. 792, 154 Pac. 33; Current v. People, 60 Colo. 362, 153 Pac. 684.

Neither will the court import any language into the indictment to sustain objections thereto urged by counsel. — United States v. Brown, 119 Fed. 482.

9 Taylor v. Territory, 2 Okla. Cr. 1, 99 Pac. 628.

10 **Borrowing money,** charged to have been procured on the representation by the accused that his brother was to arrive with money, coupled with a promise to use it in payment of the sum borrowed, held to amount to a pretense that accused had the money and that the indictment was sufficient to state that the money was procured by false pretenses. — State v. Fooks, 65 Iowa 452, 21 N. W. 773.

False pretenses not set out in the indictment or information upon which the prosecution intends to rely, demurrer held not to lie for this failure to set out the false pretenses.—State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270.

See, however, infra, § 627.

Information charging accused, in the city of La Crosse, falsely pretended to one A that he was a contractor engaged in the business of teaming at Stevens Point and desired to employ teamsters to work for him at that place; that

or authorized by the accused, that they were false and fraudulent, and that they were relied upon by and de-

he made certain other false pretenses, specifically set out in the information, to A, to satisfy the latter of the truth of such statements, and proposed to employ A to go to Stevens Point and work for him as a teamster; that thereupon A engaged to do so, and accused then falsely pretended that he had not sufficient money to pay A's railroad fare to Stevens Point, and desired A to advance a sufficient amount to purchase the necessary railroad tickets, agreeing to return the money when A should reach Stevens Point; that thereupon A advanced the sum of eight dollars for that purpose; the information specifically alleging that each and all of such pretenses were false, to the knowledge of the accused, and were so made with intent to defraud; but that A believed them to be true and advanced the money on the faith of them,—held to sufficiently charge the obtaining of money under false pretenses. — State v. Gross, 62 Wis. 41, 21 N. W. 802.

Consent to entry of judgment by city in favor of accused and against it in an action then pending charged to have been procured by false and fraudulent representations, and alleging the payment thereafter of a sum of money by the city in satisfaction of said judgment, there being no allegation that, after the judgment was rendered, any false pretenses were used to obtain the money due upon it, does not state an indictable offense under the statute, because no indictment will lie against one for obtaining by such means what is justly due him, there being no legal injury to the party so paying, which in law he is bound to pay.—Com. v. Harkins, 128 Mass. 79. See Com. v. McDuffy, 126 Mass. 467; People v. Thomas, 3 Hill (N. Y.) 169; R. v. Williams, 7 Car. & P. 354, 32 Eng. C. L. 653.

Procuring payment of just debt already due, charged to have been procured by false pretenses, does not state an indictable offense.—State v. Hurst, 11 W. Va. 54, 3 **Am. Cr. Rep.** 100; State v. Williams, 68 W. Va. 86, 32 **L. R. A.** (N. S.) 420, 69 S. E. 474.

Compare: Com. v. Leisy, 1 Pa. Co. Ct. 50.

Procuring satisfaction of indebtedness to another charged to have been done by false pretense, will not be sufficient under the statute; money must have been actually, and not merely impliedly or constructively obtained, and must have come into accused's possession.—Jamison v. State, 37 Ark. 445, 40 **Am. Rep.** 103.

Promise to perform some act in the future does not constitute a false pretense, and an indictment or information alleging that the accused procured his promissory note to be indorsed by the prosecutor, and alleging the false pretense charged to have consisted in the accused representing to the prosecutor that he would use the note so indorsed to take up and cancel another note of the same amount then about maturing, upon which latter note the prosecutor was liable as indorser, and for no

ceived the person to whom they were made. The money or property obtained by the accused must also be stated.[11]

Venue must be laid properly by stating the place where the false representations were made and the money or property obtained, in order to confer on the court jurisdiction;[12] but where each division of a court has jurisdiction over the whole district, there need be no allegation that the offense was committed within the particular division of the court in which the indictment is found or the information returned.[13]

Time when the false pretenses were made, or false tokens used, should be set out in order to show that the offense charged occurred within the limitation of the statute.

Conclusion of an indictment or information charging obtaining money or property by false pretenses, being for a statutory offense, should conclude "contrary to the

other purpose, charging that accused, instead of using the note thus indorsed for this purpose, as he pretended he would, used the same for his own private purpose, was held not to set out an indictable false pretense under the statute.—Com. v. Moore, 99 Pa. St. 570, 4 Am. Cr. Rep. 230. See State v. Moore, 15 Iowa 412; R. v. Eagleton, Dears. C. C. 515.

—Coupling future promise with a false pretense does not relieve the false pretense of its criminal character. — State v. Briggs, 74 Kan. 377, 10 Ann. Cas. 904, 7 L. R. A. (N. S.) 278, 86 Pac. 447.

Relation of the false pretenses, as an inducing cause, to the obtaining of the money or property, must be averred.—State v. Miller, 153 Ind. 229, 15 Am. Cr. Rep. 231, 54 N. E. 808.

Swindling by means of false pretenses, charged in an indictment, alleging acts on the part of the accused that constitute theft, does not make the indictment bad for the swindling.—Sims v. State, 21 Tex. App. 649, 6 Am. Cr. Rep. 253.

11 State v. Neimeier, 66 Iowa 634, 24 N. W. 247; State v. Philbrick, 31 Me. 401; Parker v. Armstrong, 55 Mich. 176, 20 N. W. 892; State v. Tomlinson, 29 N. J. L. (5 Dutch.) 13; State v. Mikle, 94 N. C. 843; Com. v. Bracken, 14 Phila. (Pa.) 342; Mathena v. State, 15 Tex. App. 473.

12 Connor v. State, 29 Fla. 455, 30 Am. St. Rep. 126, 10 So. 891; State v. Bacon, 7 Vt. 219.

13 State v. Withee, 87 Me. 462, 32 Atl. 1013; Griggs v. United States, 85 C. C. A. 596, 158 Fed. 572.

form of the statute," or in other similar words required by the particular statute under which drawn.[14]

§ 626. —— Language of the statute. An indictment or information charging obtaining money or property by false pretenses or the use of false tokens is governed by the general rule of law[1] which permits the allegation to be made in the language of the statute,[2] or in words of equivalent import,[3] it not being necessary to strictly follow the language of the statute in describing the offense;[4] and the fact that the indictment or information describes the offense with more particularity than it is described in the statute will not affect the validity of the instrument.[5] But where the statute creating the offense is in

14 See R. v. Walker, 10 Up. Can. Q. B. 465.

1 See, supra, § 269.

2 ALA.—Cowles v. State, 50 Ala. 454; Clark v. State, 14 Ala. App. 633, 72 So. 291. CAL.—People v. Frigerio, 107 Cal. 151, 40 Pac. 107; People v. Eddards, 25 Cal. App. 660, 145 Pac. 173 (here the information both followed the language of the statute and set forth with particularity the details and successive steps of the fraud). COLO.—Stoltz v. People, 59 Colo. 342, 148 Pac. 865. ILL.—Morton v. People, 47 Ill. 468; Graham v. People, 181 Ill. 477, 47 L. R. A. 731, 55 N. E. 179; People v. Weil, 243 Ill. 208, 134 Am. St. Rep. 357, 90 N. E. 731. MASS.—Com. v. Ashton, 125 Mass. 384. MINN.—State v. Evans, 88 Minn. 262, 92 N. W. 976. MO.—State v. Krueger, 134 Mo. 262, 25 S. W. 604; State v. Dewitt, 152 Mo. 76, 53 S. W. 429; State v. Wilkerson, 178 Mo. 184, 70 S. W. 478; State v. Edgen, 181 Mo. 582, 80 S. W. 942. N. Y.—People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 1 L. R. A. 293, 18 N. E. 245; Fenton v. People, 4 Hill 126; People v. Rouss, 63 Misc. 135, 23 N. Y. Cr. Rep. 340, 118 N. Y. Supp. 433. UTAH—State v. Swan, 31 Utah 336, 88 Pac. 12. WASH. — State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

Confidence game charged in the language of the statute, held to be sufficient. — Morton v. People, 47 Ill. 468; People v. Weil, 243 Ill. 208, 134 Am. St. Rep. 357, 90 N. E. 731.

3 Com. v. Scroggin, 22 Ky. L. Rep. 1338, 60 S. W. 528; State v. Lewis, 41 La. Ann. 590, 6 So. 536; State v. Southall, 77 Minn. 296, 79 N. W. 1007; Cowan v. State, 22 Neb. 519; State v. King, 67 N. H. 219, 34 Atl. 461; Tarbox v. State, 38 Ohio St. 581.

4 Com. v. Scroggin, 22 Ky. L. Rep. 1338, 60 S. W. 528.

5 Com. v. Parker, 117 Mass. 112; Bargie v. United States, 4 Hayw. & H. 357, Fed. Cas. No. 18229.

generic terms, and does not set out all the material facts constituting the offense, the indictment or information will be insufficient,[6] unless in addition it fully sets forth the elements of the offense,[7] because an indictment or information, though in the language of the statute, is insufficient where it is too indefinite to inform the accused of the nature of the cause of the accusation against him.[8]

Form prescribed by statute or code[9] being followed, the indictment or information will be sufficient.[10]

§ 627. —— NEGATION OF PRETENSES. An indictment or information charging obtaining goods or money by false pretenses should negative the pretenses by which the same was obtained, but need not negative all the pretenses,[1] it being essential to negative such material pre-

6 State v. Clay, 100 Mo. 571, 13 S. W. 827; Nasets v. State, (Tex. Cr. Rep.) 32 S. W. 698.

7 People v. Haas, 28 Cal. App. 182, 151 Pac. 672; State v. Swan, 31 Utah 336, 88 Pac. 12; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

8 State v. Levy, 119 Mo. 434, 24 S. W. 1026; State v. Fraker, 148 Mo. 143, 49 S. W. 1017; State v. Pickett, 174 Mo. 663, 74 S. W. 844.

Contra: State v. Morgan, 112 Mo. 202, 20 S. W. 456; State v. Jackson, 112 Mo. 585, 20 S. W. 674.

9 As, for example, Ala. Cr. Code, 1896, § 4923, Form No. 48, p. 330.

10 O'Connor v. State, 30 Ala. 9; Johnson v. State, 142 Ala. 1, 37 So. 937; Frederick v. State, (Ala.) 39 So. 915.

1 CAL.—People v. Hines, 5 Cal. App. 122, 89 Pac. 858. IND.—State v. Smith, 8 Blackf. 489. MASS.—Com. v. Morrill, 62 Mass. (8 Cush.) 571. N. Y.—Thomas v. People, 34 N. Y. 351; People v. Stone, 9 Wend. 182; People v. Haynes, 11 Wend. 557; reversed on another point in 14 Wend. 546, 28 Am. Dec. 530; Skiff v. People, 2 Park. Cr. Rep. 139. ENG.—Hamilton v. R., 9 Ad. & E. N. S. (9 Q. B.) 271, 58 Eng. C. L. 271; R. v. Hill, Russ. & R. C. C. 190.

Thus, an indictment for obtaining goods by false pretenses which charges that the accused, by falsely representing that he had money in bank, and thereby inducing another to accept a check in payment for goods sold and delivered, is sufficient. An additional averment that accused represented that he would give a check different from the one he did give, though unnecessary, is not an averment that he issued such different check, and does not vitiate the indictment; and a further averment, characterizing the check issued as "a false token" and "a false writing" may be disregarded as surplusage, because neither adding to nor detracting from the material allegation charging the gist of the offense.—Barton v. Peo-

tenses only as the prosecution expects to prove to have been false, and this must be done by such specific averment as will give to the accused due notice of what he is expected to defend against;[2] and the averment of falsity of the pretenses must be as distinct and specific as

ple, 135 Ill. 405, 25 Am. St. Rep. 375, 10 L. R. A. 302, 25 N. E. 776.

Several false pretenses inducing sale of goods, set out in indictment or information, as to whether proof of some of the false pretenses will be sufficient, quære.—People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530.

—Proof of one is held to be sufficient in State v. King, 67 N. H. 219, 34 Atl. 461; Bielschofsky v. People, 3 Hun 40, 2 Cow. Cr. Rep. 96, 5 Thomp. & C. 277; affirmed, 66 N. Y. 616.

2 ILL.—Barton v. People, 135 Ill. 405, 25 Am. St. Rep. 375, 10 L. R. A. 302, 25 N. E. 776. IND.—State v. Smith, 8 Blackf. 489; State v. Timmons, 58 Ind. 98; State v. Long, 103 Ind. 481; Pattee v. State, 109 Ind. 545, 10 N. E. 421; Funk v. State, 149 Ind. 338, 49 N. E. 266. IOWA—State v. Webb, 26 Iowa 262. KAN.—State v. Metsch, 37 Kan. 220, 15 Pac. 251; State v. Palmer, 50 Kan. 518, 32 Pac. 29. KY.—Com. v. Sanders, 98 Ky. 12, 32 S. W. 129; Com. v. Whitney, 8 Ky. L. Rep. 776, 3 S. W. 533. MD.—State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270. MASS.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Morrill, 62 Mass. (8 Cush.) 571. MICH.—People v. Reynolds, 71 Mich. 343, 38 N. W. 923; People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726; People v. Lennox, 106 Mich. 625, 64 N. W. 488. MO.—State v. Peacock, 31 Mo. 413; State v. Bradley, 68 Mo. 140; State v. De Lay, 93 Mo. 98, 5 S. W. 607. N. Y.—Thomas v. People, 34 N. Y. 351; Barber v. People, 17 Hun 366; People v. Winner, 80 Hun 130, 9 N. Y. Cr. Rep. 288, 30 N. Y. Supp. 54; Skiff v. People, 2 Park. Cr. Rep. 139; People v. Stone, 9 Wend. 182; People v. Conger, 1 Wheel. Cr. Cas. 448. N. C.—State v. Burrows, 33 N. C. (11 Ired. L.) 477; State v. Pickett, 78 N. C. 458; State v. Lambeth, 80 N. C. 393. OHIO—Redmond v. State, 35 Ohio St. 81; State v. Trisler, 49 Ohio St. 583, 31 N. E. 881. PA.—Com. v. Wallace, 114 Pa. St. 405, 60 Am. Rep. 353, 6 Atl. 685; Com. v. Adley, 1 Pears. 62. TENN.—Tyler v. State, 21 Tenn. (2 Humph.) 37, 36 Am. Dec. 298; Jim v. State, 27 Tenn. (8 Humph.) 603; Britt v. State, 28 Tenn. (9 Humph.) 31; Amos v. State, 29 Tenn. (10 Humph.) 117. TEX.—State v. Levi, 41 Tex. 568. ENG.—Hamilton v. R., 9 Ad. & E. N. S. (9 Q. B.) 271, 58 Eng. C. L. 271; R. v. Airey, 2 East 30, 102 Eng. Repr. 279; R. v. Perrott, 2 Maul. & S. 379, 105 Eng. Repr. 422, 8 Eng. Rul. Cas. 116, 15 Rev. Rep. 280.

Special averment negativing matter as to which the alleged false pretenses were made, is necessary to sufficiency.—Com. v. Sanders, 98 Ky. 12, 32 S. W. 129.

in the case of a charge of perjury;[3] otherwise, the indictment or information will be insufficient.[4] But it is not essential that the indictment or information should allege in terms that the pretenses were false, where it is alleged that accused knowingly, designedly, falsely and feloniously pretended, and so forth.[5]

§ 628. —— Surplusage. Where in an indictment or information, in addition to the essential facts required to be stated, other and unessential facts are alleged which are wholly redundant and useless, the latter may be disregarded as surplusage, under the general rule of pleading as to surplusage.[1] Thus, where the accused, being a merchandise broker, is charged with falsely representing himself to be the agent and broker of certain undisclosed persons residing in another city, e. g., New York, and with thereby obtaining certain goods, the indictment nowhere charging that he was a broker or agent, or authorized to act for the undisclosed persons, it is surplusage to allege that the offense was committed by him "in his capacity as a merchandise broker"; as would also be the further averment of an actual sale to the parties in such foreign city, effected by the accused as their broker, and a de-

3 State v. Peacock, 31 Mo. 413.

4 IND.—Keller v. State, 51 Ind. 11. MICH.—People v. Behee, 90 Mich. 356. N. Y.—Barber v. People, 17 Hun 366. N. C.—State v. Burrows, 33 N. C. (11 Ired. L.) 477. TENN.—Tyler v. State, 21 Tenn. (2 Humph.) 37, 36 Am. Dec. 298. TEX.—State v. Dyer, 41 Tex. 520.

5 Britt v. State, 28 Tenn. (9 Humph.) 31; State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

1 State v. Gordon, 56 Kan. 64, 42 Pac. 346; Com. v. Jeffries, 89 Mass. (7 Allen) 548, 83 Am. Dec. 712; State v. Vorback, 66 Mo. 168; Doan v. St. Louis, K. & N. W. R. R. Co., 38 Mo. App. 408; State v. Phillips, 36 Mont. 112, 92 Pac. 299.

Immaterial averments in an indictment or information do not render it defective where it is apparent that they could have prejudiced the accused.—State v. Phillips, 36 Mont. 112, 92 Pac. 299.

Indictment will not be quashed simply because it contains immaterial allegations, or because some of the pretenses are not properly charged, where upon the face of the indictment it appears that an offense has been committed.—Com. v. Parmenter, 121 Mass. 354; Com. v. Stevenson, 127 Mass. 446.

livery in pursuance of such sale, and a receipt by accused in such capacity.[2]

§ 629. Necessary averments—False pretenses and knowledge thereof. Except as otherwise provided by statute in some states,[1] an indictment or information charging obtaining of money or property by false pretenses, or by the use of false tokens, must distinctly aver that such pretenses or tokens were false,[2] and the nega-

2 Com. v. Jeffries, 89 Mass. (7 Allen) 548, 83 Am. Dec. 712.

1 As in Texas. See Arnold v. State, 11 Tex. App. 472.

2 CAL. — People v. Millan, 106 Cal. 320, 39 Pac. 65; People v. Griffith, 122 Cal. 212, 54 Pac. 275. COLO. — Current v. People, 60 Colo. 362, 153 Pac. 684. FLA.—Hamilton v. State, 16 Fla. 288. GA.—Carlisle v. State, 2 Ga. App. 651, 58 S. E. 1068. ILL.—People v. Manns, 146 Ill. App. 571. IND.—State v. Smith, 8 Blackf. 489; Pattee v. State, 109 Ind. 545, 10 N. E. 421; Funk v. State, 140 Ind. 338, 49 N. E. 266; Campbell v. State, 154 Ind. 309, 56 N. E. 665. IOWA—State v. Webb, 26 Iowa 262. KAN.—State v. Metsch, 37 Kan. 222, 15 Pac. 251; State v. Palmer, 50 Kan. 318, 32 Pac. 29; State v. Crane, 54 Kan. 251, 38 Pac. 270. MICH.—People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726. MINN.—Smith v. State, 55 Miss. 513. MISS. — State v. Mortimer, 82 Miss. 443, 34 So. 214; State v. Freeman, 103 Miss. 764, 60 So. 774. MO.—State v. Peacock, 31 Mo. 413; State v. Bradley, 68 Mo. 140; State v. DeLay, 93 Mo. 98, 5 S. W. 607. MONT.—Terr. v. Underwood, 8 Mont. 131, 19 Pac. 398; State v. Phillips, 36 Mont. 112, 92 Pac. 299. N. J.—State v. Riley, 65 N. J. L. 624, 48 Atl. 536; State v. Murphy, 68 N. J. L. 235, 15 Am. Cr. Rep. 236, 52 Atl. 279. N. Y.—People v. Stone, 9 Wend. 182; People v. Haynes, 11 Wend. 557; reversed on another point in 14 Wend. 546, 28 Am. Dec. 530; People v. Gates, 13 Wend. 311; In re Conger, 4 City Hall Rec. 65; People v. Winner, 80 Hun 130, 9 N. Y. Cr. Rep. 288, 30 N. Y. Supp. 54. N. C.—State v. Pickett, 78 N. C. 458. OHIO—Redmond v. State, 35 Ohio St. 81; State v. Trisler, 49 Ohio St. 583, 31 N. E. 881; Horton v. State, 85 Ohio St. 13, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423, 96 N. E. 797; Winnett v. State, 18 Ohio Cir. Ct. 515, 10 Ohio Cr. Dec. 245. PA.—Com. v. Adley, 1 Pears. 62. S. C.—State v. Wilson, 2 Mill 135. TENN.—Tyler v. State, 21 Tenn. (2 Humph.) 37, 36 Am. Dec. 298; Amos v. State, 29 Tenn. (10 Humph.) 117. TEX.—State v. Levi, 41 Tex. 563; Maranda v. State, 44 Tex. 442, 1 Am. Cr. Rep. 225; Hirsch v. State, 1 Tex. App. 493. VA.—Com. v. Speer, 4 Va. (2 Va. Cas.) 65. FED.—United States v. Watkins, 3 Cr. C. C. 441, Fed. Cas. No. 16649; United States v. Post, 113 Fed. 852.

An averment that the one whose name is signed to the letter "never

tiving must be by distinct and special averment,[3] it not

did write or send, or cause to be written or sent, any such letter," is a sufficient averment of falsity. — Tyler v. State, 21 Tenn. (2 Humph.) 37, 36 Am. Dec. 298.

Alleging want of authority on the part of accused to collect money for injury sustained by a named person in an accident, and that no such accident as described by accused occurred, held not to be a sufficient denial of accused's representations.—People v. Behee, 90 Mich. 353, 51 N. W. 515.

"Did falsely and designedly pretend," etc., by means of which money or credit was obtained, held to be a sufficient negativing of the truth of the representations in Com. v. Rosenberg, 1 Pa. Co. Ct. Rep. 273, 3 Lanc. Law Rev. 75.

Falsity of the representations is sufficiently laid where the indictment alleged that liens to the amount of $6000 existed against the property at the date of the representations that the property was free from liens, whereas in fact the notices of the liens were not filed until after the representations were made and the money procured. — People v. Moxley, 17 Cal. App. 466, 120 Pac. 43.

Full truth of false representations must be negatived; thus, where accused is charged with having falsely represented that he was the owner of several parcels of land, an indictment alleging that accused "was not then and there the owner of all of said real estate" is an insufficient negativing of the truth of the representations.—State v. Trisler, 49 Ohio St. 583, 31 N. E. 881.

Horse represented as "sound and all right," indictment or information specifically denying that representation need not set out in what particular the horse was diseased. — Waterman v. State, 114 Ga. 262, 40 S. E. 262.

Obtaining money for charity under false pretenses being charged, the words "whereas, in truth and in fact . . . was not at any time, nor at any other time, authorized by . . . to collect any money, . . ." avers the falsity in fact of accused's pretenses sufficiently.—People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726.

Representations or false pretenses must be relative to matter inducing to reliance upon same and parting with money or property; consequently, an indictment charging obtaining money under false pretenses, showing the pretenses to be a false representation that a building and loan association with which accused did not appear to be connected had a genuine existence, was held insufficient, in Roper v. State, 58 N. J. L. 420, 33 Atl. 969.

Substantial truth and not merely the literal truth of representations by means of which accused obtained money, property or credit, must be negatived.—Redmond v. State, 35 Ohio St. 81.

Truth of the pretense not negatived, the indictment does not charge an offense. — Pattee v. State, 109 Ind. 545, 10 N. E. 421.

[3] Id. See Com. v. Sanders, 98 Ky. 12, 32 S. W. 129; State v. Peacock, 31 Mo. 413.

See, also, supra, § 627.

Knowingly and falsely representing specified things, with in-

being sufficient to set out the false pretenses or false tokens and allege that the accused falsely pretended and by means thereof obtained the money or property alleged.[4] Where the alleged false representations consist of a series of interdependent statements, the allegation of falsity must not be negatively pregnant;[5] and where several pretenses are set out, all forming part of a general scheme, it is necessary to negative enough of the pretenses, only, to show the scheme was fraudulent.[6]

tent, etc., being alleged simply, is insufficient because not specifically negativing by direct averment the matter as to which the alleged false statement or pretenses was made.—Com. v. Sanders, 98 Ky. 12, 32 S. W. 129.

Sale of piano charged to be fraudulent on the part of the accused in representing that he was the owner thereof and had purchased it for a price much less than its actual value, indictment or information alleging accused was not in fact the owner of the piano and had never owned it, is not insufficient because it fails specifically to deny that the accused purchased the piano for the sum named by him, because the specific allegation that he did not and never had owned the piano is a sufficient denial that he ever purchased for said sum.—Merrill v. State, 156 Ind. 99, 59 N. E. 322.

4 KY.—Com. v. Sanders, 98 Ky. 12, 17 Ky. L. Rep. 544, 32 S. W. 129. MICH.—People v. Behee, 90 Mich. 356, 51 N. W. 515. MO.—State v. Bradley, 68 Mo. 140. OHIO—State v. Trisler, 49 Ohio St. 583, 31 N. E. 881. ENG.—Rex v. Perrott, 2 Maule & S. 379, 8 **Eng. Rul. Cas.** 116, 105 Eng. Repr. 422, 15 **Rev. Rep.** 280; Reg. v. Kelleher, 14 Cox C. C. 48.

A general averment that the pretense was false will, however, be deemed sufficient after verdict.—State v. Luxton, 65 N. J. L. 605, 48 Atl. 535.

False representations as to debts, accused asserting he did not owe any one, an allegation that he "did owe and was indebted to divers persons in the sum of" a named amount, not naming the persons to whom the divers sums were owing, was held to be too indefinite, in State v. Trisler, 49 Ohio St. 583, 31 N E. 881.

5 People v. Griffith, 122 Cal. 212, 54 Pac. 725; State v. Murphy, 68 N. J. L. 235, 15 **Am. Cr. Rep.** 236, 52 Atl. 279.

See, also, supra, § 627.

Substantial truth must be negatived and not merely the literal truth.—Redmond v. State, 35 Ohio St. 81.

6 Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

All the pretenses alleged in an indictment or information to be false need not be negatived.—Skiff v. People, 5 Park. Cr. Rep. (N. Y.) 139.

Accused's knowledge of the falsity of the pretenses, and that he "knowingly" made them, must be alleged in the indictment or information;[7] and where the indictment or information fails to make such an allegation, it will be bad on a motion in arrest of judgment.[8] Knowledge on the part of the accused, however, may be averred by alleging that the pretenses were made designedly and with intent to defraud;[9] and it has been held that an indictment or information charging obtaining money or other property by false pretenses or by false tokens which alleges that the accused did knowingly, designedly, falsely and feloniously pretend, is a sufficient allegation that the accused knew the pretenses or tokens to be

7 MICH.—People v. Reynolds, 71 Mich. 343, 38 N. W. 923; People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726. MISS.—State v. Freeman, 103 Miss. 764, 60 So. 774. N. J.—State v. Blauvelt, 38 N. J. L. (9 Vr.) 306. N. C.—State v. Shirrell, 95 N. C. 663. TEX.—Maranda v. State, 44 Tex. 442, 1 Am. Cr. Rep. 225; Doxey v. State, 47 Tex. Cr. 503, 11 Ann. Cas. 830, 84 S. W. 1061. VA.—Com. v. Speer, 4 Va. (2 Va. Cas.) 65. W. VA.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

"Common sense indictment" of Texas, dispensing with an averment of guilty knowledge of accused, is said not to require an allegation of knowledge on the part of the accused in an indictment or information charging false pretenses (Arnold v. State, 11 Tex. App. 472), but this doctrine seems to have been denied in Mathena v. State, 15 Tex. App. 473, in which it was held that an allegation of knowledge was necessary.

"Designedly" made with intent to defraud, imputes knowledge on the part of accused of the falsity of his representations. — State v. Snyder, 66 Ind. 203.

Did knowingly, designedly, falsely, and feloniously pretend is a sufficient allegation that accused knew the pretense to be false.— State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

Direct allegation of falsity not made in an indictment alleging knowledge of the falsity on the part of the defendant is demurrable, but not fatally defective.— People v. Millan, 106 Cal. 320, 39 Pac. 605.

To charge the representation as "false" and "fraudulent" is not equivalent to an allegation that it was knowingly false. — Doxey v. State, 47 Tex. Cr. 503, 11 Ann. Cas. 830, 84 S. W. 1061.

8 Maranda v. State, 44 Tex. 442, 1 Am. Cr. Rep. 225.

9 State v. Switzer, 63 Vt. 604, 25 Am. St. Rep. 789, 22 Atl. 724.

The use of the words "designedly and unlawfully" in place of the word "knowingly" is permis-

false.[10] Where the false pretenses averred are of such a character as to exclude the possible hypothesis of ignorance of their falsity on the part of the accused, it seems that a direct averment of falsity is not required;[11] but the rule is so strict in all other cases that even though the indictment charges that the representations or pretensions were "false" and "fraudulent," it will not be sufficient without the use of the word "knowingly," even in those cases in which the statute does not contain the word, for the reason that the words "false" and "fraudulent" do not in effect allege that the accused knew them to be false.[12]

sible.—Com. v. Hulbert, 53 Mass. (12 Met.) 446.

10 State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100. See R. v. Philpotts, 1 Car. & K. 112, 47 Eng. C. L. 110; R. v. Henderson, 1 Car. & M. 328, 41 Eng. C. L. 183.

"Did designedly, falsely represent and pretend" that he had received a designated subscription from a named person with payment in full thereof, held to sufficiently negative accused's ignorance of falsity of the pretense.—People v. Lennox, 106 Mich. 625, 64 N. W. 488.

"The defendant designedly and unlawfully did falsely pretend," omitting the word "knowingly," was held to sufficiently charge knowledge on the part of the accused of the falsity of the pretenses.—Com. v. Hulbert, 53 Mass. (12 Metc.) 446.

11 Com. v. Whitney, 8 Ky. L. Rep. 776, 3 S. W. 533; Com. v. Shedd, 61 Mass. (7 Cush.) 514; People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726; People v. Lennox, 106 Mich. 625, 64 N. W. 488.

Indorsement on note procured by falsely representing to the indorser that accused had specified property, and on trial accused stating he never had said property, an indictment need not allege the falsity of the representation, because the accused, from his own statement, must have known the falsity.—Com. v. Shedd, 61 Mass. (7 Cush.) 514.

Procuring goods from store by falsely pretending accused had been sent by A to procure the goods and representing that A would pay for them, indictment alleging said statements to be false, held to be sufficiently definite to enable accused to know the nature of the charge against him.—Com. v. Whitney, 8 Ky. L. Rep. 776, 3 S. W. 533.

12 Maranda v. State, 44 Tex. 442, 1 Am. Cr. Rep. 225; Doxey v. State, 47 Tex. Cr. Rep. 503, 11 Ann. Cas. 830, 84 S. W. 1061.

§ 630. —— Intent and design. An indictment or information charging obtaining goods or other property under false pretenses or by means of false tokens, must specifically allege that the false pretenses were made, or the false tokens used, with the intent to cheat and defraud,[1]

[1] ALA.—Mack v. State, 63 Ala. 138; Carlisle v. State, 76 Ala. 75; White v. State, 86 Ala. 69, 8 **Am. Cr. Rep.** 225, 5 So. 674. CAL.—People v. Haas, 28 Cal. App. 182, 151 Pac. 672. FLA. — Jones v. State, 22 Fla. 532. IND.—Todd v. State, 31 Ind. 514; Abbott v. State, 59 Ind. 70. IOWA—State v. Grant, 86 Iowa 216, 53 N. W. 120; State v. Daniels, 90 Iowa 491, 58 N. W. 891. LA.—State v. Lewis, 41 La. Ann. 591, 6 So. 536. ME.—State v. Philbrick, 31 Me. 401. MASS.—Com. v. Wilgus, 21 Mass. (4 Pick.) 177; Com. v. Strain, 51 Mass. (10 Metc.) 521; Com. v. Lannan, 83 Mass. (1 Allen) 590; Com. v. Hooper, 104 Mass. 549; Com. v. Dean, 110 Mass. 64; Com. v. Coe, 115 Mass. 481; Com. v. Howe, 132 Mass. 250. MICH. — People v. Getchell, 6 Mich. 496; People v. Wakely, 62 Mich. 297, 28 N. W. 871. MO.—State v. Scott, 48 Mo. 422; State v. Smallwood, 68 Mo. 192, 3 **Am. Cr. Rep.** 98; State v. Benson, 110 Mo. 18, 19 S. W. 213; State v. Chapel, 117 Mo. 639, 23 S. W. 760; State v. Kain, 118 Mo. 5, 23 S. W. 763; State v. Fraker, 148 Mo. 143, 49 S. W. 1017; State v. Martin, 226 Mo. 538, 126 S. W. 442. MONT.—Terr. v. Underwood, 8 Mont. 131, 19 Pac. 398; State v. Phillips, 36 Mont. 112, 92 Pac. 299. NEB.—Jacobs v. State, 31 Neb. 33, 47 N. W. 423. N. Y.—Scott v. People, 62 Barb. 62; Clark v. People, 2 Lans. 329. N. C.—State v. Garris, 98 N. C. 733, 4 S. E. 633; State v. Burke, 108 N. C. 750, 12 S. E. 1000. OHIO—Coblentz v. State, 84 Ohio St. 235, 95 N. E. 768; Horton v. State, 85 Ohio St. 13, **Ann. Cas.** 1913B, 90, 39 **L. R. A.** (N. S.) 423, 96 N. E. 797; State v. Mutchler, 87 Ohio St. 268, 101 N. E. 267. PA.—Com. v. Shissler, 9 Phila. 587; Com. v. Adley, 1 Pars. 62. TEX.—Marshall v. State, 31 Tex. 471; Jones v. State, 8 Tex. App. 648; Stringer v. State, 13 Tex. App. 520. VT.—State v. Switzer, 63 Vt. 604, 25 **Am. St. Rep.** 789, 22 Atl. 724. WASH. — State v. Phelps, 41 Wash. 470, 84 Pac. 24. WYO. — Haines v. Territory, 3 Wyo. 167, 13 Pac. 8.

There must be an allegation of an "intent to cheat and defraud," otherwise it is fatally defective.—People v. Cohen, 147 Ill. App. 393; People v. Herron, 147 Ill. App. 396.

Where the information charged the defendant with "wilfully, unlawfully and feloniously with intent to cheat and defraud" obtaining money, but failed to use the word "designedly" or its equivalent, it was insufficient.—State v. Pickett, 174 Mo. 663, 74 S. W. 844.

Intent of accused in making the false representations need not be alleged to have been to accomplish the particular result which was in fact obtained, or to accomplish it in a particular manner.—

it not being sufficient to allege that the pretenses were made for the purpose of obtaining the money or property, and that by means of them accused did obtain the money or property with intent to cheat and defraud.[2] The general rule is that the averment must be affirmatively made and not merely by way of inference or argument,[3] although there are cases which hold that there need be no express averment of intent.[4] Where the statute allows

Todd v. State, 31 Ind. 514; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

Intent need not be alleged in Texas; the courts will infer an intent corresponding with the obvious consequences of the accused's acts. — Tomkins v. State, 33 Tex. 228; Robinson v. State, 33 Tex. 341.

Compare: Stringer v. State, 13 Tex. App. 520.

—In Vermont, under the statute, intent need not be alleged.—State v. Bacon, 7 Vt. 222; State v. Switzer, 63 Vt. 604, 25 **Am. St. Rep.** 789, 22 Atl. 724.

Signature to written instrument charged to have been obtained by false pretenses, the indictment or information must state that the signature was obtained with intent to defraud, otherwise it will be fatally defective.—State v. Daniels, 90 Iowa 491, 58 N. W. 891; State v. Switzer, 63 Vt. 604, 25 **Am. St. Rep.** 789, 22 Atl. 724.

"Then and there asked and requested" the person defrauded to whom certain false pretenses had been made, "in consideration thereof, to pay and deliver" to the accused the money alleged to have been secured, sufficiently sets forth an intent to defraud.—Com. v. Howe, 132 Mass. 250.

"With intent to cheat and defraud, to the great damage" of a person named, sufficiently charged the intent in false pretenses. — State v. Burke, 108 N. C. 750, 12 S. E. 1000.

"With intent to defraud" need not be used in an indictment or information for statutory larceny under the statute where it is alleged that accused unlawfully, knowingly, etc., with an intent to deprive the true owner of his property, by means, color and aid of certain false writings and representations, then and there known to the accused to be false, because the allegation amounts to an averment of an intent to defraud.—State v. Southall, 77 Minn. 296, 79 N. W. 1077.

2 State v. Scott, 48 Mo. 422; State v. Smallwood, 68 Mo. 192, 3 **Am. Cr. Rep.** 98.

3 Carlisle v. State, 76 Ala. 75; White v. State, 86 Ala. 69, 8 **Am. Cr. Rep.** 225, 5 So. 674; Com. v. Dean, 110 Mass. 64; Stringer v. State, 13 Tex. App. 520.

4 GA.—Sadler v. State, 9 Ga. App. 201, 70 S. E. 969. IND.—Todd v. State, 31 Ind. 514. IOWA—State v. Hazen, 104 Iowa 16, 73 N. W. 359. MO.—State v. Smallwood, 68 Mo. 192, 3 **Am. Cr. Rep.** 98.

An allegation that the defen-

the intent to be alleged in the alternative, "to injure or defraud," an indictment charging "an intent to defraud," is sufficient.[5]

Particular person intended to be defrauded by the accused need not be alleged, under some statutes.[6]

Design to defraud being an essential element of the statute under which prosecution is had, an indictment or information which fails to allege that the act was "designedly" done, will be insufficient.[7]

§ 631. ——"FELONIOUSLY." An indictment or information charging false pretense in the words of the statute, setting forth the pretenses and alleging their falsity, is sufficient, without an allegation that the pretenses were "feloniously" made,[1] in the absence of statutory requirement to that effect; and where the absence of any intent to defraud would not avail as a defense, it is unnecessary to allege a fraudulent or a felonious intent.[2] But where by statute the crime of obtaining money or property by false pretenses, or by means of false tokens,

dant unlawfully, knowingly, etc., with intent to deprive the owner of his property by means of certain false writings and representations known by him to be false, is equivalent to an allegation of an intent to defraud. — State v. Southall, 77 Minn. 296, 79 N. W. 1007.

An averment that the representations were fraudulently made is sufficient.—Isaacs v. State, 7 Ga. App. 799, 68 S. E. 338.

It is enough to allege that the pretenses were made for the purpose of obtaining the property; and that by means thereof he did obtain the property with intent to cheat and defraud. — State v. Smallwood, 68 Mo. 192, 3 Am. Cr. Rep. 98.

5 White v. State, 86 Ala. 69, 8 Am. Cr. Rep. 225, 5 So. 674.

6 State v. Scott, 48 Mo. 422.

7 IOWA — State v. Hazen, 104 Iowa 116, 73 N. W. 359. MO.— State v. Wilson, 143 Mo. 334, 44 S. W. 722; State v. Pickett, 174 Mo. 663, 74 S. W. 844. TEX.— State v. Baggerly, 21 Tex. 757. VT.—State v. Switzer, 63 Vt. 604, 25 Am. St. Rep. 789, 22 Atl. 724.

The word "designedly," or its equivalent, must be used.—State v. Withee, 87 Me. 462, 32 Atl. 1013.

1 State v. Daley, 41 Vt. 564; State v. Switzer, 63 Vt. 604, 25 Am. St. Rep. 789, 22 Atl. 724.

2 State v. Mitchell, 109 Miss. 91, 67 So. 853.

is made a felony, or where the statute defining the crime uses the word "feloniously," an indictment or information charging the crime must allege a "felonious" intent;[3] and it has been said that it is not sufficient to allege that the accused, with intent to defraud, did "feloniously" make the false pretenses complained of,[4] although there are authorities to the contrary, holding that an allegation that the accused "did feloniously make certain false pretenses" does not make the instrument vulnerable to the objection that it is insufficient by reason of its failure to specifically allege that the accused "feloniously" intended.[5]

§ 632. —— Parties—By whom made. An indictment or information charging obtaining money or other property by false pretenses, we have already seen,[1] must specifically allege that the false pretenses or statements were made or authorized by the accused.[2] Where two or more persons are acting in concert in obtaining money or other property by false pretenses, and the false pretenses are made by one of them only, the indictment or information must allege by which one of the accused such false pretenses were made;[3] but it seems that an allegation that the defendants made the false pretenses,

3 MO.—State v. Turley, 142 Mo. 403, 44 S. W. 267. N. Y.—People v. Fish, Seld. 537, 4 Park. Cr. Rep. 206. N. C.—State v. Skidmore, 109 N. C. 795, 14 S. E. 63; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Caldwell, 112 N. C. 854, 16 S. E. 1010; State v. Wilson, 116 N. C. 979, 21 S. E. 692. TENN. — State v. Tate, 25 Tenn. (6 Humph.) 424; Johnson v. State, 25 Tenn. (6 Humph.) 426; Jim v. State, 27 Tenn. (8 Humph.) 603. TEX.—State v. Small, 31 Tex. 184.

Defrauding by false weights being charged, indictment must allege that accused's acts and intent were "felonious."—People v. Fish, Sheld. (N. Y.) 537, 4 Park. Cr. Rep. 206.

4 R. v. Walker, 6 Car. & P. 657, 25 Eng. C. L. 582; R. v. Howarth, 3 Stark. 26, 14 Eng. C. L. 151.

5 State v. Truly, 142 Mo. 403, 44 S. W. 267.

1 See, supra, § 625, footnotes 10 and 11, and text going therewith.

2 Dwyer v. State, 24 Tex. App. 132, 5 S. W. 662.

3 Kirtley v. State, 38 Ark. 543.

is a sufficient allegation that each of the defendants made such false pretenses or representations.[4]

Capacity in which accused acted in making such false pretenses or representations, e. g., in his capacity as a merchandise broker, is immaterial, and the maxim, "utile per inutile non vitiatur," is applicable to it, because the offense which the statute aims to prevent is the obtaining of property by false pretenses with an intent to defraud the owner thereof, and a possession so obtained is criminal by whomsoever it is accomplished, and in whatever capacity he acts.[5]

§ 633. —— —— To WHOM MADE AND WHO DEFRAUDED. The general rule is that an indictment or information charging obtaining money or other property by means of false pretenses, or false tokens, should state to whom the false pretenses were made,[1] and also who was defrauded or attempted to be defrauded thereby,[2] unless

4 People v. Jeffrey, 82 Hun (N. Y.) 409, 9 N. Y. Cr. Rep. 419, 31 N. Y. Supp. 267.

5 Com. v. Jeffries, 89 Mass. (7 Allen) 548, 83 Am. Dec. 712.

1 In re Schurman, 40 Kan. 533, 20 Pac. 277; State v. Fraker, 148 Mo. 143, 49 S. W. 1017; Colbert v. State, 1 Tex. App. 314.

2 ALA.—Mack v. State, 63 Ala. 138; Dorsey v. State, 111 Ala. 40, 20 So. 629; Bailey v. State, 159 Ala. 4, 17 Ann. Cas. 623, 48 So. 791. CAL. — People v. Haas, 28 Cal. App. 182, 151 Pac. 672. COLO. — Current v. People, 60 Colo. 362, 153 Pac. 684. GA. — O'Neal v. State, 10 Ga. App. 474, 73 S. E. 696; Oliver v. State, 15 Ga. App. 452, 83 S. E. 641. IOWA—State v. Clark, 141 Iowa 297, 119 N. W. 719. KAN.—In re Schurman, 40 Kan. 533, 20 Pac. 277. LA.—State v. Lewis, 41 La. Ann. 590, 6 So. 536. MICH.—People v. Barkelow, 37 Mich. 455. MO.—State v. McChesney, 90 Mo. 120, 7 Am. Cr. Rep. 184, 1 S. W. 841, overruling 16 Mo. App. 259; State v. Horn, 93 Mo. 190, 6 S. W. 96; State v. Dowd, 95 Mo. 163, 8 S. W. 7; State v. Fraker, 148 Mo. 143, 49 S. W. 1017; State v. Martin, 226 Mo. 538, 126 S. W. 442. NEB.—Jacobs v. State, 31 Neb. 33, 47 N. W. 422. N. Y.—People v. Fish, Sheld. 537, 4 Park. Cr. Rep. 206. OHIO—In re Trick Game, 7 Ohio U. P. 604, 5 Ohio Dec. 572. TENN. — State v. Woodson, 24 Tenn. (5 Humph.) 55. TEX.—Burd v. State, 39 Tex. 509. ENG.—R. v. Sowerby, 2 Q. B. 173; Sill v. R., Dears. C. C. 132, 1 El. & Bl. 553, 72 Eng. C. L. 553; R. v. Douglas, 1 Campb. 212; R. v. Silverlock,

the name of such person or persons is to the grand jury unknown,[3] in which case the indictment should so state;[4] an omission to set out the name of the person defrauded or attempted to be defrauded, where known, will render the indictment invalid.[5] The allegation may be that the false pretenses were made to a designated person,[6] to a partnership,[7] to the public—e. g., where the false repre-

2 L. R. [1894] Q. B. 766, 9 Am. Cr. Rep. 276, distinguishing Reg. v. Sowerby, 2 Q. B. 173.

It is sufficient to allege that the false pretense was made to the public through an advertisement in the paper and that by such means a person to whose notice it came and acting thereon was induced to part with money.—Reg. v. Silverlock, 18 Cox C. C. 104, 10 Am. Cr. Rep. 318.

3 People v. Fish, Sheld. (N. Y.) 537, 4 Park. Cr. Rep. 206.

4 State v. McChesney, 90 Mo. 120, 7 Am. Cr. Rep. 184, 1 S. W. 841.

5 State v. Horn, 93 Mo. 190, 6 S. W. 96.

"Brewer's association of St. Louis and East St. Louis" described as composed of "certain persons, firms and corporations as then and there composing such voluntary association," held fatally defective for not setting out the names of the persons, firms and corporations composing such association.—State v. McChesney, 90 Mo. 120, 7 Am. Cr. Rep. 184, 1 S. W. 841.

"Divers persons" alleged to have been cheated by false weights and measures held insufficient in Tennessee, for not setting out the names of the persons defrauded.—State v. Woodson, 24 Tenn. (5 Humph.) 55.

6 Fraudulent representations charged to have been made to A, with the allegation that he was the owner of the money obtained by means of such representations and that he was the owner of the "Jones County Bank" was held to sufficiently show that the bank was an individual.—Faulk v. State, 38 Tex. Cr. Rep. 77, 41 S. W. 616.

7 ALA.—Woods v. State, 133 Ala. 162, 31 So. 984. IND.—State v. Williams, 103 Ind. 235, 2 N. E. 585. MASS.—Com. v. Call, 38 Mass. (21 Pick.) 515; Com. v. Harley, 48 Mass. (7 Metc.) 462. MICH.—People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726. OHIO.—Soughton v. State, 2 Ohio St. 562.

Alleging firm name is a sufficient charge that the false pretenses were made to a partnership.—State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256.

Charity subscription obtained under false pretenses being charged, an indictment or information which states that the person to whom the false representations were made was a member of the co-partnership of which the money was fraudulently obtained, held sufficient.—People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726.

"H. & P. Son" given as the firm to whom the false representations were made and which was defrauded, held to be bad for failure

sentations or statements are made by advertisement[8]—or to a private[9] or to a municipal[10] corporation; and where the allegation is that a corporation was defrauded, or attempted to be defrauded, it is sufficient to set out the name of such corporation, without designating any particular individual, officer or agent of such corporation to whom the representations or false pretenses were made.[11]

By statute in some jurisdictions it is not necessary to allege the name of the person defrauded, it being pro-

to specify any person was deceived from whom the money was obtained.—Bates v. State, 124 Wis. 612, 103 N. W. 251.

"H., H. E., & others" being named in the indictment as the firm that was injured, and it being alleged that the false representations were made to H. E., without alleging that H. E. was a member or an employee of the firm, was held to be sufficient, because it would be presumed, on demurrer, that the H. E. to whom the representations were made and the H. E. who was a member of the firm were one and the same person.—Woods v. State, 133 Ala. 162, 31 So. 984.

8 R. v. Silverlock, 2 L. R. [1894] Q. B. 766, 9 Am. Cr. Rep. 276.

Cheating by false weights and measures charged, the indictment or information must specify the persons to whom the sales were made.—State v. Woodson, 24 Tenn. (5 Humph.) 55; Burd v. State, 39 Tex. 509.

9 Bailey v. State, 159 Ala. 4, 17 Ann. Cas. 623, 48 So. 791; State v. Hulder, 78 Minn. 524, 81 N. W. 532; State v. Turley, 142 Mo. 403, 44 S. W. 267; Brown v. State, (Tex. Cr.) 43 S. W. 986.

An allegation that the defendant uttered a check with intent to defraud "Lesser Bros. Co., a corporation," is sufficient. — People v. Russell, 156 Cal. 450, 105 Pac. 416.

10 Roberts v. People, 9 Colo. 458, 13 Pac. 630; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91; State v. Crowley, 39 N. J. L. (10 Vr.) 264; People ex rel. Phelps v. Court of Oyer and Terminer, 83 N. Y. 436.

Collector designated as the person to whom the false pretenses were made, indictment held sufficient to charge obtaining money from the board of chosen freeholders, it not being necessary that the pretenses should be made to the owner of the money, such pretenses to an agent being sufficient. —State v. Crowley, 39 N. J. L. (10 Vr.) 264.

Mayor's signature charged to have been procured by false pretenses, held to be sufficient without setting out the channels by which the representations were made to the mayor.—People ex rel. Phelps v. Court of Oyer and Terminer, 83 N. Y. 436.

11 Bailey v. State, 159 Ala. 4, 17 Ann. Cas. 623, 48 So. 791; State v. Truley, 142 Mo. 403, 44 S. W. 267.

vided that it shall be sufficient to allege that the accused did the acts complained of with the intent to defraud, without alleging an intent to defraud any particular person, partnership or corporation,[12] and a charge as to such person is immaterial, and will be treated as surplusage.[13]

False pretenses to other than owner of the money or other property received being charged, the indictment or information must show the relation of the person to whom the representations were made with the owner of the money or other property received, in order to show the connection of the former with the latter as agent or otherwise, and how the false pretenses could have caused the injury complained of.[14]

§ 634. —— The false pretenses, false tokens, etc.— In general. An indictment or information for obtaining money or other property by means of false pretenses, or by false tokens, or by tricks and devices, and so forth, in general terms, will not be sufficient;[1] the false

12 ALA. — Gardner v. State, 4 Ala. App. 131, 58 So. 1001. MD.— State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270. N. Y.—People v. Rouss, 63 Misc. 135, 23 N. Y. Cr. Rep. 340, 118 N. Y. Supp. 433. N. C.—State v. Burke, 108 N. C. 750, 12 S. E. 1000; State v. Ridge, 125 N. C. 658, 34 S. E. 440; State v. Salisbury Ice & Fuel Co., 166 N. C. 366, 52 L. R. A. (N. S.) 216, 81 S. E. 737. WASH.—State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230. ENG.—Sill v. R., Dears. C. C. 132, 1 El. & Bl. 553, 72 Eng. C. L. 553; R. v. Sowerby, 2 L. R. [1894] Q. B. 173, 7 Am. Cr. Rep. 184.

In Alabama this has been held without a statutory provision. See Mack v. State, 63 Ala. 138; Woods v. State, 133 Ala. 162, 31 So. 984.

13 MICH. — People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Fitzgerald, 92 Mich. 328, 52 N. W. 726. N. C.—State v. Salisbury Ice & Fuel Co., 166 N. C. 366, 52 L. R. A. (N. S.) 216, 81 S. E. 737. WASH.—State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230. WIS. — Owens v. State, 83 Wis. 496, 53 N. W. 736. ENG.—R. v. Tully, 9 Car. & P. 227, 38 Eng. C. L. 142.

14 Jacobs v. State, 31 Neb. 33, 47 N. W. 422; Owens v. State, 83 Wis. 496, 53 N. W. 736.

1 Burrow v. State, 12 Ark. 65; State v. Roberts, 34 Me. 320; State v. Johnson, 1 D. Chip. (Vt.) 129.

False token charged as the

pretenses, or false tokens, or tricks and devices, must be set out in detail and with reasonable certainty,[2] some of the authorities saying they must be specified with strict certainty;[3] in any event the false pretenses must be set out with such particularity, and in such terms, that the accused may know the exact offense with which he is charged and which he will be called upon to answer, and will enable the court to determine whether the particular things set out come within the statute and render the accused liable for the crime charged;[4] that is to say, the

means of obtaining property by false pretenses, failing to allege that the token was delivered by the accused, and received by the party defrauded, in exchange for, or in payment for the goods or property, is fatally defective.— Wagoner v. State, 90 Ind. 504.

2 CAL.—People v. McKenna, 81 Cal. 158, 22 Pac. 488; People v. Haas, 28 Cal. App. 182, 152 Pac. 672. FLA.—Hamilton v. State, 16 Fla. 288. MO.—State v. Fraker, 148 Mo. 143, 49 S. W. 1017; State v. Pickett, 174 Mo. 663, 74 S. W. 844; State v. Martin, 226 Mo. 538, 126 S. W. 442. WASH.—State v. Swan, 31 Utah 336, 88 Pac. 12. WIS.—State v. Crowley, 41 Wis. 271, 2 Am. Cr. Rep. 33.

3 Burrow v. State, 12 Ark. 65; State v. Roberts, 34 Me. 320; State v. Johnson, 1 D. Chip. (Vt.) 129.

4 O'Connor v. State, 30 Ala. 9; Beasley v. State, 59 Ala. 20. ARK.—Moffatt v. State, 11 Ark. 171; McKenzie v. State, 11 Ark. 594; Burrow v. State, 12 Ark. 65; State v. Vandimark, 35 Ark. 396. CAL.—People v. Carolan, 71 Cal. 195, 12 Pac. 52; People v. McKenna, 81 Cal. 158, 22 Pac. 488; People v. Frigerio, 107 Cal. 151, 40 Pac. 107. FLA.—Hamilton v. State, 16 Fla. 288; Scarlett v. State, 25 Fla. 717, 6 So. 767. GA.—Hatchcock v. State, 88 Ga. 91, 13 S. E. 959; Jones v. State, 93 Ga. 547, 19 S. E. 250. ILL.—Cowen v. People, 14 Ill. 348; West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254. IND.—Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211; Johnson v. State, 75 Ind. 553; Musgrave v. State, 133 Ind. 297, 32 N. E. 885. IOWA—United States v. Ross, 1 Morr. 164; State v. Cadwell, 79 Iowa 473, 44 N. W. 711. KAN.—State v. Palmer, 40 Kan. 474, 20 Pac. 270; In re Schurman, 40 Kan. 533, 20 Pac. 1277. KY.—Glackan v. Com., 60 Ky. (3 Metc.) 234; Com. v. Moore, 11 Ky. L. Rep. 971, 12 S. W. 1066. ME.—State v. Ripley, 31 Me. 386; State v. Roberts, 34 Me. 320; State v. Mayberry, 48 Me. 218. MD.—State v. Scribner, 2 Gill & J. 246. MASS.—Com. v. Wallace, 82 Mass. (16 Gray) 221; Com. v. Goddard, 86 Mass. (4 Allen) 312; Com. v. Walker, 108 Mass. 309. MICH.—People v. Arnold, 46 Mich. 268, 9 N. W. 406. MO.—State v. Newell, 1 Mo. 248; State v. Chunn, 19 Mo. 233; State v. Bonnell, 46 Mo. 395; State v. Porter, 75 Mo. 171; State v. Crooker, 95 Mo. 389, 8

facts must be alleged from which it may be determined whether or not the conclusion of their false and fraudulent character is correct,[5] and it is insufficient to merely aver that the representations were false and fraudulent.[6] There need, however, be no allegation as to whether the pretenses were spoken or written.[7]

All the pretenses need not be set out, the indictment or information being sufficient where it sets out those

S. W. 422; State v. Clay, 100 Mo. 571, 13 S. W. 827; State v. Terry, 109 Mo. 601, 19 S. W. 206; State v. Benson, 110 Mo. 18, 19 S. W. 213; State v. Cameron, 117 Mo. 371, 22 S. W. 1024; State v. Fleming, 117 Mo. 377, 22 S. W. 1024; State v. Chapel, 117 Mo. 639, 23 S. W. 760; State v. Kain, 118 Mo. 5, 23 S. W. 763; State v. Levy, 119 Mo. 434, 24 S. W. 1024; State v. Fraker, 148 Mo. 143, 49 S. W. 117; State v. Pickett, 174 Mo. 663, 74 S. W. 844; State v. McChesney, 16 Mo. App. 259. N. H.—State v. Parker, 43 N. H. 83. N. Y.—Thomas v. People, 34 N. Y. 351; People v. Laurence, 66 Hun 574, 21 N. Y. Supp. 818; reversed on another point, 137 N. Y. 517, 10 N. Y. Cr. Rep. 331, 33 N. E. 547; Skiff v. People, 2 Park. Cr. Rep. 139; People v. Stone, 9 Wend. 182, 191; People v. Haynes, 11 Wend. 557; reversed on another point in 14 Wend. 546, 28 Am. Dec. 530; People v. Gates, 13 Wend. 311; People v. Conger, 1 Wheel. Cr. Cas. 448. N. C.—State v. Boon, 40 N. C. (4 Jones L.) 463; State v. Holmes, 82 N. C. 607; State v. Sherrill, 95 N. C. 663. OHIO—Dillingham v. State, 5 Ohio St. 280. PA.—Com. v. Frey, 50 Pa. St. 245; Com. v. Wallace, 114 Pa. St. 405, 60 Am. Rep. 353, 6 Atl. 685; Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Com. v. McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; Com. v. Daniels, 2 Pars. Eq. Cas. 332; Com. v. Dennis, 1 Pa. Co. Ct. Rep. 278; Com. v. Galbraith, 24 Leg. Int. 117. TENN.—Bowen v. State, 68 Tenn. (9 Baxt.) 45, 40 Am. Rep. 71. TEX.—State v. Dyer, 41 Tex. 520; Warrington v. State, 1 Tex. App. 168; Mathena v. State, 15 Tex. App. 473. VT.—State v. Johnson, 1 D. Chip. 129; State v. Keach, 40 Vt. 113. WIS.—State v. Green, 7 Wis. 676. FED.—United States v. Hess, 124 U. S. 483, 31 L. Ed. 516, 8 Sup. Ct. Rep. 571; United States v. Watkins, 3 Cr. C. C. 441, Fed. Cas. No. 16649; United States v. Beatty, 60 Fed. 740. CANADA—R. v. Davis, 18 Up. Can. Q. B. 180; R. v. Patterson, 26 Ont. 656. ENG.—R. v. Plestow, 1 Campb. 494; R. v. Munoz, 2 Stra. 1127, 93 Eng. Repr. 1078; R. v. Mason, 2 T. R. 581, 100 Eng. Repr. 312, 1 Rev. Rep. 545; R. v. Hazelton, L. R. 2 C. C. 134; R. v. Henshaw, 9 Cox C. C. 472.

[5] People v. Carpenter, 6 Cal. App. 231, 91 Pac. 809.

[6] People v. Carpenter, 6 Cal. App. 231, 91 Pac. 809.

[7] Com. v. Stevenson, 127 Mass. 446; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91.

false pretenses, false tokens, tricks and devices, which were the inducing cause to reliance by the party defrauded, and because of which the crime charged was rendered possible.[8]

Spoken words constituting the false pretenses charged, an indictment setting out the words as uttered, has been said to be sufficient, without explaining their meaning.[9]

Written instrument, e. g., a certificate of stock, charged as the false token used, an indictment or information is sufficient which alleges its falsity without setting forth the manner in which it could be used by the accused to accomplish his purpose of deceiving and defrauding the party named;[10] the same is true of a false coin,[11] and the like. The general rule is that the written instrument or false token should be set out in the indictment or information either in hæc verba or by purport.[12] Where the written instrument thus used is known by a well defined name—e. g., bank bill,[13] check,[14] verified claim against a county,[15] and the like—and which is but one step in the transaction, a particular description of the instrument in the indictment is unnecessary,[16] it being sufficient to describe the instrument by name and set

8 Cowen v. People, 14 Ill. 348; Moore v. People, 190 Ill. 331, 60 N. E. 535.

9 State v. Call, 48 N. H. 126; Skiff v. People, 2 Park. Cr. Rep. (N. Y.) 139.

10 Com. v. Coe, 115 Mass. 481.

11 Com. v. Nason, 75 Mass. (9 Gray) 125.

12 See: ALA.—Oliver v. State, 37 Ark. 134. IND.—State v. Layman, 8 Blackf. 338. MASS.—Com. v. Coe, 115 Mass. 491. TEX.—State v. Dyer, 41 Tex. 520; Baker v. State, 14 Tex. App. 332; Dwyer v. State, 24 Tex. App. 132, 5 S. W. 662; Willis v. State, 24 Tex. App. 400, 5 S. W. 316; Hardin v. State, 25 Tex. App. 74, 7 S. W. 534; Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479; Doxey v. State, 47 Tex. Cr. Rep. 503, 11 Ann. Cas. 830, 84 S. W. 1061.

Reason must be given where instrument can not be set out in full.—Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479.

13 See State v. Lyman, 8 Blackf. (Ind.) 330.

14 State v. Baker, 57 Kan. 541, 46 Pac. 947.

15 See Wilson v. State, 156 Ind. 631, 59 N. E. 380, 60 N. E. 1086.

16 State v. Baker, 57 Kan. 541, 46 Pac. 947.

out the purport thereof,[17] except in those cases in which the instrument enters into the offense as the basis thereof, that is, as the inducement,[18] or the question whether the crime charged was in fact perpetrated turns upon the construction of the instrument, in either of which cases the instrument must be set out in hæc verba.[19]

By statute in some jurisdictions the false pretenses, and so forth, used by the accused are not required to be set out in the indictment or information, it not being necessary to state the particulars of the false pretense intended to be relied upon by the prosecution.[20]

§ 635. ——— DESCRIPTION OF THE PARTICULAR PRETENSES. The indictment or information must clearly and certainly, in plain and concise language, describe the particular pretense, or the false token, complained of, by means of which the fraud alleged was perpetrated, sufficiently to inform the accused of the nature and cause of the accusation against him,[1] or it will be insufficient.[2]

17 State v. Caldwell, 79 Iowa 473, 44 N. W. 711; Bargie v. United States, 2 Hayw. & H. 357, Fed. Cas. No. 18229.

18 Dwyer v. State, 24 Tex. App. 132, 5 S. W. 662; Scott v. State, 27 Tex. App. 264, 11 S. W. 320; State v. Green, 7 Wis. 676.

19 See: ILL.—Moore v. People, 190 Ill. 331, 6 N. E. 535. TEX.—White v. State, 3 Tex. App. 605; Baker v. State, 14 Tex. App. 332; Dwyer v. State, 24 Tex. App. 132, 5 S. W. 662; Hardin v. State, 25 Tex. App. 74, 7 S. W. 534; Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479. WIS.—State v. Green, 7 Wis. 676. ENG.—R. v. Wickham, 10 Ad. & E. 34, 37 Eng. C. L. 43; R. v. Coulson, 1 Den. C. C. 592.

20 State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270; Jules v. State, 85 Md. 305, 36 Atl. 1027; People v. Clark, 10 Mich. 310; People v. Winslow, 39 Mich. 505; State v. Porter, 75 Mo. 171.

1 See, supra, § 625; State v. Phelps, 41 Wash. 470, 84 Pac. 24.

Money obtained, in what relation, whether as a gift, a loan, or otherwise, need not be alleged.—Com. v. White, 24 Pa. Sup. Ct. 178.

2 ARK. — Burrow v. State, 12 Ark. 65. CAL. — People v. McKenna, 81 Cal. 158, 22 Pac. 488. FLA.—Hamilton v. State, 16 Fla. 288. IND.—Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211; Shaffer v. State, 82 Ind. 221; State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256, 2 N. E. 585. MO.—State v. Chunn, 19 Mo. 233; State v. McChesney, 90 Mo. 120, 7 Am. Cr. Rep. 184, 1 S. W. 841; State v. Pickett, 174 Mo. 663, 74 S. W. 844. N. H.—State v. Parker, 43 N. H. 83. N. C.—State v. Lambeth, 80

Thus, an indictment or information is insufficient which charges that accused was a common cheat and "did, by divers false pretenses and divers false tokens, cheat and defraud," etc.;[3] "by means of divers false, fraudulent and unlawful pretenses";[4] "designedly and by false pretenses and with intent to defraud," etc.;[5] "did unlawfully, knowingly and designedly, and by false and fraudulent representations and pretenses defraud" a named person out of his property, describing it;[6] "falsely pretended" that certain property—e. g., a horse or a cow—was sound,[7] and the like, without alleging specifically

N. C. 393; State v. Holmes, 82 N. C. 607. OHIO — In re Trick Game, 7 Ohio N. P., 5 Ohio S. & C. Dec. 572. PA.—Com. v. Hoover, 6 Lanc. 129. TEX.—State v. Baggerly, 21 Tex. 757. VT.—State v. Johnson, 1 D. Chip. 129.

Charging attempt to cheat and defraud by means of trick, deception, false and fraudulent representations and statements, and a bogus metal, indictment held sufficient without stating of what the "cheat," fraud, etc., consisted.—State v. Morgan, 112 Mo. 212, 20 S. W. 456.

3 State v. Johnson, 1 D. Chip. (Vt.) 129.

4 Burrow v. State, 12 Ark. 65.

5 Hamilton v. State, 16 Fla. 288.

6 People v. McKenna, 81 Cal. 158, 22 Pac. 488.

7 See, among other cases: IOWA—State v. Patty, 97 Iowa 373, 66 N. W. 727. KY.—Com. v. Watson, 146 Ky. 83, Ann. Cas. 1913C, 272, 142 S. W. 200; Hale v. Com., 151 Ky. 639, 152 S. W. 773. ME.—State v. Stanley, 64 Me. 157, 1 Am. St. Rep. 209. N. Y.—Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397, affirming 26 Hun 76. N. C.—State v. Holmes, 82 N. C. 607; State v. Mangum, 116 N. C. 998, 21 S. E. 189. PA.—Com. v. Hoover, 6 Lanc. (Pa.) 129. S. C.—State v. Stone, 95 S. C. 390, 49 L. R. A. (N. S.) 574, 79 S. E. 108.

Fraud in a horse trade charged, consisting in falsely representing the horse to be "sound," "with intent to cheat and defraud," held to be sufficient as alleging a misrepresentation of a subsisting fact.—State v. Mangum, 116 N. C. 998, 21 S. E. 189.

—Age of horse knowingly misrepresented.—State v. Holden, 2 Boyce (Del.) 429, 79 Atl. 215.

—Identity of horse knowingly misrepresented.—State v. Mills, 17 Me. 211.

Overstatement of milk-yield knowingly made to induce a trade.—Parks v. State, 94 Ga. 601, 20 S. E. 430.

—Milk-yield as to future of cow traded is merely matter of opinion, and not false representations.—Miller v. State, 99 Ga. 207, 25 S. E. 169, distinguishing Parks v. State, 94 Ga. 601, 20 S. E. 430.

Sheep represented as free from disease.—People v. Crissie, 4 Den. (N. Y.) 525.

the facts constituting the false pretenses. And charging that accused falsely pretended and represented to a named person that a certain order or token in writing he then and there had, and which purported to be signed by another, authorizing accused to sell the interest of such signer in certain property in the county, merely charging a sale of the property by accused to such person alleged to have been defrauded, or a mere transfer of the order, is insufficient.[8] But it has been said that an indictment or information charging a conspiracy to obtain money from a named person "by false pretenses, and by false and privy tokens and subtle means and devices," need not state more specifically what such pretensions, tokens or devices were, the obtaining of the money on false pretenses being a crime under the statute.[9]

§ 636. —— —— —— CONFIDENCE GAME AND BUNKO STEERING. An indictment or information charging an attempt to obtain money by the use of the confidence game, in the language of the statute providing for the punishment of those who attempt to obtain money by the use of the confidence game, is sufficient to inform the accused of the exact charge against him, and the outer lines within which the evidence must be confined, and apprises him of what evidence he will be required to meet, without alleging all the acts constituting the offense, such as the manner of playing the game, the participants in the game, the amount of money lost, and the like;[1] and it is in the

8 Shaffer v. State, 82 Ind. 221.

9 State v. Crowley, 41 Wis. 271, 2 Am. Cr. Rep. 33.

1 COLO.—Lace v. People, 43 Colo. 199, 95 Pac. 302. ILL.—Morton v. People, 47 Ill. 468; Seacord v. People, 121 Ill. 623, 13 N. E. 194; Loehr v. People, 132 Ill. 504, 24 N. E. 68; West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254; Maxwell v. People, 158 Ill. 248, 41 N. E. 995; Graham v. People, 181 Ill. 477, 47 L. R. A. 731, 55 N. E. 179; Du Boise v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 183; People v. Weil, 244 Ill. 176, 91 N. E. 112; People v. Clark, 256 Ill. 14, Ann. Cas. 1913E, 214, 99 N. E. 866. MINN.—State v. Gray, 29 Minn. 142, 12 N. W. 455. MO.—

discretion of the trial court as to whether or not it will allow or refuse a bill of particulars.[2]

Bunko steering game being charged, an indictment or information alleging the offense in the language of the statute providing for the punishment of bunko steering, averring that a person named was enticed to a certain place, and then and there "by duress or fraud" was compelled to part with money upon a foot race, or upon any other occasion, is insufficient, the facts constituting the nature of the fraud and duress not being set out,[3] because the nature of the offense designated simply as "bunko steering" defines and describes the crime in generic terms, and when the crime is thus generically described and defined, the pleader must descend to the particulars.[4]

§ 637. ——— DESCRIPTION OF THE FALSE TOKEN. The general rules regarding the pleading of a written instrument, in order to be sufficient, where it is used as a means of procuring money or other property of another by false pretenses, have been set out,[1] and it remains but to add in this place that the description of the written instrument, or other false token, must be sufficient to meet all the requirements of the rules of criminal pleading,[2] and to give a few illustrations which, it is thought,

State v. Jackson, 112 Mo. 585, 20 S. W. 674; State v. Edgen, 181 Mo. 582, 80 S. W. 942. FED.—Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 15 Sup. Ct. Rep. 394.

2 Lace v. People, 43 Colo. 199, 95 Pac. 302.

3 Haughn v. State, 159 Ind. 413, 59 L. R. A. 789, 65 N. E. 287.

4 Haughn v. State, 159 Ind. 413, 59 L. R. A. 789, 65 N. E. 287. See: ARK.—State v. Graham, 38 Ark. 519. IND.—Bowles v. State, 13 Ind. 427; Malone v. State, 14 Ind. 219; State v. Bruner, 111 Ind. 98, 12 N. E. 103. TEX.—Burch v. Republic, 1 Tex. 608; Kerry v. State, 17 Tex. App. 178, 50 Am. Dec. 122. VA.—Boyd v. Com., 77 Va. 52. FED.—United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

1 See, supra, § 634.

2 Among other cases, see: ILL.—Barton v. People, 136 Ill. 405, 25 Am. St. Rep. 375, 10 L. R. A. 302, 25 N. E. 776. IND.—State v. Layman, 8 Blackf. 330; State v. Locke, 35 Ind. 419; Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211. KAN.—State v. Baker, 57 Kan. 541, 46 Pac. 947. MASS.—Com. v. Stevenson, 127 Mass. 446. MO.—State v.

will be helpful to the pleader. Thus, bank-bills charged as the means of procuring goods by false pretenses, it being alleged accused represented the bank-bills as good, an indictment or information charging the bank was insolvent and the bank-bills worthless, sufficiently describes the bills.[3] A bank-check charged as the means of defrauding, indictment or information need not particularly describe the check,[4] and an allegation in the indictment or information characterizing the check as "a false token" and "a false writing" is surplusage.[5] A chattel mortgage

Barbee, 136 Mo. 440, 37 S. W. 1119. N. C.—State v. Patillo, 11 N. C. (4 Hawks) 348. TEX.—State v. Dyer, 41 Tex. 520; Willis v. State, 24 Tex. App. 400, 6 S. W. 316; Hardin v. State, 25 Tex. App. 74, 7 S. W. 534; Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479.

[3] State v. Layman, 8 Blackf. (Ind.) 330.

[4] State v. Baker, 57 Kan. 541, 46 Pac. 947.

Bank-check charged as the means of obtaining money from one bank by falsely representing that accused had money in another bank upon which the check was drawn, indictment is sufficient, without alleging that the latter bank was incorporated.—Brown v. State, (Tex. Cr.) 43 S. W. 986.

Bank-check alleged as the means of defrauding by procuring another to sign same through fraudulent representations, indictment or information purporting to give the representations and statements made by the accused, is not invalidated by the fact that such statements and representations are in the alternative.—State v. Carter, 112 Iowa 15, 83 N. W. 715.

[5] Barton v. People, 135 Ill. 405, 25 Am. St. Rep. 375, 10 L. R. A. 302, 25 N. E. 776.

Bank-check charged as the means of cheating by false pretense, an indictment or information alleging accused falsely represented that he had money in the bank upon which the check was drawn, and by such representations induced a merchant to accept a check in payment, which was delivered, and further alleging that accused represented that he would give a check different from the one actually delivered, held not to amount to a charge of issuing such different check.—Barton v. People, 135 Ill. 405, 25 Am. St. Rep. 375, 10 L. R. A. 302, 25 N. E. 776.

Bank-check charged as the means used in an attempt to defraud, accused representing he then and there had in his possession, for the payment of money drawn by him in favor of the party attempted to be defrauded, by means of which he intended to pay certain bills due from the said party to other persons, without further allegations, is insufficient, as it fails to allege that accused

alleged as the means used, an indictment or information charging that accused did not own the cattle specified, is not defective in failing to allege that the accused did not own other cattle upon which the mortgage was executed, or that the money loaned was not secured by other cattle;[6] but it has been held that an indictment failing to set out the mortgage in hæc verba, is fatally defective,[7] although there are authorities to the contrary.[8] A counterfeit coin charged as the means of procuring goods by false pretenses, the indictment or information need not aver that the spurious coin was made like the genuine coin it represented, the word "counterfeit" being a sufficient allegation of that fact;[9] and it need not be averred that the fraud was accomplished by passing the coin.[10] A false certificate of stock charged as the means of defrauding, alleged to be false and forged, but represented by accused to be good, valid and a genuine certificate of stock, an indictment or information setting forth such certificate in hæc verba is good, notwithstanding the fact

had or pretended to have any money in the bank on which the check was drawn; or that the check was delivered, or possession or control over it obtained.—Com. v. Stevenson, 127 Mass. 446.

6 Moore v. People, 190 Ill. 331, 60 N. E. 535.

Chattel mortgage charged as the means of defrauding by accused falsely representing that he was the owner of "twenty-two steer cattle," the description of the cattle held sufficient. — State v. Hubbard, 170 Mo. 346, 70 S. W. 883.

False representations as to ownership of cattle not contained in the mortgage, the indictment need not set out the mortgage.—Moore v. People, 190 Ill. 331, 60 N. E. 535.

7 Hardin v. State, 25 Tex. App. 74, 7 S. W. 534; Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479.

Mortgage not set out, reason must be stated showing it to be impossible to do so.—Ferguson v. State, 25 Tex. App. 451, 8 S. W. 479.

8 **Chattel mortgage,** or its provisions, need not be set out in the indictment or information. — Moore v. People, 92 Ill. App. 137.

9 State v. Boon, 49 N. C. (4 Jones L.) 463.

Counterfeit quarter of a dollar charged as the means of cheating by false pretenses, indictment or information need not aver to what currency the genuine coin belonged.—State v. Boon, 49 N. C. (4 Jones L.) 463.

10 State v. Boon, 49 N. C. (4 Jones L.) 463.

that the certificate is made out in the name of the defrauded party;[11] indorsements on the certificate need not be set forth;[12] neither need it be stated in what manner it could be used to deceive.[13] A false draft charged as the means by which accused secured property of the injured party, the indictment or information need not allege the draft to be due, where it appears from the instrument that it was due upon presentation.[14] False weights charged as the means of cheating, indictment or information averring that accused used the same, "by artful and deceitful contrivances," to defraud named persons, sufficiently describes the false token and the manner of cheating.[15] A note charged as the means of the false pretenses, indictment or information charging that the pretense was made to induce the party defrauded to become the surety thereon, but that, instead of becoming surety, he became the principal and made a note for the specified amount, payable to the accused, is bad for ambiguity and uncertainty; it must be direct and certain both as regards the party and the offense charged.[16] A mortgage charged as the means of procuring goods by false pretenses, indictment or information setting forth the substance of the mortgage, is sufficient;[17] the pretense being that the real property covered by the mortgage was worth a designated sum of money, and the allegation being that the real estate was not worth that amount of money, is insufficient; the indictment or information must show that the real estate was not of sufficient value amply to secure the sum loaned.[18] And where the false pretense consists

11 Com. v. Coe, 115 Mass. 481.

12 Com. v. Coe, 115 Mass. 481.

13 Com. v. Coe, 115 Mass. 481.

14 State v. Cadwell, 79 Iowa 473, 44 N. W. 711.

15 People v. Fish, 4 Park. Cr. Rep. (N. Y.) 206.

16 State v. Locke, 35 Ind. 419. See Whitney v. State, 10 Ind. 404; Walker v. State, 23 Ind. 61; Com. v. Magowan, 58 Ky. (1 Metc.) 368, 71 Am. Dec. 480; People v. Gates, 13 Wend. (N. Y.) 311.

17 Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211.

18 In re Shotwell, 4 City Hall Rec. (N. Y.) 75.

in representing that the property covered by the mortgage is not subject to prior liens, an indictment or information charging that this representation was false and that the property was subject to prior liens, will be insufficient, if it does not set out and describe such prior liens.[19] Overdrafts to a specified amount procured to be paid by a bank, for and on account of accused by his false representations as to the ownership of a note, an indictment or information must aver the date, amount and maturity of the note; that the maker was, or was represented by accused to be solvent; that the overdrafts were authorized by reason of accused's representations, and give the dates, amounts and payees of such overdrafts, or it will be insufficient by reason of uncertainty.[20] Promissory note charged as the means of procuring property by false pretenses, by representing that it was a draft, indictment or information will be insufficient unless it discloses in what particular the instrument was defective;[21] for the reason that promissory notes are not public tokens, like bank notes, where the indictment does not aver that the instruments bore the resemblance of bank notes;[22] and an indictment or information setting out in hæc verba a note apparently valid on its face, will be fatally defective, unless it also alleges the facts which render the instrument worthless.[23]

19 Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211.

False pretense in sale of mortgage charged, it seems that if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the accused represented the real estate to be very much more valuable than it actually was.—Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211.

20 State v. Barbee, 136 Mo. 440, 37 S. W. 1119.

21 State v. Dyer, 41 Tex. 520.

Name given to instrument alleged to be the means of cheating by false pretenses, is immaterial, where the instrument is valid.—State v. Dyer, 41 Tex. 520.

22 State v. Patillo, 11 N. C. (4 Hawks) 348.

23 Willis v. State, 24 Tex. App. 400, 6 S. W. 316.

§ 638. ——— ——— REPRESENTATIONS AS TO FINANCIAL CONDITION. An indictment or information charging obtaining money, goods, or other property by means of false representations as to present financial condition and ability to pay, must show that the false representations were made for the purpose, and with the intention, to induce the party defrauded to part with his money, goods, or other property,[1] or to induce him to indorse or sign commercial paper for the benefit of accused, that the representations were relied upon;[2] that the accused thereby, and by reason of such false representations obtained the money, goods, or other property, or secured the desired signature to commercial or other paper.[3] It must also appear that the person defrauded was not in fault in relying upon such false representations, and that he exercised due business care and acted prudently.[4] Thus, where the

1 **Under Washington Pen. Code, § 234,** indictment or information otherwise sufficient is good without this allegation.—State v. Boklin, 14 Wash. 403, 44 Pac. 889.

2 See, infra, § 640; Curtis v. State, 31 Tex. Cr. Rep. 39, 19 S. W. 604.

3 See, infra, § 642; State v. Penley, 27 Conn. 587; State v. Connor, 110 Ind. 469, 11 N. E. 454.

4 Among other cases, see: IND. — Bonnell v. State, 64 Ind. 498; Jones v. State, 50 Ind. 473. IOWA — State v. McConkey, 49 Iowa 499. KY.—Com. v. Haughey, 60 Ky. (3 Metc.) 223; Com. v. Grady, 76 Ky. (13 Bush) 285, 26 **Am. Rep.** 192. ME.—State v. Estes, 46 Me. 150. N. Y.—People v. Stetson, 4 Barb. 151; People v. Crissie, 4 Den. 525; People v. Williams, 4 Hill 9, 40 **Am. Dec.** 258; People v. Johnson, 12 Johns. 292; People v. Haynes, 11 Wend. 557; reversed on another point in 14 Wend. 546, 28 **Am. Dec.** 530; People v. Sully, Sheld. 17, 5 Park. Cr. Rep. 142. TENN. — State v. De Hart, 65 Tenn. (6 Baxt.) 222; Delaney v. State, 66 Tenn. (7 Baxt.) 28; Bowen v. State, 68 Tenn. (9 Baxt.) 45, 40 **Am. Rep.** 71.

Compare: People v. Pray, 1 Mich. 69; Com. v. Henry, 22 Pa. St. 253; In re Greenough, 31 Vt. 279; Colbert v. State, 1 Tex. App. 314; and see, also, post, § 641, footnote 5.

"It may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think the statute should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and

accused obtained credit on a note he owed upon the false and fraudulent pretense and representation that a large quantity of tobacco, which the party defrauded had then purchased from the accused, would average in quality with a sample which accused then and there exhibited, the indictment was dismissed, the court saying that a common caution on the part of the person defrauded would have protected him from the injury;[5] and where accused fraudulently represented that he was the owner of certain realty, and that it was free from encumbrance, when as a matter of fact there was on record a mortgage executed by the accused, the court held that the indictment showed on its face that the party defrauded had the means of detection of fraud in his hands which he failed, as an ordinarily prudent man, to exercise.[6]

§ 639. —— Relation to past events or existing state of facts. False representations, to be indictable, must relate to past events,[1] or be as to an existing and not as to a

stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artfully-contrived story which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or a false writing — an ingenious contrivance of unusual artifice, against which common sagacity and the exercise of ordinary caution, would not be sufficient to guard" (obiter).—People v. Crissie, 4 Den. (N. Y.) 525.

"If the construction should be narrowed to cases which might be guarded against by common prudence, the weak and imbecile, the usual victims of false pretenses, would be left unprotected." — State v. Mills, 17 Me. 211.

5 Com. v. Haughey, 60 Ky. (3 Metc.) 223.

6 Com. v. Grady, 76 Ky. (13 Bush) 285, 26 Am. Rep. 192.

1 See, among other cases: Burrow v. State, 12 Ark. 65; State v. Magee, 11 Ind. 154; Keller v. State, 51 Ind. 111, 1 Am. Cr. Rep. 211; Glackan v. Com., 60 Ky. (3 Metc.) 232; Dillingham v. State, 5 Ohio St. 280.

future[2] state of facts,[3] and the indictment or information must set out the false pretenses complained of in such terms as to clearly show that they were false representations by the accused of an existing state of facts, or clearly establish their relation to a past state of events, otherwise the indictment will be insufficient.[4]

§ 640. —— Reliance on pretenses. An indictment or information charging obtaining money or other property by means of false pretenses, if otherwise adequate, has been said to be sufficient if it alleges that the money or other property was obtained by the accused by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon and was induced thereby to part with his property,[1] for the reason that it must necessarily be im-

2 Thus where accused was charged with falsely representing that A was to give to him a stated amount, and that B was going to allow a third person a stated amount of money weekly, for the benefit of his health, the indictment was held to be insufficient because it failed to state a case as to an existing state of facts.—R. v. Henshaw, 10 Jur. N. S. 595.

3 See, among other cases: Colly v. State, 55 Ala. 85; In re Snyder, 17 Kan. 542; State v. Evers, 49 Mo. 542; State v. Vorback, 66 Mo. 168; State v. King, 67 N. H. 219, 34 Atl. 461; People v. Blanchard, 90 N. Y. 314; In re Conger, 4 City Hall Rec. (N. Y.) 65; Com. v. Moore, 99 Pa. St. 570; Canter v. State, 75 Tenn. (7 Lea) 349; Allen v. State, 16 Tex. App. 150.

4 FLA. — Scarlett v. State, 25 Fla. 717. IND.—Clifford v. State, 56 Ind. 249; Bonnell v. State, 64 Ind. 498. KY.—Com. v. Haughey, 60 Ky. (3 Metc.) 223; Glackan v. Com., 60 Ky. (3 Metc.) 232. LA.—State v. Colly, 39 La. Ann. 841. N. C.—State v. Phifer, 65 N. C. 321; State v. Dickson, 88 N. C. 643; State v. Mangum, 116 N. C. 998, 21 S. E. 189. ENG.—R. v. Douglas, 1 Moo. C. C. 462; R. v. Henshaw, 9 Cox C. C. 472.

1 IOWA—State v. McConkey, 49 Iowa 499. MICH.—People v. Jacobs, 35 Mich. 36, 2 Am. Cr. Rep. 102. MISS.—State v. Dodenhoff, 88 Miss. 277, 40 So. 641. N. H.—State v. King, 67 N. H. 219, 34 Atl. 461. OHIO—Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291, 2 Am. Cr. Rep. 85. TEX.—Baker v. State, 14 Tex. App. 332. WASH.—State v. Ryan, 34 Wash. 597, 76 Pac. 90. FED. — In re Strauss, 63 C. C. A. 99, 126 Fed. 327.

An averment charging that the firm "relied on such false representations" is a sufficient allega-

plied from such allegations that he was induced to part with his money or other property by such false representations.[2] However, there is a line of cases which seem to hold—and it would probably be the better practice to so plead—that there must be some sort of an allegation that the person defrauded relied on the false pretenses as true;[3] that he was deceived thereby;[4] that by means of such false pretenses he was induced to part with the pos-

tion that they believed them to be true.—State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256.

The statement that accused by means of the false pretenses obtained the money is a sufficient allegation of the fact.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

In Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291, 2 Am. Cr. Rep. 85, Gilmore, J., in discussing the objection that the indictment was insufficient because it did not allege that the party defrauded relied upon the false pretenses and representations, and was induced by means thereof to part with his property, said: "We have been referred to quite a number of authorities supposed to support this objection, which, on examination, are found not to do so. Two questions are discussed in them. First, as to whether the offenses charged are within the statute, of which no notice need be taken; and second, whether the indictment in the case then under consideration was good. And in not a single case examined is it found that an indictment, otherwise good, was held bad for a want of the averments in question,"—citing and analyzing, and showing to be in harmony with his decision, the cases of State v. Philbrick, 31 Me. 401, and Com. v. Strain, 51 Mass. (10 Metc.) 521.

2 State v. McConkey, 49 Iowa 499; People v. Jacobs, 35 Mich. 36, 2 Am. Cr. Rep. 102; State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

Where the indictment charges that the accused obtained money by means of certain false representations there is sufficient implication that the prosecutor was induced to part with his money through his reliance on the representations.—State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023.

3 FLA.—Strickland v. State, 51 Fla. 129, 40 So. 178. IND.—Jones v. State, 50 Ind. 473, 1 Am. Cr. Rep. 218. MONT.—State v. Phillips, 36 Mont. 112, 92 Pac. 299. N. Y.—Clark v. People, 2 Lans. 329. OKLA.—Taylor v. Territory, 2 Okla. Cr. 1, 99 Pac. 628. TEX.—Johnson v. State, 57 Tex. Cr. Rep. 347, 123 S. W. 143.

Where an attempt is charged it is not necessary to allege that the person intended to be defrauded believed the representations, that being immaterial.—State v. Phillips, 36 Mont. 112, 92 Pac. 299.

4 Cook v. State, 51 Fla. 36, 40 So. 490; Strickland v. State, 51 Fla. 129, 40 So. 178.

session of the property acquired by the accused,[5] and that an indictment or information which fails so to allege will be held to be bad on a motion to quash,[6] or on a general demurrer.[7]

[5] See, among other cases discussing this question pro and con: ALA.—Cowles v. State, 50 Ala. 454; Copeland v. State, 97 Ala. 30, 12 So. 181; Tennyson v. State, 97 Ala. 78, 12 So. 391. CONN.—State v. Penley, 27 Conn. 587. FLA.—Ladd v. State, 17 Fla. 215; Pendry v. State, 18 Fla. 191. IND.—Johnson v. State, 11 Ind. 481; State v. Orvis, 13 Ind. 569; Todd v. State, 31 Ind. 514; Jones v. State, 50 Ind. 473; Clifford v. State, 56 Ind. 245; Wagoner v. State, 90 Ind. 504; State v. Williams, 103 Ind. 235, 6 **Am. Cr. Rep.** 256, 2 N. E. 585; State v. Connor, 110 Ind. 469, 11 N. E. 454. IOWA — State v. Dowe, 27 Iowa 273, 1 **Am. Rep.** 271; State v. Neimeier, 66 Iowa 634, 24 N. W. 247. KAN.—State v. Metsch, 37 Kan. 222, 15 Pac. 251. ME.—State v. Philbrick, 31 Me. 401. MASS.—Com. v. Harley, 48 Mass. (7 Metc.) 462; Com. v. Strain, 51 Mass. (10 Metc.) 521; Com. v. Lannan, 83 Mass. (1 Allen) 590; Com. v. Goddard, 86 Mass. (4 Allen) 321; Com. v. Jeffries, 89 Mass. (7 Allen) 548, 83 **Am. Dec.** 712; Com. v. Lincoln, 93 Mass. (11 Allen) 233; Com. v. Hooper, 104 Mass. 549; Com. v. Dean, 110 Mass. 64; Com. v. Coe, 115 Mass. 481; Com. v. Parmenter, 121 Mass. 354; Com. v. Stevenson, 127 Mass. 446; Com. v. Howe, 132 Mass. 250; Com. v. Lee, 149 Mass. 179, 21 N. E. 299; Com. v. Dunleay, 153 Mass. 330, 26 N. E. 870. MISS.—Enders v. People, 20 Mich. 233; People v. Cline, 44 Mich. 290, 6 N. W. 671; People v. Brown, 71 Mich. 296, 38 N. W. 916. MINN.—State v. Thaden, 43 Minn. 325, 45 N. W. 447; State v. Butler, 47 Minn. 483, 50 N. W. 532. MISS. — Denley v. State, 12 So. 698. MO. — State v. Bonnell, 46 Mo. 395; State v. Evers, 49 Mo. 542; State v. Saunders, 63 Mo. 482; State v. Vorback, 66 Mo. 168; State v. Smallwood, 68 Mo. 192. MONT.—Territory v. Underwood, 8 Mont. 131. NEB.—Cowan v. State, 22 Neb. 519, 35 N. W. 405. N. Y.—People v. Rice, 128 N. Y. 649, affirming 13 N. Y. Supp. 161; People v. Higbie, 66 Barb. 131; People v. Jefferey, 82 Hun 409, 9 N. Y. Cr. Rep. 419, 31 N. Y. Supp. 267; Clark v. People, 2 Lans. 329; People v. Herrick, 13 Wend. 88; People v. Gates, 13 Wend. 311; People v. Conger, 1 Wheel. Cr. Cas. 448. ORE.—State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023. TENN.—State v. Tate, 25 Tenn. (6 Humph.) 424. TEX. — Ervine v. State, 11 Tex. App. 536; Lutton v. State, 14 Tex. App. 518; Mathena v. State, 15 Tex. App. 473; Hightower v. State, 23 Tex. App. 451, 5 S. W. 343; Curtis v. State, 31 Tex. Cr. Rep. 39, 19 S. W. 604. W. VA.—State v. Hurst, 11 W. Va. 54, 3 **Am. Cr. Rep.** 100. WIS.—State v. Green, 7 Wis. 676. WYO. — Haines v. Territory, 3 Wyo. 168. ENG.—R. v. Reed, 7 Car. & P. 849, 32 Eng. C. L. 904.

[6] Jones v. State, 50 Ind. 473, 1 **Am. Cr. Rep.** 218.

[7] Taylor v. Territory, 2 Okla. Cr. Rep. 1, 99 Pac. 628.

§ 641. —— Representations as inducing cause. An indictment or information charging obtaining money or other property by false pretenses must show,[1] and should directly aver,[2] that the injured party was induced to part with his money or property because of the false pretenses on the part of the accused.[3] It seems that where the facts recited in the indictment or information show upon their face that they are capable of defrauding, and it is charged that the accused did in fact, intentionally and wickedly defraud, then it is unnecessary to aver that the pretenses were capable of defrauding,[4] and that the indictment or information need not show that the person defrauded acted as a prudent man,[5] although there are authorities to the contrary.[6]

Inducement and reliance required to attach criminal liability to the accused making the false representations

1 **Not necessary to allege in express terms,** according to some authorities, that the party defrauded relied upon the false representations made, but there must be an allegation that he was induced by such representations to part with his property.—People v. Jacobs, 35 Mich. 36, 2 **Am. Cr. Rep.** 102.

2 **"Relied on such false representations,"** is a sufficient showing that the party defrauded believed such representations, and that they were the inducing cause. See State v. Williams, 103 Ind. 235, 6 **Am. Cr. Rep.** 256, 2 N. E. 585.

3 FLA.—Ladd v. State, 17 Fla. 215; Pendry v. State, 18 Fla. 191. IND.—State v. Williams, 103 Ind. 235, 6 **Am. Cr. Rep.** 256, 2 N. E. 585. MICH.—Enders v. People, 20 Mich. 233. MISS.—State v. Freeman, 103 Miss. 764, 60 So. 774. N. J.—State v. Tomlin, 29 N. J. L. (5 Dutch.) 13. N. Y.—Clark v. People, 2 Lans. 329. TEX.—Ervin v. State, 11 Tex. App. 536; Hightower v. State, 23 Tex. App. 451, 5 S. W. 343. W. VA.—State v. Hurst, 11 W. Va. 54, 3 **Am. Cr. Rep.** 100. WIS.—State v. Green, 7 Wis. 676.

A contrary doctrine is maintained in Norris v. State, 25 Ohio St. 217, 18 **Am. Rep.** 291, 2 **Am. Cr. Rep.** 85, and the line of cases cited in the first part of § 640, supra.

4 Meek v. State, 117 Ala. 116, 23 So. 155; Com. v. Beckett, 119 Ky. 817, 27 Ky. L. Rep. 265, 115 **Am. St. Rep.** 285, 68 **L. R. A.** 638, 84 S. W. 758.

5 People v. Henninger, 20 Cal. App. 79, 128 Pac. 352.

Guilt of the accused does not depend upon the degree of folly or credulity of the party defrauded.—People v. Cummings, 123 Cal. 269, 55 Pac. 898.

6 See, supra, § 638, authorities in footnote 4.

complained of, is not a constant quantity; some of the decisions, under the peculiarities of local statutes, hold that the false pretenses set out in the indictment or information must be such as "had a tendency" to induce the party defrauded to part with his money or property;[7] others hold that the false pretenses must be the sole inducing cause.[8] The better doctrine is thought to be the middle course of decision, which holds that the indictment or information will be sufficient when it appears therefrom that the false pretenses or representations made by the accused were the decisive cause, either in and of themselves, or in co-operation with other matters, in influencing the party defrauded to part with his money or other property,[9] and that this fact may be inferred from

7 See Roper v. State, 58 N. J. L. 420, 33 Atl. 969.

False token must have been calculated to deceive according to the capacity of the person to whom presented to detect its falsity under the circumstances.—Com. v. Beckett, 119 Ky. 817, 115 **Am. St. Rep.** 285, 68 **L. R. A.** 638, 27 Ky. L. Rep. 265, 84 S. W. 758. See, also, Com. v. Ferguson, 135 Ky. 39, 24 **L. R. A.** (N. S.) 1104, 121 S. W. 967; McDowell v. Com., 136 Ky. 12, 123 S. W. 313.

A false token that might be calculated to deceive a blind man, or a man in the dark, or a child, would not necessarily be a false token when used upon one who could see and who had mature judgment. — Peckham v. State, (Tex. Cr.) 28 S. W. 532.

False representation or false token not within the statute unless calculated to deceive is true in a limited sense, only, "for the statute was not designed to protect only the ordinarily wary and prudent, who, in spite of their vigilance, might be overreached by the clever rogue, but must have been aimed at all scoundreldom who, by false statements or false tokens, succeeded in hoodwinking the unwary, or even the foolish, into parting with their property." —Com. v. Beckett, 119 Ky. 817, 115 **Am. St. Rep.** 285, 68 **L. R. A.** 638, 27 Ky. L. Rep. 265, 84 S. W. 758.

Absurd and irrational pretenses, not ordinarily calculated to deceive one of the intellect and capacity of one upon whom it may have been practiced, it seems, will not be a false pretense within the statute.—See Woodbury v. State, 69 Ala. 242, 44 **Am. Rep.** 515; People v. Crissie, 4 Den. (N. Y.) 525.

8 People v. Conger, 1 Wheel. Cr. Cas. (N. Y.) 448; People v. Dalton, 2 Wheel. Cr. Cas. (N. Y.) 161.

9 See: MASS.—Com. v. Drew, 36 Mass. (19 Pick.) 179. MISS.—Smith v. State, 53 Miss. 513. N. J. — State v. Thatcher, 35 N. J. L. (6 Vr.) 445. N. Y.—People v. Haynes, 11 Wend. 557; People

an allegation that the defrauded person was induced by the false pretenses to consummate the transaction and part with his property.[10]

Connection between the false pretenses and the payment of the price contracted or the delivery of the property must be set forth in the indictment or information,[11] and must be such as to show why or how the person defrauded was induced by means of the false pretenses to

v. Herrick, 13 Wend. 87. ENG.—R. v. Eagleton, 33 Eng. L. & Eq. 540.

10 See, supra, § 640, and particularly authorities in footnote 1; also: CONN.—State v. Penley, 27 Conn. 587. IND.—Clifford v. State, 56 Ind. 245; State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256, 2 N. E. 585. IOWA—State v. McConkey, 49 Iowa 499. MICH.—Enders v. People, 20 Mich. 233; People v. Jacobs, 35 Mich. 36, 2 Am. Cr. Rep. 102. N. J.—State v. Vanderbilt, 27 N. J. L. (3 Dutch.) 328. N. Y.—People v. Rice, 128 N. Y. 649, affirming 13 N. Y. Supp. 161; People v. Jefferey, 82 Hun 409, 9 N. Y. Cr. Rep. 419, 31 N. Y. Supp. 267. ORE.—State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023. TEX.—Baker v. State, 14 Tex. App. 332. W. VA.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

11 ALA.—Copeland v. State, 97 Ala. 30, 12 So. 181. ARK.—Roberts v. State, 85 Ark. 435, 108 S. W. 842. CAL.—People v. White, 7 Cal. App. 99, 93 Pac. 683; People v. Kahler, 26 Cal. App. 449, 147 Pac. 228; People v. Canfield, 28 Cal. App. 792, 154 Pac. 33. FLA.—Jones v. State, 22 Fla. 532. ILL.—Simmons v. People, 187 Ill. 327, 58 N. E. 384, reversing 88 Ill. App. 334. IND.—State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256, 2 N. E. 585; State v. Miller, 153 Ind. 229, 15 Am. Cr. Rep. 231, 54 N. E. 808; Campbell v. State, 154 Ind. 309, 56 N. E. 665. ME.—State v. Philbrick, 31 Me. 401. MASS.—Com. v. Strain, 51 Mass. (10 Metc.) 521; Com. v. Dunleay, 153 Mass. 330, 26 N. E. 870. MICH.—People v. McAllister, 49 Mich. 12, 12 N. W. 891; People v. Brown, 71 Mich. 296, 38 N. W. 916. MISS.—Denley v. State, 12 So. 698. MO.—State v. Clay, 100 Mo. 571, 13 S. W. 827. NEB.—Moline v. State, 67 Neb. 164, 93 N. W. 228. N. J.—Roper v. State, 58 N. J. L. 420, 33 Atl. 969. N. Y.—People v. Gates, 13 Wend. 311. N. C.—State v. Fitzgerald, 18 N. C. 408. OHIO—Redmond v. State, 35 Ohio St. 81. TEX.—State v. Baggerly, 21 Tex. 757; Curtis v. State, 31 Tex. Cr. Rep. 39, 19 S. W. 604; Hurst v. State, 39 Tex. Cr. Rep. 196, 45 S. W. 573.

There must be alleged some natural connection between the false pretenses and the delivery of the money or property, and a failure to so allege is a defect that is not cured by verdict.—People v. White, 7 Cal. App. 99, 93 Pac. 683.

It may, however, be sufficient to aver such facts from which the connection between the pretense

part with his money or property,[12] it being insufficient merely to allege that the representations induced the defrauded party to part with his money or property,[13] although there are well-reasoned cases holding it to be sufficient simply to aver the obtaining of the property by means of the false pretenses.[14]

§ 642. —— Damage to or loss by prosecutor. We have already seen that it must appear from the indictment or information that the false pretenses were the means by which accused obtained the money or other property,[1] and that it is insufficient to allege that the person defrauded was, by reliance on the pretenses, induced

and the obtaining of the property can be inferred.—People v. Canfield, 28 Cal. App. 792, 154 Pac. 33.

12 ILL.—Simmons v. People, 187 Ill. 327, 58 N. E. 384. IND.—Jones v. State, 50 Ind. 473, 1 **Am. Cr. Rep.** 218; Johnson v. State, 75 Ind. 553. MICH.—Enders v. People, 20 Mich. 233. TEX.—State v. Baggerly, 21 Tex. 757. WIS.—State v. Green, 7 Wis. 676.

Where the contract into which the person was sought to be defrauded was not set out in the indictment, it will be held bad on a motion to quash. — Jones v. State, 50 Ind. 473, 1 **Am. Cr. Rep.** 218.

13 State v. Whedbee, 152 N. C. 770, 27 **L. R. A.** (N S.) 363, 67 S. E. 60.

14 Com. v. Hulbert, 53 Mass. (12 Metc.) 446; State v. Butler, 47 Minn. 483, 50 N. W. 532; Norris v. State, 25 Ohio St. 217, 18 **Am. Rep.** 291, 2 **Am. Cr. Rep.** 85; State v. Bokien, 14 Wash. 403, 44 Pac. 889.

1 See, supra, § 634; also: ALA.—Tennyson v. State, 97 Ala. 78, 12 So. 391. FLA.—Jones v. State, 22 Fla. 532; Connor v. State, 29 Fla. 455, 30 **Am. St. Rep.** 176, 10 So. 30. GA. — Jackson v. State, 118 Ga. 125, 44 S. E. 833. IND.—Abbott v. State, 59 Ind. 70; State v. O'Connor, 110 Ind. 469, 11 N. E. 454. MISS.—State v. Mortimer, 82 Miss. 443, 34 So. 214. MO.—State v. Evers, 49 Mo. 542; State v. Saunders, 63 Mo. 482; State v. Pickett, 174 Mo. 663, 74 S. W. 844. NEV.—In re Waterman, 29 Nev. 288, 13 **Ann. Cas.** 926, 11 **L. R. A.** (N. S.) 424. OHIO—Horton v. State, 85 Ohio St. 13, **Ann. Cas.** 1913B, 90, 39 **L. R. A.** (N. S.) 423, 96 N. E. 797. OKLA.—Taylor v. Territory, 2 Okla. Cr. 1, 99 Pac. 628. TEX.—White v. State, 3 Tex. App. 605; Mathena v. State, 15 Tex. App. 473; Hightower v. State, 23 Tex. App. 451, 5 S. W. 343; Nasets v. State, (Tex. Cr.) 32 S. W. 698; Cummings v. State, 36 Tex. Cr. Rep. 152, 36 S. W. 266. WIS.—State v. Green, 7 Wis. 676.

to part with and did part with his ownership.[2] It is held in some jurisdictions that the indictment or information need not charge an actual pecuniary loss or damage to the person to whom the false pretenses were presented,[3] for the reason that one may be actually defrauded without having suffered a pecuniary loss when he received something substantially different from that which he would have received had the representations in relation thereto been true.[4] However, there are other cases which hold that the indictment or information must show that the deceitful means caused pecuniary loss to the prosecutor.[5] The better doctrine is thought to be that the indictment or information will be insufficient which fails to show that the prosecutor suffered some legal injury, as that term is understood in the law of false pretense.[6] However, it is not essential that legal injury be alleged in specific terms; if the allegations are such as to warrant the inference of injury, it will be sufficient.[7] Thus, an averment that by means of false pretenses charged, accused secured the signature of the prosecutor to a deed of grant

2 Connor v. State, 29 Fla. 455, 30 Am. St. Rep. 126, 10 So. 891.

Insufficient allegation: An allegation that the person defrauded, or owner of the property, or his agent, was, by reason of and in reliance upon false pretenses of a defendant, induced to part with and did part with their ownership in the money or other property is not equivalent to an allegation that the defendants obtained the money by or through such pretenses or at all.—Connor v. State, 29 Fla. 455, 30 Am. St. Rep. 126, 10 So. 891.

3 Stoltz v. People, 59 Colo. 342, 148 Pac. 865; West v. State, 63 Neb. 257, 88 N. W. 503; People v. Higbee, 66 Barb. (N. Y.) 131.

4 Stoltz v. People, 59 Colo. 342, 148 Pac. 865.

5 Busby v. State, 120 Ga. 858, 48 S. E. 314; Bonnell v. State, 64 Ind. 498; Graves v. State, 31 Tex. Cr. 65, 19 S. W. 895.

An averment that it was a "warranty deed" to which it was sought to falsely obtain the signature shows that it may prejudice the prosecutor. — State v. Butler, 47 Minn. 483, 50 N. W. 532.

6 Bonnell v. State, 64 Ind. 498; West v. State, 63 Neb. 257, 88 N. W. 503; Graves v. State, 31 Tex. Cr. Rep. 65, 19 S. W. 895.

7 West v. State, 63 Neb. 257, 88 N. W. 503.

with warranty, sufficiently shows that the person signing might be prejudiced thereby;[8] and where the charge is of having obtained a signature to a promissory note by means of false pretenses, it is not necessary to allege that the party signing was injured, for the reason that it sufficiently appears in the indictment that the promissory note, on its face, was an instrument calculated to prejudice the prosecutor.[9]

§ 643. Property, etc., obtained—Description of. An indictment or information charging the accused with having obtained money or other property, or the signature of the party defrauded, must contain a description of the property alleged to have been obtained, or the instrument alleged to have been signed,[1] and this description must be of sufficient certainty and particularity to enable

8 State v. Butler, 47 Minn. 483, 50 N. W. 582.

9 People v. Crissie, 4 Den. (N. Y.) 525.

1 FLA.—Ladd v. State, 17 Fla. 215. IND.—Markle v. State, 3 Ind. 535; Smith v. State, 33 Ind. 159. MASS.—Com. v. Walker, 108 Mass. 309; Com. v. Howe, 132 Mass. 250. MO.—State v. Crooker, 95 Mo. 389, 8 S. W. 422; State v. Clay, 100 Mo. 571, 13 S. W. 827; State v. Stowe, 132 Mo. 199, 33 S. W. 799. N. J.—Hagerman v. State, 54 N. J. L. 104, 23 Atl. 357. N. Y.—People v. Parish, 4 Den. 153; People v. Conger, 1 Wheel. Cr. Cas. 448. N. C.—State v. Burrows, 33 N. C. (11 Ired. L.) 477; State v. Reese, 83 N. C. 637. OHIO—Redmond v. State, 35 Ohio St. 81. PA.—Com. v. France, 2 Brews. 568. TEX.—Rosales v. State, 22 Tex. App. 673. VA.—Leftwich v. Com., 61 Va. (20 Gratt.) 716. W. VA.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100. WIS.—State v. Black, 75 Wis. 490, 44 N. W. 635.

Contract under which property obtained being simply a means to the end desired, the property obtained, and not the contract under which obtained, should be described in the indictment.—People v. Martin, 102 Cal. 558, 36 Pac. 952.

Copy of bill containing names, quantities, prices, and amount, in figures, using abbreviations known to the trade only, is insufficient description.—People v. Conger, 1 Wheel. Cr. Cas. (N. Y.) 448.

Compare: In re Conger, 4 City Hall Rec. (N. Y.) 65.

House moldings, inside doors, corner blocks, and finishing boards for houses, held to be a sufficient description of the property obtained.—Hagerman v. State, 54 N. J. L. 104, 23 Atl. 357.

the accused to make his defense, and the court and jury to determine whether the property disclosed in the evidence is the property set out in the indictment.[2] Some of the cases hold that the description must be made with the same particularity that would be required in an indictment for a larceny of such property;[3] other cases are to the effect that the indictment or information may describe the property in the language used by the accused in making the false pretenses.[4] However, the description of the property should be reasonably certain,[5] and as particular as the case will admit of.[6] This de-

2 People v. Conger, 1 Wheel. Cr. Cas. (N. Y.) 448; State v. Reese, 83 N. C. 637; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

3 ARK.—Maxey v. State, 85 Ark. 499, 108 S. W. 1135. FLA.—Sullivan v. State, 44 Fla. 155, 32 So. 106. IND.—Markle v. State, 3 Ind. 535; Smith v. State, 33 Ind. 159. NEV.—In re Waterman, 29 Nev. 288, 13 Ann. Cas. 926, 11 L. R. A. (N. S.) 424, 89 Pac. 291. N. Y.—People v. Conger, 1 Wheel. Cr. Cas. 448. N. C.—State v. Reese, 83 N. C. 637. OHIO—Redmond v. State, 35 Ohio St. 81. VA.—Leftwich v. Com., 61 Va. (20 Gratt.) 716. W. VA.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100. WIS.—State v. Kube, 20 Wis. 217, 91 Am. Dec. 390; State v. Black, 75 Wis. 490, 44 N. W. 635.

Description of the goods as "a large amount of dry and fancy goods" of a stated value is too indefinite.—Appleby v. State, 63 N. J. L. 526, 42 Atl. 847.

Describing the property obtained as "a certain lot of dry goods" is insufficient.—Redmond v. State, 35 Ohio St. 81.

A description of the money as "divers United States treasury notes and divers national bank notes, the denomination of which treasury notes and national bank notes were to the jurors unknown, amounting in the whole to the sum of one hundred and fifty-eight dollars, and of the value of one hundred and fifty-eight dollars, the money and property of the said B. R. C.," is sufficient.—State v. Hurst, 11 W. Va. 100, 3 Am. Cr. Rep. 100.

4 State v. Hubbard, 170 Mo. 350, 70 S. W. 883; State v. Loesch, (Mo.) 180 S. W. 875.

Description of property forms a part of the false pretenses and representations, and the indictment may set out the description of the property exactly as made by the defendant, regardless of any uncertainty therein.—People v. Nesbitt, 102 Cal. 327, 36 Pac. 654.

5 Com. v. France, 2 Brews. (Pa.) 568.

6 Hagerman v. State, 54 N. J. L. 104, 23 Atl. 357; State v. Reese, 83 N. C. 637; Baker v. State, 31 Ohio St. 314; R. v. McQuarrie, 22 Up. Can. Q. B. 600.

scription need not be by the legal name of the article,[7] and should not be in the alternative.[8]

§ 644. —— Money, bank-bills, etc. Where the property charged in an indictment or information to have been obtained by false pretenses, consists of money, either coin or bank-bills, there is a line of cases holding that the money must be described with the certainty and particularity required in an indictment or information charging the larceny of such money;[1] but the weight of decision, and the better doctrine, is to the effect that it is sufficient to describe the money as a certain amount of lawful money,[2] without setting out the character, denomi-

7 State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

8 Com. v. France, 2 Brews. (Pa.) 568.

1 ARK.—Barton v. State, 29 Ark. 68; Treadaway v. State, 37 Ark. 443; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103 (this point omitted by editor); Cain v. State, 58 Ark. 43, 22 S. W. 954. FLA.—Sullivan v. State, 44 Fla. 155, 32 So. 106. IND.—Smith v. State, 33 Ind. 159. MO.—State v. Kroeger, 74 Mo. 530. VA.—Leftwich v. Com., 61 Va. (20 Gratt.) 716.

2 ALA.—Oliver v. State, 37 Ala. 134. MASS.—Com. v. Lincoln, 93 Mass. (11 Allen) 233. N. Y.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178; People v. Smith, 5 Park. Cr. Rep. 490. N. C.—State v. Reese, 83 N. C. 637. WASH.—State v. Knowlton, 11 Wash. 512, 39 Pac. 966. W. VA.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100. ENG.—R. v. Brown, 2 Cox C. C. 348.

"A package of money containing the sum of sixty dollars in bank-bills," held to be a sufficient description, bank-bills which are current as a medium of exchange being money.—State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

It is sufficient to describe the money as of a certain sum, alleging it to be of a kind and description unknown to the grand jury.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178.

By statute in Virginia it is sufficient to describe the money as "United States currency," or its equivalent, "national currency of the United States." This statute was passed in order to get around the decision of the supreme court in the case of Leftwich v. Com., 61 Va. (20 Gratt.) 716; Dull v. Com., 66 Va. (25 Gratt.) 965.

"Divers United States treasury notes and national bank-notes, and fractional currency notes, amounting in the whole to one hundred fifty-eight dollars," etc., held to be good.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

See Com. v. Swinney, 3 Va. (1 Va. Cas.) 146, 5 Am. Dec. 512, in which it was held that a descrip-

nation, or kind of money obtained,[3] but it must be described as money and not as "goods."[4] There are also cases holding that the indictment or information must state whether the money was delivered to the accused as a loan, a gift, or otherwise,[5] but it is thought that the better doctrine is that the nature of the possession need not be stated.[6]

§ 645. —— WRITTEN INSTRUMENTS. We have already discussed the methods of describing in an indictment or information, charging the procuring of money or property by false pretenses, a written instrument which is the basis of the false pretenses and of the fraud complained of.[1] Where the obtaining of a signature to a written instrument is the injury complained of, the same as in those cases in which the thing obtained is a written instrument, the instrument need not be set out in hæc verba,[2] it being sufficient to indicate the nature, char-

tion of "one hundred dollars in a note of the Bank of Virginia," was not good on the ground, it would seem, that the bank-note was not money in the sense in which that word is used in statutes relating to false pretenses.

3 Com. v. Lincoln, 93 Mass. (11 Allen) 233; State v. Knowlton, 11 Wash. 512, 39 Pac. 966.

A statement in the indictment that the number of coins or bank-notes stolen were to the grand jurors unknown would dispense with the statement of their number and render the indictment good.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100.

Thus in Haskins v. People, 16 N. Y. 344, the description of the property stolen in the indictment was, "bank-bills of banks, to the jurors unknown, and of a number and denomination to the jurors unknown, of the value of six hundred dollars; silver coin, current money of the state of New York, of a denomination to the jurors unknown, of the value of fifty dollars; gold coin, current money of the state of New York, of a denomination to the jurors unknown, of the value of fifty dollars,"—and this was held by the court to be sufficient description.

4 Schleisinger v. State, 11 Ohio St. 669.

Certificate of deposit is not money, and description of it as such will be bad.—Com. v. Howe, 132 Mass. 250.

5 Com. v. Adley, 1 Pears. (Pa.) 62.

6 State v. Williams, 14 Mo. App. 591.

1 See, supra, § 634.

2 State v. Carter, 112 Iowa 115, 83 N. W. 715; Com. v. Coe, 115

acter and contents thereof;[3] and when the substance of the instrument can not be set out, an excuse or reason therefor must be alleged.[4] That the indictment may be good, however, there must be a description of sufficient definiteness and certainty to identify the instrument when it is introduced in evidence.[5] Where the indictment charges the obtaining of a "bill of sale or mortgage of personal property," it must give the purport thereof, or set it out, in order that there can be no mistake as to the identification of the instrument with that produced in evidence;[6] but where a check given was only a step in the transaction, or an incident of the offense, a particular description of the check is not indispensable.[7]

§ 646. —— Ownership of money or property. An indictment or information charging obtaining money or other property by means of false pretenses, must correctly state the ownership, in some person, of such money

Mass. 481; People v. Peckens, 12 App. Div. (N. Y.) 626, 43 N. Y. Supp. 1160; affirmed, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883.

3 Oliver v. State, 37 Ala. 134; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

The instrument ought not to be described by name alone. Its substance or tenor should be shown.—Langford v. State, 45 Ala. 26.

Where the offense was committed by means of fraudulent bills of costs the indictment is not defective for failing to set out such bills of cost.—State v. Morgan, 109 Tenn. 157, 69 S. W. 970.

A description of the check as that of a named person "upon the Commercial Bank of Cincinnati for the sum of thirty-four dollars and fifty-one cents, which check was then and there of the value of thirty-four dollars and fifty-one cents," does not sufficiently describe the check. — Bonnell v. State, 64 Ind. 498.

The description as "a check and order for the payment of money" is sufficient. — Com. v. Coe, 115 Mass. 481.

Particulars of the contract by which the goods or money were obtained need not be set out.—Com. v. Blanchette, 157 Mass. 486, 32 N. E. 658.

4 Bonnell v. State, 64 Ind. 498.

5 Bonnell v. State, 64 Ind. 498; State v. Blauvelt, 38 N. J. L. (9 Vr.) 306; State v. Baggerly, 21 Tex. 757.

6 State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270.

7 State v. Baker, 57 Kan. 541, 46 Pac. 947.

or other property alleged to have been so obtained,[1] or

[1] FLA.—Ladd v. State, 17 Fla. 215; Moulie v. State, 37 Fla. 321, 20 So. 554; Cook v. State, 51 Fla. 36, 40 So. 490; Strickland v. State, 51 Fla. 129, 40 So. 178; Webb v. State, 69 Fla. 697, 68 So. 943. GA.—O'Neal v. State, 10 Ga. App. 474, 73 S. E. 696; Oliver v. State, 15 Ga. App. 452, 83 S. E. 641. ILL.—Thompson v. People, 24 Ill. 60, 76 Am. Dec. 733; DuBois v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658. IND.—State v. Smith, 8 Blackf. 489; Leobold v. State, 33 Ind. 484; Holly v. State, 43 Ind. 509; State v. Miller, 153 Ind. 229, 15 Am. Cr. Rep. 231, 54 N. E. 808. IOWA—State v. Jackson, 128 Iowa 543, 105 N. W. 51; State v. Clark, 141 Iowa 297, 119 N. W. 719; State v. Kiefer, 172 Iowa 306, 151 N. W. 440. MD. — State v. Blizzard, 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270. MISS.—State v. Hubanks, 99 Miss. 775, 56 So. 163. MO.—State v. Horn, 93 Mo. 190, 6 S. W. 96, overruling State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; State v. Clay, 100 Mo. 571, 13 S. W. 827; State v. Stowe, 132 Mo. 199, 33 S. W. 799; State v. Vandenburg, 159 Mo. 230, 60 S. W. 79, 160 Mo. 42, 60 S. W. 1134. N. M.—Terr. v. Hubbell, 13 N. M. 579, 13 Ann. Cas. 848, 86 Pac. 747. N. Y.—People v. Krummer, Seld. 549, 4 Park. Cr. Rep. 217. PA.—Com. v. Graham, 1 Pa. Co. Ct. 882, 3 Kulp 289. TEX. — State v. Vickey, 19 Tex. 326; State v. Levi, 41 Tex. 563; Washington v. State, 41 Tex. 583; Mays v. State, 28 Tex. App. 484, 13 S. W. 787. VT.—State v. Lathrop, 15 Vt. 279. W. VA.—State v. Cutlip, 88 S. E. 829. WIS. — Owens v. State, 83 Wis. 496, 53 N. W. 736. WYO.—Martins v. State, 17 Wyo. 319, 22 L. R. A. (N. S.) 645, 98 Pac. 709. CANADA—R. v. Walker, 10 Up. Can. Q. B. 465. ENG.—R. v. Norton, 8 Car. & P. 196, 34 Eng. C. L. 686; R. v. Parker, 3 Q. B. 292.

Thus, an indictment or information charging that accused, with intent to defraud another, and, to induce him to purchase specified property, made certain false pretenses as to the ownership of such property, and did thereby obtain from him ten dollars, the ownership of the money not being averred, and it not being averred that the sale was consummated, will be insufficient.—State v. Miller, 153 Ind. 229, 15 Am. Cr. Rep. 231, 54 N. E. 808. See State v. Williams, 103 Ind. 235, 6 Am. Cr. Rep. 256, 2 N. E. 585; Com. v. Strain, 51 Mass. (10 Metc.) 521.

An allegation that defendant "did unlawfully, fraudulently, falsely, and feloniously obtain from Ed Haglin fifty-three dollars and fifty-four cents gold, silver and paper money of the value of fifty-three dollars and fifty-four cents," etc., sufficiently alleges ownership and description of the money.—Silvie v. State, 177 Ark. 108, 173 S. W. 857.

An erroneous allegation as to ownership is immaterial. — Hennessy v. Com., 88 Ky. 301, 11 S. W. 13.

Where the ownership is not alleged there must be an allegation of a legal excuse for the omission. —Terr. v. Hubbell, 13 N. M. 579, 13 Ann. Cas. 848, 86 Pac. 747.

Where the ownership is not al-

present a sufficient excuse for not so doing;[2] and a failure to so allege will be fatal.[3] There is authority to the effect that the indictment or information will be sufficient in those cases where a statement of ownership can be gathered from the whole instrument, without a specific allegation as to such ownership;[4] but other cases hold that this will not be sufficient, because the ownership is a material fact and should be directly averred.[5] The ownership should be laid in some person who could maintain a civil action for the possession of the property.[6] It has been said that the ownership may be laid in a person having authority to sell the property;[7] or in a person who was in possession of the property at the time;[8] or in a mortgagee of the property;[9] or in any one of the partners of a copartnership;[10] or in a named company, and when the ownership is laid in a company, it is not necessary to allege whether that company is a corporation

leged there must be averred an excuse for not alleging it.—State v. Lathrop, 15 Vt. 279.

By statute in North Carolina it is unnecessary to allege ownership.—State v. Ridge, 125 N. C. 658, 34 S. E. [illegible].

2 Territory v. Hubbell, 13 N. M. 579, 13 Ann. Cas. 848, 86 Pac. 747; State v. Lathrop, 15 Vt. 279.

3 Jenkins v. State, 97 Ala. 66, 12 So. 110; Washington v. State, 41 Tex. 583; R. v. Martin, 8 Ad. & E. 481, 35 Eng. C. L. 443; R. v. Parker, 2 Gale & D. 709.

4 People v. Skidmore, 123 Cal. 267, 55 Pac. 984; McClintock v. State, 98 Neb. 158, 152 N. W. 378; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; Griggs v. United States, 84 C. C. A. 596, 158 Fed. 572.

Where all the facts are set out in the indictment and the ownership can be gathered therefrom as fully as if there had been a direct allegation, the indictment is sufficient. — People v. Skidmore, 123 Cal. 267, 55 Pac. 984.

5 Moulie v. State, 37 Fla. 321, 20 So. 554.

6 Jones v. State, 22 Fla. 532.

7 Com. v. Blanchette, 157 Mass. 486, 32 N. E. 658.

8 Fields v. State, 121 Ala. 16, 25 So. 726; May v. State, 15 Tex. 430; R. v. Dent, 1 Car. & K. 249, 47 Eng. C. L. 249.

An article of property obtained by means of a counterfeit piece of coin, the ownership of the property need not be laid in the person from whom the article was obtained.—State v. Boon, 49 N. C. (4 Jones L.) 463.

9 Barber v. People, 17 Hun (N. Y.) 366.

10 Gardner v. State, 4 Ala. App. 131, 58 So. 1001.

or a copartnership;[11] or in a county officer, where the money is secured by the accused to be paid out by such officer on a false and fraudulent warrant,[12] and the like; and in those cases in which the ownership is not known, it may be alleged that the property belonged to a party to the grand jury unknown.[13]

Ownership immaterial, however, in those cases in which the accused points out to a prospective purchaser valuable property, which he does not own, and subsequently concludes a bargain with such person for the property pointed out, but instead, conveys or delivers to him, instead of the valuable property pointed out and which the party intended to purchase, other property which was worthless; in which case the ownership of the property pointed out is immaterial, and need not be alleged.[14]

§ 647. —— VALUE OF MONEY OR PROPERTY. An indictment or information charging the procuring of money or other property by means of false pretenses, need not allege the value of such money[1] or property,[2] if it be a

11 State v. Wilson, 73 Kan. 334, 80 Pac. 639; reversed on other points in 73 Kan. 343, 117 Am. St. Rep. 479, 84 Pac. 737.

12 State v. Lynn, 3 Penn. (Del.) 316, 51 Atl. 878.

13 See State v. McChesney, 90 Mo. 120, 1 S. W. 841; State v. Lathrop, 15 Vt. 279.

Charging obtaining money by false pretenses, the money being described as: "Divers United States notes, and divers national bank notes, the denominations of which treasury notes and national bank notes are to the jurors unknown, amounting to" a stated number of dollars, is a sufficient description of the money, it not being necessary to state the number of the notes or to allege that the number of them was unknown to the jury.—State v. Hurst, 11 W. Va. 54, 3 Am. Cr. Rep. 100. See Leftwick's Case, 61 Va. (20 Gratt.) 716.

Where the name is unknown there must be an allegation to that effect. — State v. McChesney, 90 Mo. 120, 7 Am. Cr. Rep. 184, 1 S. W. 841.

14 State v. McConkey, 49 Iowa 499.

1 Charging accused, with intent to defraud a named person, obtained from him the sum of twenty dollars, it is unnecessary to allege that twenty dollars are money and worth something.—State v. Ryan, 34 Wash. 597, 76 Pac. 90.

2 ALA.—Oliver v. State, 37 Ala. 134. ME.—State v. Dorr, 33 Me.

thing recognized as property,[3] except in those cases in which the value is made by the statute an element of the offense,[4] e. g., where a greater punishment is inflicted when the value is over a designated amount;[5] but a statement that the accused obtained money[6] or property[7] of a designated value, is sufficient. Money being the property obtained, being in itself a measure of value, there need be no averment of its value;[8] and it is not neces-

498. N. Y.—People v. Stetson, 4 Barb. 151; People v. Higbie, 66 Barb. 131; People v. Jefferey, 82 Hun 409, 9 N. Y. Crim. Rep. 419, 31 N. Y. Supp. 267. N. C.—State v. Gillespie, 80 N. C. 396.

Horse trade charged as the basis of false pretenses, after conviction the fact that the indictment did not allege the horse was of any value, held not to be sufficient ground for an arrest of judgment.—State v. Dorr, 33 Me. 498.

3 State v. Boon, 49 N. C. (4 Jones L.) 463.

4 Baker v. State, 31 Ohio St. 314.

5 CAL.—People v. Haas, 28 Cal. App. 182, 151 Pac. 672. MONT.—Terr. v. Underwood, 8 Mont. 131, 19 Pac. 398; State v. Phillips, 36 Mont. 112, 92 Pac. 299. N. H.—State v. Ladd, 32 N. H. 110. N. Y.—People v. Stetson, 4 Barb. 151; People v. Higbie, 66 Barb. 131. N. C.—State v. Gillespie, 80 N. C. 396. OHIO—Baker v. State, 31 Ohio St. 314.

6 State v. Ryan, 34 Wash. 597, 76 Pac. 90.

7 IOWA—State v. Jackson, 128 Iowa 543, 105 N. W. 51. MO.—State v. Vandenburg, 159 Mo. 230, 60 S. W. 79, 160 Mo. 42, 60 S. W. 134. N. J.—Hagerman v. State, 54 N. J. L. 104, 23 Atl. 357. N. Y.—People v. Peckens, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883, affirming 12 App. Div. 626, 43 N. Y. Supp. 1160.

Deed and title to land alleged to have been procured feloniously through false pretenses, an allegation of the value of the land at fifteen hundred dollars sufficiently alleges the value of the deed.—People v. Peckens, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883, affirming 12 App. Div. 626, 43 N. Y. Supp. 1160.

Reasonably worth "about fifteen thousand dollars," is not sufficient description of value.—State v. Jackson, 128 Iowa 543, 105 N. W. 51.

8 ALA.—Oliver v. State, 37 Ala. 134. CAL.—People v. Millan, 106 Cal. 320, 39 Pac. 605. MO.—State v. Vandenburg, 159 Mo. 230, 60 S. W. 79. WIS.—State v. Kube, 20 Wis. 217, 91 Am. Dec. 390. FED.—Griggs v. United States, 85 C. C. A. 596, 158 Fed. 572.

Where the information alleged that the person defrauded "did then and there deliver to said W. H. G. a check payable for the sum of one thousand dollars in money . . . and said W. H. G. did then and there unlawfully . . . receive and obtain said money," the check and the value

sary to aver that the false pretenses were made concerning property or a thing of value.[9]

§ 648. False pretense of being an officer. The offense of falsely personating an officer has already been discussed under the specific crime of "False Personation,"[1] and it remains but to add in this place that an indictment or information charging the receiving of money or property by accused through falsely pretending and representing himself to be an officer, must describe the money or other property with the same particularity as is required in an indictment or information charging the larceny of such money or property;[2] must allege that the accused falsely assumed and pretended to be, and represented himself to be, an officer;[3] that the party defrauded relied upon such false pretenses and representations, and believed accused to be an officer;[4] that the party defrauded intended that the money or property be delivered to the accused for the party or person whom the accused falsely pretended to represent;[5] and that the accused intended[6] to convert the money or property to his own use.[7]

§ 649. Presenting false claim. An indictment or information charging procuring money by means of false pretense through presenting a false and fraudulent claim to a public officer whose duty it was to pay claims duly presented, phrased in the language of the statute, will be

thereof were sufficiently described and stated.—State v. Garland, 65 Wash. 666, 118 Pac. 907.

9 People v. Henninger, 20 Cal. App. 79, 128 Pac. 352; People v. Stetson, 4 Barb. (N. Y.) 151.

1 See, supra, § 624.

2 Treadaway v. State, 37 Ark. 443; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103.

3 Com. v. Wolcott, 64 Mass. (10 Cush.) 61; United States v. Brown, 119 Fed. 482.

4 Jones v. State, 22 Fla. 532; Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

5 Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

6 As to intent of accused, see, supra, § 630.

7 Jones v. State, 22 Fla. 532; Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

sufficient,[1] where it states, in addition, the particulars in which the claim was false.[2] The purport of the claim should be given, but the claim itself need not be set out in the indictment or information.[3] The alleged false pretenses should be correctly described,[4] and there must be an allegation that the claim was false, and the money not owing;[5] that the accused knew the claim to be false and fraudulent,[6] and that he received the money, or shared in it.[7]

§ 650. JOINDER OF DEFENDANTS. In an indictment or information charging procuring money or other property by means of false pretenses, it has been pointed out elsewhere,[1] all the parties actively participating in the commission of the offense may be joined as co-defendants. Thus, in a case where false pretenses are made by one of several parties in pursuance of a conspiracy or agreement between them, for the purpose of procuring

1 People v. Carolan, 71 Cal. 195, 12 Pac. 52. See, also, supra, § 626.

2 People v. Mahoney, 145 Cal. 104, 78 Pac. 354; Wilson v. State, 156 Ind. 631, 59 N. E. 380; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91.

Compare: Davis v. State, 20 Ohio Cir. Ct. Rep. 430, 10 Ohio Cir. Dec. 738; United States v. Watkins, 3 Cr. C. C. 441, Fed. Cas. No. 16649.

Claim docket not required by law to be kept, indictment need not allege that such a docket was kept.—Wilson v. State, 156 Ind. 631, 59 N. E. 380.

False returns of amount due made by a city official, and money obtained thereon, the indictment or information need not set out the names of the other officers through whose hands the returns must pass for approval.—Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91.

3 Johnson v. State, 75 Ind. 553; Wilson v. State, 156 Ind. 631, 59 N. E. 380.

4 Johnson v. State, 75 Ind. 553; Davis v. State, 20 Ohio Cir. Ct. Rep. 430, 10 Ohio Cir. Dec. 738.

Accused falsely pretended that the city was indebted to him, need not be averred in the indictment. —Davis v. State, 20 Ohio Cir. Ct. Rep. 430, 10 Ohio Cir. Dec. 738.

5 Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91.

6 Wilson v. State, 156 Ind. 631, 59 N. E. 380; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91. See Davis v. State, 20 Ohio Cir. Ct. Rep. 430, 10 Ohio Cir. Dec. 738.

7 Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738; People v. Court of General Sessions, 13 Hun (N. Y.) 395.

1 See, supra, § 351; 2 Kerr's Whart. Crim. Law, § 1476.

money or other property from another person, the false pretenses or representations made by one are chargeable against all, and they may all be jointly indicted.[2]

§ 651. JOINDER OF OFFENSES. We have already seen that offenses of the same character and having the same mode of trial and punishment may be joined in the same indictment,[1] even where the punishment, though of the same class, is of different degrees of severity;[2] hence, an indictment or information charging obtaining money or property by false pretenses may be joined with counts for conspiracy so to obtain money or property, and especially so in those jurisdictions in which the two offenses are of the same grade;[3] so also may obtaining money by false pretenses and larceny from the person be joined in different counts in the same indictment;[4] and a count for obtaining money by false pretenses and another for embezzlement, they both belonging to the same family of crimes.[5] The same is true of a charge of forgery and a charge of attempt to obtain money by false pretenses, both being based on the same transaction.[6]

§ 652. JOINDER OF COUNTS. We have already seen that the cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence, and that this the law permits.[1] An indictment or information charging the crime of securing money or other property, or attempting to secure money

2 Cowen v. People, 14 Ill. 348; Com. v. Harley, 48 Mass. (7 Metc.) 462; Jones v. United States, 5 Cr. C. C. 647, Fed. Cas. No. 7499.

1 See, supra, § 335.

2 See Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Oliver v. State, 37 Ala. 134; Tanner v. State, 92 Ala. 1, 9 So. 613; Lowe v. State, 134 Ala. 154, 32 So. 273; Herman v. People, 131 Ill. 594, 9 L. R. A. 182, 22 N. E. 471; Pointer v. United States, 151 U. S. 396, 38 L. Ed. 208, 14 Sup. Ct. Rep. 410.

3 Id.; Lamkin v. People, 94 Ill. 501; Thomas v. People, 113 Ill. 531.

4 Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383.

5 State v. Lincoln, 49 N. H. 464.

6 People v. Danford, 14 Cal. App. 442, 112 Pac. 474.

1 See, supra, § 347.

or other property, by false pretenses, should have as many counts as the facts and circumstances seem to require. Thus, where the accused obtained money by means of false pretenses on two different days, the false pretense of each day should be set forth in a separate count, and the two counts will cover but one transaction;[2] where the charge is of procuring money from a building and loan association, one count may charge the obtaining of the money from the association, and a second count may charge the accused with having obtained the money from the treasurer of such association by making the same fraudulent representations to him;[3] and an indictment charging accused with obtaining property under false pretenses in one count, and in another count charging him with obtaining the signature to a note by false pretenses, both acts having reference to the same transaction, charges but one offense.[4]

Duplicity can not be charged against an indictment setting forth conjunctively the acts necessary to constitute the offense, stated disjunctively in the statute.[5] An information charging in one count that accused conspired together to defraud a corporation, and by fraudulent representations, which are fully set forth, obtained from it a bank-check, by means whereof they obtained a certain sum of money and thereby defrauded the corporation, charges but one offense.[6] Where the offenses of larceny, false pretense, or embezzlement all relate to the same transaction, they may be charged together, in different counts; in fact, should be so charged where there is any doubt which offense the evidence will disclose.[7]

2 See Beasley v. State, 59 Ala. 20; West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254.

3 State v. Franzreb, 11 Ohio Dec. 775, 29 Wkly. L. Bul. 129.

4 People v. Danford, 14 Cal. App. 442, 112 Pac. 474; State v. House, 55 Iowa 466, 8 N. W. 307.

5 State v. Leonard, 73 Ore. 451, 144 Pac. 113, rehearing 144 Pac. 681.

See, also, supra, § 278.

6 State v. Richmond, 96 Kan. 600, 152 Pac. 644.

7 People v. Miles, 19 Cal. App. 223, 125 Pac. 250.

Where an indictment charges the offense of swindling in due form, it will not be rendered duplicitous, because the facts may also have constituted the crime of theft,[8] and by the same act the accused may have committed both offenses, and the state could have prosecuted him for either, at its election.[9]

[8] Sims v. State, 21 Tex. App. 649.

[9] Sims v. State, 21 Tex. App. 649.

CHAPTER XLVI.

INDICTMENT—SPECIFIC CRIMES.

Fellatio and Cunnilingus.

§ 653. FORM AND SUFFICIENCY OF INDICTMENT. The California legislature of 1915[1] sought to provide new punishment and to give new names to old offenses by calling them "fellatio" and "cunnilingus," which are not terms of art or "technical terms" known either to the law, or in medical or chirurgical science. Inasmuch as these terms are not defined by the act,[2] and as they constitute the principal part of the section, the legislation has been attacked as plainly unconstitutional, because it is in violation of the fundamental provision of the state constitution[3] requiring all laws to be printed in the English language.[4] Whether the legislation is constitutional or unconstitutional, is for the courts, and until this matter is passed upon, an indictment or information drawn under that section must contain a full statement of the acts constituting the offense charged in ordinary and concise language,[5] and in a manner to enable a person of

1 Statutes and Amendments, 1915, p. 1022.

2 The acts technically known as fellatio and cunnilingus are hereby declared to be felonies, and any person convicted of the commission of either thereof shall be punishable by imprisonment in the state prison for not more than fifteen years. — Cal. Pen. Code, § 288a; Kerr's Biennial Supplement, 1915, to Cyc. Codes of California, p. 3245.

3 Cal. Const. 1879, arts. I, V, § 24.

4 See Kerr's Biennial Supplement, 1917, to Cyc. Codes of California, p. 4091.

5 Mr. Justice Chipman, of the Third District Courts of Appeal, has well said of this section that it is "to a man of common understanding (indeed, we think, also, to one of uncommon understanding), as cabalistic as if written in Egyptian or Mexican hieroglyphics, or in Japanese or Chinese characters."—People v. Carrell, 31 Cal. App. 793, 795, 161 Pac. 995.

common understanding to know what is intended,[6] otherwise, the indictment or information will not state a public offense, in the absence of any definition in the statute of the terms "fellatio" and "cunnilingus," or of any statement of the particular acts constituting the alleged offense.[7]

6 People v. Carrell, 31 Cal. App. 793, 161 Pac. 995.

7 Id.

CHAPTER XLVII.

INDICTMENT—SPECIFIC CRIMES.

Forgery.

§ 654. Form and sufficiency of indictment[1]—In general. An indictment at common law charging forgery in any of its phases was an extremely technical instrument, verbose and filled with essential "terms of art," or specific technical words, the omission of which was fatal, and contained minute descriptions of matters of fact.[2] The common law technicality and formality have been entirely done away with by statutes in most, if not all, the states in the Union, under which statutes an indictment or information in plain and concise language, setting out all the elements of the offense sought to be charged as the same are laid down in the particular statute, will be sufficient,[3] however unartfully drawn,[4] and the omission

1 As to forms of indictment of forgery in all its phases, see Forms Nos. 978-1036.

2 See, fully, 3 Chit. Crim. Law 1044; 2 Russ. on Crimes (9th Am. ed.), pp. 795 et seq.

3 GA.—Watson v. State, 78 Ga. 349. ILL.—Crofts v. People, 3 Ill. 442. IND.—Sharley v. State, 54 Ind. 168. KY.—Hughes v. Com., 89 Ky. 227, 12 S. W. 269; Holdsworth v. Com., 6 Ky. L. Rep. 591. MO.—State v. Jackson, 90 Mo. 156. N. Y.—In re Van Orden, 32 Misc. 215, 15 N. Y. Cr. Rep. 79, 65 N. Y. Supp. 720. OHIO—Lougee v. State, 11 Ohio 69; Poage v. State, 3 Ohio St. 229. PA.—Com. v. Shissler, 9 Phila. 587. S. C.—State v. Foster, 3 McC. L. 442. VT.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201. FED.—United States v. Albert, 45 Fed. 552.

4 People v. King, 125 Cal. 369, 58 Pac. 19; Stockslager v. United States, 54 C. C. A. 46, 116 Fed. 590.

of such special words as "falsely,"[5] "feloniously,"[6] "knowingly,"[7] and the like, will not vitiate the indictment.

Certainty in the indictment or information is necessary in charging the offense in ordinary language in such a manner as to enable a person of common understanding to know what is intended to be charged,[8] and be informed of the particular acts relied upon as constituting his guilt;[9] to enable the jury to readily understand the nature of the offense;[10] to enable the court to pronounce

5 CAL.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597. COLO.—Cohen v. People, 7 Colo. 274, 3 Pac. 385. FLA.—Turnipseed v. State, 45 Fla. 110, 33 So. 851. IND.—State v. Dark, 8 Blackf. 526. NEV.—State v. McKiernan, 17 Nev. 224, 30 Pac. 831.

6 Cohen v. People, 7 Colo. 274, 3 Pac. 385; Com. v. Lemon, 18 Ky. L. Rep. 480, 37 S. W. 61; State v. Murphy, 17 R. I. 698, 16 L. R. A. 550, 24 Atl. 473; United States v. Staats, 49 U. S. (8 How.) 41, 12 L. Ed. 679.

Louisiana doctrine seems to be different. See State v. Flint, 33 La. Ann. 1288.

7 Morris v. State, 17 Tex. App. 660.

8 ALA.—Jones v. State, 50 Ala. 163; Horton v. State, 53 Ala. 491. ILL.—Bland v. People, 4 Ill. 364, 39 Am. Dec. 418. IOWA—State v. Thompson, 19 Iowa 300; State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158. KY.—Stowers v. Com., 75 Ky. (12 Bush) 342; Com. v. Williams, 76 Ky. (13 Bush) 267; Com. v. Bowman, 96 Ky. 40, 27 S. W. 816. LA.—State v. Fritz, 27 La. Ann. 360; State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447. MO.—State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Cr. Rep. 132. NEV.—State v. McKiernan, 17 Nev. 224, 30 Pac. 831. N. Y.—People v. Clements, 26 N. Y. 193. WASH.—State v. Wright, 9 Wash. 96, 37 Pac. 313.

The indictment must show whose name was forged.—State v. Chinn, 142 Mo. 507, 44 S. W. 245.

Where the information after setting forth a copy of the instrument alleged to have been forged and stating that the instrument was false and fictitious, then states that "whereas in truth and in fact there was no such individual as H. C. W. then or there in existence," these latter words are not indefinite, and the information is sufficient to enable the defendant to know what was intended, and the court is enabled to pronounce judgment on conviction.—People v. Gordon, 13 Cal. App. 678, 110 Pac. 469.

9 ALA.—Jones v. State, 50 Ala. 163. IND.—State v. Callahan, 124 Ind. 366, 24 N. E. 732. TENN.—Luttrell v. State, 81 Tenn. (13 Lea) 232. VA.—Powell v. Com., 52 Va. (11 Gratt.) 824.

10 Cross v. People, 47 Ill. 152, 95 Am. Dec. 475.

the proper judgment in case of conviction,[11] and to enable the accused to plead such judgment in bar of another indictment and prosecution for the same offense.[12] Failure in these respects is good ground for quashing an indictment or information;[13] but a mere clerical error will not vitiate the instrument.[14] Where the charging part of an indictment or information is defective and insufficient when taken separately, it gains no additional strength when joined with the other parts and considered as a whole.[15]

Conclusion should be "contrary to the form of the statute" where the statute expressly creates or prohibits the crime charged, but it is otherwise where the statute merely inflicts a punishment on what was before an offense;[16] and where there is nothing on the face of the indictment or information to show that it was drawn under any statute, the conclusion "against the form of the statute," or other similar conclusion, may be disregarded as surplusage.[17]

§ 655. —— Following language of statute. As in all other criminal offenses, in a charge of forgery, in any of its phases, the general rule[1] applies, under which an in-

11 McDonnell v. State, 58 Ark. 242, 24 S. W. 105; Com. v. Bowman, 96 Ky. 40, 27 S. W. 816; Stowers v. Com., 75 Ky. (12 Bush) 342; Com. v. Williams, 76 Ky. (13 Bush) 267; Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886.

12 McDonnell v. State, 58 Ark. 242, 24 S. W. 105; State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158; Com. v. Shissler, 9 Phila. (Pa.) 587; Johnson v. State, 1 Tex. App. 151.

13 State v. Cook, 52 Ind. 574; Trout v. State, 107 Ind. 578, 8 N. E. 618; Shannon v. State, 109 Ind. 407, 10 N. E. 87.

14 State v. Given, 32 La. Ann. 782; State v. Morgan, 35 La. Ann. 293.

As to clerical errors, see, supra, §§ 322 et seq.

15 People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

16 Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446. See McCann v. State, 21 Miss. (13 Smed. & M.) 71; White v. Com., 6 Bin. (Pa.) 179, 6 Am. Dec. 443; Russell v. Com., 7 Serg. & R. (Pa.) 489.

As to statutory conclusion, see, supra, §§ 329-334.

17 See R. v. Carson, 14 Up. Can. C. P. 309.

1 See, supra, §§ 269 et seq.

dictment or information is usually sufficient which follows the language of the statute,[2] or substantially the language of the statute,[3] where the words of that statute,

2 ALA.—Horton v. State, 53 Ala. 488. CAL. — People v. Todd, 77 Cal. 464, 19 Pac. 883; People v. Harold, 84 Cal. 567, 24 Pac. 106; People v. Eppinger, 105 Cal. 36, 38 Pac. 538. COLO. — Cohen v. People, 7 Colo. 274, 3 Pac. 385. GA.—Travis v. State, 83 Ga. 372, 9 S. E. 1063; Curtis v. State, 16 Ga. App. 678, 85 S. E. 980. ILL.—People v. Cotton, 250 Ill. 338, 95 N. E. 283. IND.—State v. Miller, 98 Ind. 70. KAN.—State v. Foster, 30 Kan. 365, 2 Pac. 628; State v. Gavigan, 36 Kan. 322, 13 Pac. 555. KY. — Eldridge v. Com., 21 Ky. Law Rep. 1088, 54 S. W. 7. LA.—State v. Boasso, 38 La. Ann. 202; State v. Tisdale, 39 La. Ann. 476, 2 So. 406; State v. Stephen, 45 La. Ann. 702, 12 So. 883. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MISS.—Harrington v. State, 54 Miss. 490. MO.—State v. Watson, 65 Mo. 115; State v. Fisher, 65 Mo. 438; State v. Rucker, 93 Mo. 88, 5 S. W. 609; State v. Rowlen, 114 Mo. 626, 21 S. W. 729. NEV. — State v. McKiernan, 17 Nev. 224, 30 Pac. 831; State v. Raymond, 34 Nev. 198, 117 Pac. 17. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212. N. Y.—People v. Rynders, 12 Wend. 425; Holmes v. People, 15 Abb. Pr. 154. N. C.—State v. Morgan, 19 N. C. (2 Dev. & B.) 348; State v. Gardiner, 23 N. C. (1 Ired. L.) 27. OHIO—Poage v. State, 3 Ohio St. 229. OKLA. — Williams v. State, 11 Okla. Cr. 82, 142 Pac. 1181. S. C.—State v. Foster, 3 McC. L. 442. TENN. — Croxdale v. State, 38 Tenn. (1 Head) 139. TEX.—Labbaite v. State, 6 Tex. App. 257; Townser v. State, (Tex. Cr. Rep.) 182 S. W. 1104. VA.—Huffman v. Com., 27 Va. (6 Rand.) 685. FED.—United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, 4 Am. Cr. Rep. 246; United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 Sup. Ct. Rep. 512; United States v. Jolly, 37 Fed. 108.

Where the indictment follows the code form it is not subject to demurrer. — Davis v. State, 165 Ala. 93, 51 So. 239; Newsum v. State, 10 Ala. App. 124, 65 So. 87.

Where the indictment closely conforms to the language of the statute defining forgery in the first degree it is good.—People v. Alderdice, 120 App. Div. (N. Y.) 368, 21 N. Y. Cr. Rep. 379, 105 N. Y. Supp. 395.

Inasmuch as forgery is a statutory and not a common law crime in the District of Columbia, the offense must be charged as defined in the statute, irrespective of common law rules of pleading.—Simon v. United States, 37 App. D. C. 280.

3 CAL.—People v. Eppinger, 105 Cal. 36, 38 Pac. 538. IND.—State v. Miller, 98 Ind. 70; Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. KY.—Moore v. Com., 92 Ky. 630, 18 S. W. 833. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MISS.—Harrington v. State, 54 Miss. 490. MO.—State v. Watson, 65 Mo. 115. NEV.—State v. McKiernan, 17 Nev. 224, 30 Pac.

in and of themselves, fully, distinctly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the particular phase of forgery sought to be charged;[4] but where, by pursuing the words of the statute, there is any ambiguity or uncertainty in the indictment or information, it will be insufficient,[5] because "the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment the facts necessary to bring the case within that intent."[6] And where the forgery in question is considered a common-law offense because it is not defined by the statute, it will not be sufficient simply to follow the language of the statute.[7] Where the language of the statute is not followed, but words of equivalent import are sought to be used, the indictment or information must set forth all the facts which are necessary to constitute the material ingredients in the particular phase of the offense sought to be

831. OHIO — Poage v. State, 3 Ohio St. 229. S. C.—State v. Foster, 3 McC. L. 442. TENN.—Croxdale v. State, 38 Tenn. (1 Head) 139. FED.—United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, 4 Am. Cr. Rep. 246.

An indictment following the language of the statute but not further alleging that the defendant knew the forged obligation to be false, forged, counterfeited, and altered is insufficient even after verdict. — United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, 4 Am. Cr. Rep. 246.

4 United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, 4 Am. Cr. Rep. 246.

5 State v. Foster, 30 Kan. 365, 2 Pac. 628; State v. Gavigan, 36 Kan. 322, 13 Pac. 555; United States v. Staats, 49 U. S. (8 How.) 41, 12 L. Ed. 679; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, 4 Am. Cr. Rep. 246.

6 Mr. Justice Gray, delivering the opinion in United States v. Carll, 105 U. S. 611, 25 L. Ed. 1135, 4 Am. Cr. Rep. 246, citing: Com. v. Clifford, 62 Mass. (8 Cush.) 215; Com. v. Bean, 65 Mass. (11 Cush.) 414; Com. v. Bean, 80 Mass. (14 Gray) 52; Com. v. Filburn, 119 Mass. 297; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819.

7 State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447.

charged;[8] all technical words,[9] and words which are a part of the definition and descriptive of the offense, must be used in the indictment or information to make it sufficient,[10] although it is otherwise as to those words of the statute which are merely descriptive of the instrument which is the subject of forgery.[11]

§ 656. —— Having forged instrument in possession.[1] The statute making it a criminal offense to have a forged or counterfeit instrument in possession with the intent to pass it as true and genuine, an indictment or information charging the offense in the language of the statute, or substantially in the language of the statute,[2] or drawn in conformity with the statute,[3] will be sufficient, without an allegation of an intent to utter and pass it for a consideration,[4] or averring an intention on the part of the accused to cheat and defraud any particular per-

8 GA. — Moore v. State, 33 Ga. 225; Johnson v. State, 109 Ga. 268, 34 S. E. 573; McCombs v. State, 109 Ga. 500, 34 S. E. 1023. KY.— Com. v. Lee, 18 Ky. L. Rep. 484, 37 S. W. 72. MICH.—People v. Stewart, 4 Mich. 655. MINN. — Benson v. State, 5 Minn. 19; State v. Cody, 65 Minn. 121, 67 N. W. 798; State v. Minton, 116 Mo. 605, 22 S. W. 808. N. H.—State v. Horan, 64 N. H. 548, 15 Atl. 20. N. C.—State v. Britt, 14 N. C. (3 Dev. L.) 122. WIS.—Snow v. State, 14 Wis. 479.

9 As "feloniously," under a statute declaring forgery to be a felony.—State v. Murphy, 17 R. I. 698, 16 L. R. A. 550, 24 Atl. 473.

Where a statute has not provided what shall constitute the offense of forgery, or prescribed a form of indictment therefor, the indictment will have to conform to the rules of common law pleading and allege that the act was done "feloniously."—State v. Murphy, 17 R. I. 698, 16 L. R. A. 550, 24 Atl. 473. See, also, Edwards v. State, 25 Ark. 444; Mott v. State, 29 Ark. 147; Bowler v. State, 41 Miss. 570; Mears v. Com., 2 Grant's Cas. (Pa.) 385; Cain v. State, 18 Tex. 387.

"Willingly," substituted in an indictment for the statutory word "wittingly," renders the indictment insufficient. — Harrington v. State, 54 Miss. 490.

10 State v. Hesseltine, 130 Mo. 468, 32 S. W. 983; People v. Wilber, 4 Park. Cr. Rep. 19.

11 Powell v. Com., 52 Va. (11 Gratt.) 822.

1 As to forms of indictment for having forged instruments in possession, see Forms Nos. 1132-1136.

2 See, ante, § 655.

3 See People v. Smith, 125 Mich. 566, 84 N. W. 1068.

4 State v. Eaton, 166 Mo. 575, 66 S. W. 539.

son.[5] An exception being provided by the statute, that exception need not be negatived, where it clearly appears from the face of the indictment or information that the crime charged does not fall within the exception.[6]

Intent being an element of the offense under the statute, the indictment or information must contain the words "knowing the same to be false," or their equivalent, otherwise it will be insufficient.[7]

Joinder of counts where accused is charged with having in his possession more than one forged bank-note with the intention of passing it, is permissible,[8] and there may be a conviction of a separate offense on each count,[9] although there is authority to the effect that where the accused is charged, in several informations, with having in his possession, at one time, several forged bank-notes, of different banks, with the intent to pass them, they charge but one offense;[10] and it has been said that an allegation accused had in his possession on a certain day, which is specified, a given number of forged or counterfeit bank-notes, with intent to pass the same, is not an allegation that he had all such bank-notes at the same time.[11]

§ 657. —— UTTERING FORGED INSTRUMENT.[1] An indictment or information charging accused with having uttered a forged instrument, framed in the language of the statute, or substantially in the language of the statute, is sufficient,[2] when as thus framed it sets forth all the

5 State v. Turner, 148 Mo. 206, 49 S. W. 988.

6 State v. Hathhorn, 166 Mo. 229, 65 S. W. 576.

7 Newby v. State, 75 Neb. 33, 105 N. W. 1099.

8 Logan v. United States, 59 C. C. A. 476, 123 Fed. 291.

9 Id.

10 State v. Benham, 7 Conn. 414.

11 State v. Bonney, 34 Me. 223.

1 As to forms of indictment for uttering forged instrument, see Forms Nos. 1018-1031.

2 See, supra, § 655; Espalla v. State, 108 Ala. 38, 19 So. 82; State v. Stanton, 23 N. C. (1 Ired. L.) 424.

"Utter, publish, and pass, or attempt to pass" a forged instrument, is bad on demurrer, though in the language of the statute;

essential elements of the offense of uttering a forged instrument,[3] any immaterial variance from the language of the statute not being material where the words used are of the same general import;[4] but the careful pleader will follow the exact wording of the statute under which he is prosecuting, in order to insure the sufficiency of his pleading, because, although it has been held in some jurisdictions that the statutory words "passing, uttering or publishing" are sufficiently pleaded by charging accused with "selling and delivering,"[5] in other jurisdictions it has been held that the statutory words "utter and publish" are not met by an indictment charging accused did "dispose of and put away";[6] in still other jurisdictions it is held that the statutory words "pass and transfer" are essential to the validity of the indictment or information.[7] Where the statute provided that it should be forgery for any one to sell a forged instrument "with intent to have the same uttered and passed," an indictment was held to be insufficient which charged accused sold "with intent to injure and defraud."[8]

A charge of forging does not include a charge of uttering a forged instrument;[9] there must be a distinct averment as to the uttering,[10] as well as an averment in

the charge should be in the conjunctive form.—People v. Tomlinson, 35 Cal. 503.

See, also, footnote 31, this section.

3 ALA. — Harrison v. State, 36 Ala. 248; Espalla v. State, 108 Ala. 38, 19 So. 82. IOWA — State v. Burling, 102 Iowa 681, 72 N. W. 295. KAN. — State v. Foster, 30 Kan. 365, 2 Pac. 628. MO.—State v. Webster, 152 Mo. 87, 53 S. W. 423. N. C.—State v. Stanton, 23 N. C. (1 Ired. L.) 424. TENN.—Faute v. State, 83 Tenn. (15 Lea) 712. WYO. — Leslie v. State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

4 State v. Walker, 167 Mo. 366, 67 S. W. 228.

5 State v. Watson, 65 Mo. 115; State v. Mills, 146 Mo. 195, 47 S. W. 938.

6 State v. Petty, Harp. (S. C.) 59.

7 Croxdale v. State, 38 Tenn. (1 Head) 139.

8 State v. Hesseltine, 130 Mo. 468, 32 S. W. 983.

9 State v. Snow, 30 La. Ann. 401.

10 "False, forged, and counterfeit bank-note" alleged to have been uttered, is not bad for repugnancy. — Mackey v. State, 3 Ohio St. 362.

"Utter and publish" as true a

the indictment or information that the accused had knowledge of the forgery;[11] but existing forgery, and knowledge thereof, have been said to be sufficiently alleged by an averment that accused, on a specified day, had in his possession the forged instrument and did "then and there" utter it as true, with the intent to defraud, "then and there" well knowing it to be forged.[12] Who committed the forgery or how it was done, or the particulars or facts constituting the forgery,[13] or the intent of the maker of the false instrument,[14] need not be stated in the indictment or information,[15] it being sufficient to aver that accused delivered the forged instrument knowing it to have been false and forged;[16] but where the particulars of the forgery are attempted to be set out, the prose-

forged instrument, states properly the crime under a statute making it an offense to "alter or publish" as true a forged instrument, the word "utter" being mere surplusage. — State v. Barrett, 121 La. 1058, 46 So. 1016.

—**"Utter" and "publish"** carry the same meaning of disposing of the forged instrument.—State v. Barrett, 121 La. 1058, 46 So. 1016.

Uttering altered instrument may be charged as the uttering of either a forged or an altered instrument. — Biddings v. State, 56 Ind. 101.

Uttering forged deed by delivery to "helper" of recorder of deeds, for record, sufficient, although there is no such officer as "helper" to recorder known to the law.—Temple v. State, (Ark.) 189 S. W. 855.

"Showing forth in evidence" a forged instrument charged, it is not necessary to state in the indictment in what suit or jurisdiction proceedings it was "shown forth."—State v. Stanton, 23 N. C. (1 Ired. L.) 424.

11 Powers v. State, 87 Ind. 97; Shelton v. State, 143 Ala. 98, 39 So. 377.

12 Com. v. Butterick, 100 Mass. 12.

Uttering forged check, knowing it to be forged, charged, it is not necessary that accused should have forged the check, if he had knowledge that it was forged.—King v. State, 8 Ala. App. 239, 62 So. 374.

13 Com. v. Cochran, 143 Ky. 807, 137 S. W. 521; State v. Goodrich, 67 Minn. 176, 69 N. W. 815.

14 State v. Goodrich, 67 Minn. 176, 69 N. W. 815.

15 Com. v. Cochran, 143 Ky. 807, 137 S. W. 521; Eldridge v. Com., 21 Ky. L. Rep. 1087, 54 S. W. 10; People v. Marion, 28 Mich. 225; State v. Goodrich, 67 Minn. 176, 69 N. W. 815.

16 Eldridge v. Com., 21 Ky. L. Rep. 1087, 54 S. W. 10.

cution will be bound to state them truly, and to prove them as laid.[17] Acts constituting the offense charged required by statute to be stated, an indictment or information charging accused "did feloniously and falsely utter and publish as true" a certain writing without further allegation, will be insufficient, because failing to state the particular acts constituting the uttering.[18] Consideration for the uttering need not be alleged, in the absence of a statutory provision so requiring.[19] Description of the instrument alleged to have been uttered should be given,[20] or a satisfactory reason stated for failing to do so.[21] The facts constituting the uttering should be specifically alleged,[22] and only such facts as are alleged can be proved.[23] The name of the person, firm, corporation, or company to, or upon whom the forged instrument was uttered, published, or passed, is required to be stated in some jurisdictions, or an averment that such person is to the grand jurors unknown,[24] while in other jurisdictions this is not required;[25] but alleging instrument passed to named person is sufficient without an allegation as to how passed.[26] Official capacity in which alleged forged instrument uttered need not be stated, except in those cases where injury could result alone from utterance by accused as an officer.[27] Uttering forged

17 People v. Marion, 28 Mich. 225.

18 Com. v. Williams, 76 Ky. (13 Bush) 267; Powers v. Com., (Ky.) 18 S. W. 357.

19 State v. Eaton, 166 Mo. 575, 66 S. W. 539.

20 Hess v. State, 73 Ind. 537.

21 Id.

22 Flaugher v. Com., 1 Ky. L. Rep. 119.

23 Id.

24 McClellan v. State, 32 Ark. 609; Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

Agent of bank alleged to have received the forged check, indictment need not set out that he received the check as such agent. —Heimes v. State, (Tex. Cr. Rep.) 129 S. W. 123.

Forged check alleged to have been passed, the name of any particular person to be injured or defrauded need not be set out.—Heimes v. State, (Tex. Cr. Rep.) 129 S. W. 123.

25 State v. Hart, 67 Iowa 142, 25 N. W. 99.

26 Selby v. State, 161 Ind. 667, 69 N. E. 463.

27 State v. Anderson, 30 La. Ann. 557.

mortgage charged, it need not be alleged there was an actual transfer, and if there was a transfer, the name of the transferee need not be set out.[28] Where uttering through an agent is charged, it is not necessary to allege the innocence of the agent, and any averments as to him, will be surplusage.[29]

Multifariousness can not be charged against an indictment or information alleging that accused did utter, publish, and show forth in evidence, a certain forged instrument, because of the allegation that the instrument was shown forth in evidence; the latter clause may be rejected as surplusage.[30] And where the statute enumerates several distinct acts disjunctively which separately, or together, would constitute the offense of uttering, e. g., "utter, or publish, or pass," the indictment or information may charge more than one of them, and this not only may, but should be done in the conjunctive, and not the disjunctive form.[31]

§ 658. NECESSARY AVERMENTS—MAKING[1]—IN GENERAL. There is a marked similarity between the crime of forgery and the crime of counterfeiting, particularly in so far as relates to bank-bills and bank-notes, and the essentials of an indictment or information charging either offense are substantially the same as to their general form.[2] The indispensable elements to be clearly shown in an indictment or information charging forgery are: (1) A writing

28 State v. Weaver, (Iowa) 128 N. W. 559.

29 Dillard v. State, (Tex. Cr. Rep.) 177 S. W. 99.

30 State v. Jarvis, 129 N. C. 698.

31 People v. Tomlinson, 35 Cal. 503. See People v. Ah Woo, 28 Cal. 205; People v. Frank, 28 Cal. 507, 513; Mackey v. State, 3 Ohio St. 362.

Separate count for each different method of committing the crime of uttering as specified in the statute, may be incorporated in the indictment or information, was held in Territory v. Poulier, 8 Mont. 150, 19 Pac. 594.

1 As to forms for making forged instruments, see Forms Nos. 983-1008.

2 As requisites of indictment or information charging counterfeiting in any of its phases, see, supra, §§ 538-553.

apparently valid, and if valid, obligatory;[3] (2) fraudulent intent of the accused to defraud,[4] and (3) the falsity of the writing,[5] all of which elements must be proved to warrant conviction, and an indictment or information containing all these elements will be sufficient,[6] however unartfully drawn.[7] An indictment or information charg-

[3] See: CAL.—People v. Munroe, 100 Cal. 664, 38 Am. St. Rep. 323, 24 L. R. A. 33, 35 Pac. 326; People v. Bellafont, 11 Cal. App. 492, 105 Pac. 426. FLA.—King v. State, 43 Fla. 211, 31 So. 254. ILL.—People v. Daugherty, 246 Ill. 458, 92 N. E. 929. IND.—Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. IOWA—State v. Van Auken, 98 Iowa 674, 68 N. W. 454. LA.—State v. Alexander, 113 La. 747, 37 So. 711. OKLA.—Territory v. Deland, 3 Okla. 373, 41 Pac. 618.

Essential ingredients of the crime of forgery are said, by the California court, to be: (1) A false making of some instrument, (2) a fraudulent intent, (3) if genuine, the writing might injure another. —People v. Munroe, 100 Cal. 664, 38 Am. St. Rep. 323, 24 L. R. A. 33, 35 Pac. 326.

The court say that the third element above stated has been recognized by the California courts to be the true test as to the nature of the writing, citing People v. Frank, 28 Cal. 507; People v. Tomlinson, 35 Cal. 503; Ex parte Finley, 66 Cal. 262, 5 Pac. 222.

"There is some general language in the Tomlinson case (supra), taken probably from People v. Shall, 9 Cow. (N. Y.) 778, 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test in our opinion."

[4] CAL.—People v. Munroe, 100 Cal. 664, 38 Am. St. Rep. 323, 24 L. R. A. 33, 35 Pac. 326. ILL.—Goodman v. People, 228 Ill. 154. KY.—Barnes v. Com., 101 Ky. 556, 41 S. W. 772. LA.—State v. Sturgeon, 127 La. 459, 53 So. 703. MINN. — State v. Bjornaas, 88 Minn. 301, 42 N. W. 980. N. Y.—People ex rel. Hegeman v. Corrigan, 129 App. Div. 75, 113 N. Y. Sup. 513; affirmed, 195 N. Y. 1, 23 N. Y. Cr. Rep. 242, 87 N. E. 792; People v. Brown, 141 App. Div. 638, 126 N. Y. Supp. 322. N. C.—State v. Wolf, 122 N. C. 1079, 29 S. E. 840. TEX.—Jones v. State, (Tex. Cr.) 69 S. W. 143.

[5] CAL.—People v. Munroe, 100 Cal. 664, 38 Am. St. Rep. 323, 24 L. R. A. 33, 35 Pac. 326. ILL.—People v. Pfeiffer, 243 Ill. 200, 26 L. R. A. (N. S.) 138, 90 N. E. 680. KAN.—State v Gavigan, 36 Kan. 326, 13 Pac. 554. LA.—State v. Ford, 38 La. Ann. 797; State v. Grayder, 44 La. Ann. 962, 32 Am. St. Rep. 358, 11 So. 573. S. C.—State v. Webster, 88 S. C. 56, 32 L. R. A. (N. S.) 337, 70 S. E. 422.

[6] Hughes v. Com., 89 Ky. 227, 12 S. W. 269; Holdsworth v. Com., 6 Ky. L. Rep. 591; In re Van Orden, 32 Misc. (N. Y.) 215, 15 N. Y. Cr. Rep. 79, 65 N. Y. Supp. 720.

[7] See, supra, § 654, footnote 4.

ing accused did "forge" a specified instrument in writing, has been held to be sufficient,[8] without the specific allegation that accused "falsely" made and forged the instrument, even though the statute uses the word "falsely," because the word "forged" implies false making to the full extent the same as if the word "falsely" were incorporated.[9] The particulars in which the forgery consists need not be set forth, as we shall see hereafter.[10] However, it must be distinctly alleged that there was an intention to forge and falsely make the instrument.[11] In case the charge is that accused procured,[12] or aided[13] in the forgery, the name of the person whom he procured or aided need not be set forth.

§ 659. ——— TIME OF THE OFFENSE. As in the case of other crimes charged, an indictment or information setting out forgery should allege the time[1] and place of the commission of the offense charged, in the absence of statutory provisions dispensing with an allegation as to

8 CAL.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597. FLA.—King v. State, 43 Fla. 211, 31 So. 254. KAN.—State v. Foster, 30 Kan. 365, 2 Pac. 628. MINN.—State v. Greenwood, 76 Minn. 211, 77 Am. St. Rep. 632, 78 N. W. 1042, 1117. TEX.—Cagle v. State, 39 Tex. Cr. Rep. 109, 44 S. W. 1097; Webb v. State, 39 Tex. Cr. Rep. 534, 47 S. W. 356.

Kentucky rule seems to be to the contrary, as expressed in Stowers v. Com., 75 Ky. (12 Bush) 342; Com. v. Williams, 76 Ky. (13 Bush) 267, and Com. v. Martin, 1 Ky. L. Rep. 279. But of these decisions it has been said: "We do not deem these decisions sound, and decline to follow them." — State v. Greenwood, 76 Minn. 211, 77 Am. St. Rep. 632, 78 N. W. 1042.

9 People v. Mitchell, 92 Cal. 590, 28 Pac. 597; Haskins v. Ralston, 69 Mich. 63, 13 Am. St. Rep. 376, 37 N. W. 45.

10 See, infra, § 664.

11 DEL. — State v. Marvels, 2 Harr. 527. KAN.—State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895. N. H.—State v. Bryant, 17 N. H. 323. TEX. — Franklin v. State, 46 Tex. Cr. Rep. 181, 78 S. W. 934.

12 Huffman v. Com., 27 Va. (6 Rand.) 685.

13 Com. v. Ervine, 4 Va. (2 Va. Cas.) 337; Huffman v. Com., 27 Va. (6 Rand.) 685.

1 As to necessity for alleging time, see, supra, §§ 162 et seq.

the time;[2] the reason for this rule being to show that the offense charged was committed within the period of limitation of statute. It is to be observed that while the offenses of forgery and of uttering forged instruments are separate and distinct offenses,[3] and should be so pleaded,[4] yet as regards the running of the statute of limitations they are considered as one offense.[5]

§ 660. ——— NAME OF DEFENDANT. An indictment or information charging forgery of an instrument prohibited by statute should be certain as to the name of the accused,[1] the general rule being that the given or Christian name should be set out in full,[2] although the surname may be laid as an alias;[3] but it has been held that an indictment charging the forgery of an instrument purporting to be the act of Lorenz Brown, the name being set out in the indictment as L. Brown, will not be void or objectionable for uncertainty.[4]

§ 661. ——— NAME OF PERSON TO BE DEFRAUDED.[1] An indictment or information charging forgery should set out the name of the person intended to be defrauded; and in a case in which the name of a deceased person is forged to a promissory note, or other instrument for the payment of money, the indictment or information may

2 McGuire v. State, 37 Ala. 161.

3 State v. McCormack, 56 Iowa 585, 9 N. W. 916; State v. Blodgett, 143 Iowa 578, 21 Ann. Cas. 231, 121 N. W. 685; Huff v. Com., 19 Ky. L. Rep. 1064, 42 S. W. 907; People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594; State v. Carragin, 210 Mo. 351, 16 L. R. A. (N. S) 561, 109 S. W. 553; Wells v. Territory, 1 Okla. Cr. 469, 98 Pac. 483.

Montana rule is that an indictment or information charging forgery and the uttering of the instrument thus forged, with the proper allegations as to intent to defraud, etc., does not state two offenses within Pen. Code, § 1834. —State v. Mitten, 36 Mont. 376, 92 Pac. 969.

4 See, infra, § 693, et seq.

5 State v. Leekins, 81 Neb. 280, 115 N. W. 1080.

1 See, supra, § 138.

2 See, supra, § 140.

3 See, supra, § 141.

4 State v. Karlowski, 142 Mo. 463, 44 S. W. 244.

1 As to person to be defrauded, see, fully, post, § 668.

allege the act was done with the intent to defraud the estate of such deceased person, the estate of a decedent being, in law, regarded as a person,[2] although there is authority to the effect that an estate is not a "person."[3] Under the statutory provisions in some states[4] it is only necessary to allege the intent to defraud without designating the person intended to be defrauded.[5]

§ 662. ——— FICTITIOUS NAME SIGNED. Fictitious name purporting to be signed to an instrument for the payment of money, made with the intention to defraud, was punishable as forgery at common law.[1] Under stat-

2 Billings v. State, 107 Ind. 54, 7 Am. Cr. Rep. 188, 6 N. E. 914, 7 N. E. 763; Brewer v. State, 32 Tex. Cr. Rep. 74, 40 Am. St. Rep. 760, 22 S. W. 41. See Ginn v. Collins, 43 Ind. 271; Henderson v. State, 14 Tex. 503.

3 See Cole v. Manson, 42 Misc. (N. Y.) 149, 85 N. Y. Supp. 1011.

4 As under North Carolina Code, § 1191.

5 State v. Cross, 101 N. C. 770, 7 S. E. 715; affirmed in 132 U. S. 131, 33 L. Ed. 287, 10 Sup. Ct. Rep. 47.

1 2 Kerr's Whart. Crim. Law, §§ 864, 865; 2 Russ. on Crimes (9th Am. ed.), p. 730.

It is well established that a forgery may be committed by signing a fictitious name. See, among other cases: CAL. — People v. Eppinger, 105 Cal. 36, 38 Pac. 538; People v. Terrill, 133 Cal. 120, 65 Pac. 303; People v. Nishiyama, 135 Cal. 299, 67 Pac. 776 (under Kerr's Cyc. Pen. Code, § 476); People v. Chretein, 137 Cal. 450, 70 Pac. 305 (under Kerr's Cyc. Pen. Code, § 470). LA.—State v. Hahn, 38 La. Ann. 169. MASS.—Com. v. Costello, 120 Mass. 370. MO. — State v. Warren, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191. NEB.—Randolph v. State, 65 Neb. 523, 91 N. W. 356. N. H.—State v. Hayden, 15 N. H. 355. ORE.—State v. Wheeler, 20 Ore. 192, 23 Am. St. Rep. 119, 10 L. R. A. 779, 25 Pac. 397; State v. Kelliher, 49 Ore. 82, 88 Pac. 867; TEX.—Brewer v. State, 32 Tex. Cr. Rep. 74, 40 Am. St. Rep. 760, 22 S. W. 41; Davis v. State, 34 Tex. Cr. Rep. 117, 29 S. W. 478; Hocker v. State, 24 Tex. Cr. Rep. 359, 53 Am. St. Rep. 716, 30 S. W. 783; Allen v. State, 44 Tex. Cr. Rep. 63, 100 Am. St. Rep. 839, 68 S. W. 286. FED.—United States v. Mitchell, Baldw. 366, Fed. Cas. No. 15787. ENG.—R. v. Rogers, 8 Car. & P. 629, 34 Eng. C. L. 930; R. v. Ashby, 2 Fost. & F. 560; R. v. Lockett, 1 Leach 94; R. v. Shepherd, 1 Leach 226; R. v. Parkes, 2 Leach C. C. 775.

Subscribing fictitious name to check by accused, and passing it as his own, credit being given to accused and not to the fictitious name, has been held not to be forgery.—R. v. Martin, 49 L. J. C. C. R. 11, 41 L. T. (N. S.) 531,

ute in some of the states[2] a distinction is drawn between the making of such an instrument purporting to be signed by the name of an existing person, firm, or corporation, and the making of such instrument purporting to be signed by a fictitious name of some person, firm, or corporation which in reality has no existence; and where such statutory distinction is drawn, the indictment or information seeking to charge the offense of executing such instrument in a fictitious name, must bring the offense sought to be charged clearly within the requirements and conditions of the statute, and must show on its face the making, with intent to defraud another, of an obligation calling for the payment of money, purporting to be signed in the name of some bank, corporation, co-partnership, or individual; must distinctly negative the existence of such bank, corporation, co-partnership, or individual; and must further allege that the instrument purported to be signed by such fictitious name,[3] and that the name purported to be the name of a bank, or of a corporation, or of a co-partnership, or of an individual, as the case may be, it not being sufficient merely to charge the making and passing of a check, or other similar instrument for the payment of money, with the averment that there was no bank, corporation, co-partnership, or individual in existence of the name by which the said instrument was purported to have been signed.[4] Where the fictitious name purporting to be signed to the instrument appears to be that of either a corporation or a co-partnership, it must be alleged which of the two it purports

1 Crim. L. Mag. 266, 21 Alb. L. J. 91, 4 Val. L. J. 115.

The same has been held where accused signed name of a pretended firm, composed of himself and another.—Com. v. Baldwin, 77 Mass. (11 Gray) 197, 71 Am. Dec. 703.

2 Kerr's Cyc. Pen. Code of California, § 476.

3 People v. Dowd, 2 Cal. Unrep. 68; People v. Elliott, 90 Cal. 586, 27 Pac. 433; People v. Eppinger, 105 Cal. 36, 38 Pac. 538.

4 People v. Eppinger, 105 Cal. 36, 38 Pac. 538.

to be, and that the one alleged has no existence;[5] likewise where the fictitious name purporting to be signed to the instrument appears to be that of an individual, it must be alleged that the name purports to be that of an individual, and aver that there is no such individual in existence.[6]

Designating as "forgery" the offense of making an instrument for the payment of money purporting to be signed by a fictitious name, is immaterial, where the indictment is otherwise sufficient.[7]

§ 663. ——— THING PROHIBITED—VALUE. An indictment or information charging forgery must show that the written instrument complained of was one of the instruments designated in the statute under which prosecution is had, and the allegation must be such as to bring the instrument clearly within the statute; but the indictment or information need not further allege how the instrument was that thing, or how it could be used as an instrument of fraud, or that it was in fact so used.[1] Where the statute makes it a crime to forge or counterfeit, among other things, "any warrant, order or request for the payment of money, or the delivery of any property, or writing of value," an indictment or information charging the forgery of an application for an insurance policy, is bad which does not aver, in the language of the statute, that the policy was a "writing of value";[2] but where the statute does not make the value of the forged instrument a part of the description, or an

5 Id.

6 Id.

7 Id. See People v. Morley, 8 Cal. App. 374, 97 Pac. 85; People v. Izlar, 8 Cal. App. 604, 97 Pac. 686.

Fictitious check, or other instrument in writing for the payment of money, is a species of "forgery." See People v. Lee, 128 Cal. 330, 60 Pac. 854; People v. Terrill, 133 Cal. 120, 65 Pac. 303.

1 Com. v. White, 145 Mass. 392, 7 Am. Cr. Rep. 192, 14 N. E. 611.

2 State v. Horan, 68 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20.

ingredient of the offense, there need be no allegation respecting the value thereof.[3]

§ 664. ——— MANNER AND MEANS OF FORGERY. It is not necessary to set out the particular acts in which the forgery consisted,[1] the reason being that such facts are not essential ingredients of the offense.[2] That is to say, how and in what manner the party was to be defrauded being no ingredient of the crime, but a mere matter of evidence, need not be set out in the indictment.[3] But an indictment or information can not charge a specific offense by the use of general terms, without setting out all the facts and circumstances;[4] hence, it is insufficient to charge that the defendant committed the crime of altering a genuine instrument,[5] or of uttering a false and altered instrument without alleging how he had committed it.[6]

§ 665. ——— LACK OF AUTHORITY. An indictment or information charging forgery, or the uttering of a forged instrument, prohibited by statute, must further allege that it was done without authority,[1] but it need not be

3 Chidester v. State, 25 Ohio St. 433, 2 Am. Cr. Rep. 153.

1 People v. Di Ryana, 8 Cal. App. 333, 96 Pac. 919; People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594; Bennett v. State, 36 S. W. 947.

The steps necessary to perfect the fraud need not be set out.—State v. Zimmerman, 79 S. C. 289, 60 S. E. 680.

2 People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594.

3 ARK.—Snow v. State, 85 Ark. 203, 122 Am. St. Rep. 23, 107 S. W. 980. CAL.—People v. Johnson, 7 Cal. App. 127, 93 Pac. 1042; People v. Di Ryana, 8 Cal. App. 333, 96 Pac. 919. GA.—Travis v. State, 83 Ga. 372, 9 S. E. 1063. MASS.—Com. v. Costello, 120 Mass. 358. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MISS.—State v. Barber, 105 Miss. 390, 62 So. 361. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212. TENN.—Snell v. State, 21 Tenn. (2 Humph.) 347. FED. — United States v. Andem, 158 Fed. 996.

4 State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447.

5 See, infra, § 666.

6 State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447.

1 Com. v. Bowman, 96 Ky. 40, 27 S. W. 816; Snyder v. State, 8 Ohio C. C. 463, 4 Ohio Cir. Dec. 279.

Thus, an indictment alleging accused did "forge and alter" a cer-

alleged that the instrument was made or altered without the knowledge of the person sought to be made liable.[2] However, it has been said that an indictment or information charging that accused "did unlawfully, etc., forge a certain deed" necessarily imports that the act was done without authority;[3] and it has also been said that where the indictment is not predicated upon a statute, or that portion of the statute, defining forgery not qualified by the phrase "knowing that he had no authority so to do," need not allege that the accused had no authority to execute or utter the instrument.[4]

§ 666. ——— GUILTY KNOWLEDGE OF ACCUSED. Whether an indictment or information charging forgery should also charge guilty knowledge on the part of the accused, we have already seen,[1] depends upon the particular wording of the statute under which the prosecution is had. Where the guilty knowledge is a part of the definition of forgery, guilty knowledge must, of course, be averred in the indictment or information;[2] in all other cases, it seems that the allegation of guilty knowledge is confined to the charge of uttering or passing forged instruments,[3] in which latter case it is insufficient to

tain note, without alleging that it was done "without authority," is insufficient.—Com. v. Bowman, 96 Ky. 40, 27 S. W. 816.

An allegation that the accused feloniously and falsely altered a check by adding one hundred dollars to the amount for which drawn, and that it was done with the intent to defraud the drawer, sufficiently alleges that the alteration was made without the consent or authority of the drawer.—State v. Stickler, 90 Kan. 783, 136 Pac. 329.

2 Eldridge v. Com., 21 Ky. L. Rep. 1088, 54 S. W. 7.

3 Bennett v. State, 62 Ark. 516, 36 S. W. 947.

4 People v. Peterson, 17 Cal. App. 734, 21 Pac. 703.

1 See, supra, § 665, footnote 4.

2 See People v. Peterson, 17 Cal. App. 734, 21 Pac. 703; Com. v. Shissler, 9 Phila. (Pa.) 587.

3 CAL. — People v. Mitchell, 92 Cal. 590, 28 Pac. 597. IND.—Powers v. State, 87 Ind. 97, distinguished in State v. Williams, 139 Ind. 43, 47 Am. St. Rep. 255, 38 N. E. 339. KY.—Lockhard v. Com., 87 Ky. 201, 8 S. W. 266. TENN.—Buren v. State, 84 Tenn. (16 Lea) 61. TEX.—Henderson v. State, 14

allege merely that the passing or uttering was done "feloniously and falsely."[4] It has been said that where, under the statute, an averment of guilty knowledge is required to the validity of the indictment or information, an allegation that the act was "knowingly" done, or done "well knowing," and the like, will be sufficient to take the place of, and dispense with a positive averment of guilty knowledge.[5] It has been said that an indictment or information charging the uttering and publishing a forged promissory note which alleges that accused knew the note "to be false and forged," need not specifically allege that accused knew at the time he uttered and passed the instrument that it was forged;[6] that charging the forging of a false order for the payment of money, with intent to defraud, and passing it as true, after judgment, sufficiently charges knowledge on the part of the accused;[7] and that an unlawful, false and fraudulent uttering and passing a written instrument, with intent to defraud, being charged, the want of a specific allegation of knowledge does not deprive the accused of any substantial legal right.[8]

§ 667. ——— ——— Intent to defraud—In general. The essence of the crime of forgery is an intent on the part of the accused to defraud,[1] and an indictment or in-

Tex. 503; Morris v. State, 17 Tex. App. 666. FED.—United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

4 Henderson v. State, 14 Tex. 503.

5 See, supra, § 654; also, State v. Atkins, 8 Blackf. (Ind.) 458; McGinnis v. State, 24 Ind. 500; State v. Williams, 139 Ind. 43, 47 Am. St. Rep. 255, 38 N. E. 339, distinguishing an inadvertent ruling in Powers v. State, 87 Ind. 97.

A charge that the defendant did feloniously and falsely forge an instrument includes a sufficient charge of knowledge on his part of his own act, and especially where the question is not raised before the trial.—State v. Kruger, 34 Nev. 302, 122 Pac. 483.

6 State v. Burgson, 53 Iowa 318, 5 N. W. 167.

7 State v. Hauser, 112 La. 313, 36 So. 396.

8 Com. v. Hall, 24 Pa. Sup. Ct. 558.

1 CAL.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Smith, 103 Cal. 563, 37 Pac. 516. FLA.—Hawkins v. State, 28 Fla.

formation which fails to allege, in the accusing part, an intent on the part of the accused to defraud, will be insufficient,[2] unless the particular statute under which

363, 9 So. 652; Darby v. State, 41 Fla. 274, 26 So. 315. IDAHO—State v. Swensen, 13 Idaho 1, 81 Pac. 379. KAN.—State v. Gavigan, 36 Kan. 322, 13 Pac. 554. LA.—State v. Boasso, 38 La. Ann. 202. MD.—Arnold v. Cost, 3 Gill & J. 219, 22 Am. Dec. 302. MASS.—Com. v. Ladd, 15 Mass. 526. MO.—State v. Phillips, 78 Mo. 49; State v. Jackson, 89 Mo. 561, 1 S. W. 760; State v. Warren, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212, 233. N. Y.—People v. Wiman, 85 Hun 320, 9 N. Y. Cr. Rep. 490, 32 N. Y. Supp. 1037; affirmed, 148 N. Y. 29, 12 N. Y. Cr. Rep. 77, 42 N. E. 408. OHIO—Fouts v. State, 8 Ohio St. 98; Drake v. State, 19 Ohio St. 211. VT.—State v. Shelters, 51 Vt. 105.

Intent to have forged instrument uttered and passed being denounced by the statute, an allegation of an intent to "injure and defraud" is insufficient.—State v. Hesseltine, 130 Mo. 468, 32 S. W. 983.

Under statute denouncing forgery "with intent to defraud any person whatsover," an indictment need not allege person to be defrauded resided within the United States.—State v. Houseal, 2 Brev. L. (S. C.) 219.

From the intent to pass a forged instrument as good, the law infers a purpose to defraud a person who may be prejudiced. — State v. Patch, 21 Mont. 534, 55 Pac. 108; State v. Cleavland, 6 Nev. 181.

2 ALA.—State v. Givens, 5 Ala. 759; Jones v. State, 50 Ala. 163. CAL.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Smith, 103 Cal. 563, 37 Pac. 516; People v. Turner, 113 Cal. 278, 45 Pac. 331; People v. Elphis, 7 Cal. Unrep. 150, 72 Pac. 838. DEL.—State v. Hegeman, 2 Penn. 143, 44 Atl. 623. FLA.—Hawkins v. State, 28 Fla. 363, 9 So. 652. GA.—Phillips v. State, 17 Ga. 459; Williams v. State, 51 Ga. 535, 1 Am. Cr. Rep. 227; Gibson v. State, 79 Ga. 344, 5 S. E. 76. ILL.—Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. IND.—Shinn v. State, 57 Ind. 144; Billings v. State, 107 Ind. 54, 57 Am. Rep. 77, 6 N. E. 914, 7 N. E. 763. IOWA—State v. Maxwell, 47 Iowa 454. KAN.—State v. Gavigan, 36 Kan. 322, 13 Pac. 554. KY.—Moore v. Com., 92 Ky. 630, 18 S. W. 833. LA.—State v. Nelson, 28 La. Ann. 46; State v. Foster, 32 La. Ann. 34; State v. Maas, 37 La. Ann. 292; State v. Boasso, 38 La. Ann. 202; State v. Adams, 39 La. Ann. 238, 1 So. 455. ME.—State v. Kimball, 50 Me. 422; Rounds v. State, 78 Me. 42, 2 Atl. 673. MASS. — Com. v. Ladd, 15 Mass. 526; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65; Com. v. Brown, 147 Mass. 585, 9 Am. St. Rep. 736, 18 N. E. 587. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MINN.—State v. Adamson, 43 Minn. 196, 45 N. W. 152. MISS.—Cunningham v. State, 49 Miss. 685; Harrington v. State, 54 Miss. 490. MO.—State v. Yerger, 86 Mo. 33; State v. Phillips, 78 Mo. 49;

the instrument is drawn dispenses with such an allegation.[3] The indictment or information need not allege that the forged instrument was presented as genuine;[4] and the fraudulent intent being stated, it is not necessary to explicitly and particularly set out the means intended to be employed to effect the fraud.[5] The fraud need not be alleged to have been actually perpetrated, in forgery in any of its phases.[6] The essence of the crime is the making of

State v. Jackson, 89 Mo. 561, 1 S. W. 760; State v. Rucker, 93 Mo. 88, 5 S. W. 609; State v. Warren, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191; State v. Rowlen, 114 Mo. 626, 21 S. W. 729; State v. Gullette, 121 Mo. 447, 26 S. W. 354. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212, 233. N. Y.—Noakes v. People, 25 N. Y. 380; Paige v. People, 3 Abb. App. Dec. 439, 6 Park. Cr. Rep. 683; Harris v. People, 9 Barb. 664; People v. Martin, 2 N. Y. Cr. Rep. 51. N. C.—State v. Leak, 80 N. C. 403; State v. Hastings, 86 N. C. 599; State v. Weaver, 94 N. C. 836, 55 Am. Rep. 647; State v. Cross, 101 N. C. 770, 9 Am. St. Rep. 53; sub nom. State v. White, 7 S. E. 715; State v. Hall, 108 N. C. 776, 13 S. E. 189. OHIO—Barnum v. State, 15 Ohio 717, 45 Am. Dec. 601; Fouts v. State, 8 Ohio St. 98; Drake v. State, 19 Ohio St. 211; Turpin v. State, 19 Ohio St. 540. ORE.—State v. Lurch, 12 Ore. 104, 6 Pac. 411. PA.—McClure v. Com., 86 Pa. St. 335; Com. v. Mulholland, 12 Phila. 608. TENN.—Snell v. State, 21 Tenn. (2 Humph.) 347; State v. Haynes, 46 Tenn. (6 Cold.) 550. TEX.—Westbrook v. State, 23 Tex. App. 401, 5 S. W. 248. VT.—State v. Shelters, 51 Vt. 105. W. VA.—State v. Henderson, 29 W. Va. 147, 1 S. E. 225; State v. Coontz, 31 W. Va. 127, 5 S. E. 328; State v. Tingler, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935. FED.—United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Lawrence, 13 Blatchf. 211, Fed. Cas. No. 15572; United States v. Shellmire, 1 Baldw. 370, Fed. Cas. No. 16271; United States v. Jolly, 37 Fed. 108.

Forging and uttering a check both being charged, but the indictment charging the uttering and passing only to have been done with intent to defraud, the charge of the forgery will be insufficient, and vice versa.—People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

[3] Phillips v. State, 17 Ga. 459; Whatson v. State, 78 Ga. 349; State v. Taylor, 117 Mo. 181, 22 S. W. 1103.

See, also, infra, § 669.

[4] Com. v. Ladd, 15 Mass. 526.

[5] Jackson v. Com., 17 Ky. L. Rep. 1197, 34 S. W. 14; West v. State, 22 N. J. L. (2 Zab.) 212; Com. v. Bachop, 2 Pa. Sup. Ct. 294; Snell v. State, 21 Tenn. (2 Humph.) 347.

[6] Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; Com. v. White, 145 Mass. 392, 7 Am. Cr. Rep. 192, 14 N. E. 611. See Com. v. Ladd, 15 Mass. 526; Com. v. Costello, 120 Mass. 358.

the false writing with the evil intent that the instrument forged shall be used as good.[7]

Failure to allege intent, on the part of the accused to defraud in the charging part, is fatal even though the indictment subsequently charges that the accused did "unlawfully, feloniously, and fraudulently make and forge," and that he did "falsely, fraudulently, knowingly, feloniously, and with intent to defraud, prejudice and damage" a named person, "utter, publish and pass the same."[8] The criminal intent has been said to be sufficiently charged by the use of the words "wilfully and feloniously";[9] charging that accused did feloniously utter and publish as true a named forged instrument, with intent to defraud, knowing the same to be forged, has been said to be a sufficient allegation of intent;[10] and charging accused with "unlawfully and feloniously" causing an instrument to be forged, "with intent to defraud," has been said to be sufficient, without expressly averring that it was done "with a felonious intent."[11] Alteration of a public record, with intent to defraud, being charged, an indictment or information setting out the record as it existed before the alleged alteration, without a repetition of the charge of an intent to defraud in that portion of the instrument charging the alteration, has been said to be sufficient.[12]

Language of statute: While intent is a necessary element in every charge of forgery, in any of its phases, yet an indictment or information drawn in the language of

7 State v. Patch, 21 Mont. 534, 55 Pac. 108. See Bennett v. State, 62 Ark. 532, 36 S. W. 947; People v. Ferris, 56 Cal. 442; People v. Turner, 113 Cal. 278, 45 Pac. 331; Com. v. Henry, 118 Mass. 460.

8 People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788.

9 In re Van Orden, 32 Misc. (N. Y.) 215, 15 N. Y. Cr. Rep. 79, 65 N. Y. Supp. 720.

10 Harrison v. State, 36 Ala. 248.

11 State v. Tobie, 141 Mo. 547, 42 S. W. 1076; State v. Reed, 141 Mo. 546, 42 S. W. 1149.

12 State v. Van Auken, 98 Iowa 674, 68 N. W. 454.

the statute, is sufficient,[13] notwithstanding the fact that it fails to specifically allege the accused's intent to defraud a particular person.[14] Thus, in an indictment or information charging the uttering of a forged order for the payment of money, in the language of the statute, it is not necessary to name the person on whom the order was passed, or the person whom the accused intended to defraud.[15]

§ 668. ——————— PERSON INTENDED TO BE DEFRAUDED. In the absence of statutory provisions to the contrary, the common-law rule, requiring the name of the person intended to be defrauded to be set out, prevails,[1] and an indictment or information which fails to thus set out the name of the party intended to be defrauded, or state that the name is to the grand jury unknown,[2] will be insuffi-

13 IOWA—State v. Maxwell, 47 Iowa 454. MO.—State v. Phillips, 78 Mo. 49; State v. Yerger, 86 Mo. 33; State v. Rowlen, 114 Mo. 626, 21 S. W. 729; State v. Gullette, 121 Mo. 447, 26 S. W. 354. ORE.—State v. Lurch, 12 Ore. 104, 6 Pac. 411. PA. — Com. v. McClure, 12 Phila. 579, 34 Leg. Int. 204. FED.—United States v. Jolly, 37 Fed. 108.

14 IOWA—State v. Maxwell, 47 Iowa 454. MO.—State v. Phillips, 78 Mo. 49; State v. Yerger, 86 Mo. 33; State v. Rowlen, 114 Mo. 626, 21 S. W. 729; State v. Gullette, 121 Mo. 447, 26 S. W. 354. ORE.—State v. Lurch, 12 Ore. 104, 6 Pac. 411. PA. — Com. v. McClure, 12 Phila. 579, 34 Leg. Int. 204.

15 State v. Adams, 39 La. Ann. 238, 1 So. 455.

1 CAL.—People v. Elphis, 7 Cal. Unrep. 150, 7 Pac. 858. DEL.—State v. Hegeman, 2 Penn. 143, 44 Atl. 623. FLA.—State v. Gavigan, 36 Kan. 322, 13 Pac. 554. GA. — Williams v. State, 51 Ga. 535, 1 Am. Cr. Rep. 227. KY.—Barnes v. Com., 101 Ky. 556, 41 S. W. 772; Huff v. Com., 19 Ky. L. Rep. 1064, 42 S. W. 907. MISS.—Cunningham v. State, 49 Miss. 685. OHIO—Barnum v. State, 15 Ohio 717, 45 Am. Dec. 601. PA.—Com. v. Bachop, 2 Pa. Sup. Ct. 294. R. I.—State v. Murphy, 17 R. I. 698, 15 L. R. A. 550, 24 Atl. 473.

In England an intent to defraud a particular person is necessary, but the name of the person need not be alleged. — R. v. Hodgson, Dears. & B. C. C. 3, 7 Cox C. C. 122.

Uttering a forged check charged, indictment or information failing to allege the name of the party intended to be defrauded is insufficient to sustain a conviction.—People v. Elphis, 7 Cal. Unrep. 150, 72 Pac. 838.

2 Barnes v. Com., 101 Ky. 556, 41 S. W. 772; Huff v. Com., 19 Ky. L. Rep. 1064, 42 S. W. 907.

cient,[3] except, it seems, in those cases in which the indictment or information is without a purport clause, but sets out the instrument according to its tenor,[4] and also where the indictment uses the language of the statute.[5] Thus, in an indictment or information charging the uttering of a forged order, the name of the person to whom it was passed, being a material part of the description of the offense, must be given, or a statement made that the name of the person was to the grand jury unknown.[6] It may be charged that the person intended to be defrauded was a bank,[7] without specifying of whom the bank consisted;[8] a corporation;[9] a county;[10] the estate of a de-

3 **Christian name must be given** or it must be alleged that such Christian name is to the grand jury unknown.—Zellers v. State, 7 Ind. 659.

Name wrongly written but intended for a specified individual may be set out as the name forged, with extrinsic averments showing who was the person whose name was intended to be written.—Allen v. State, 44 Tex. Cr. Rep. 63, 100 **Am. St. Rep.** 839, 68 S. W. 286, following Rollins v. State, 22 Tex. App. 548, 58 **Am.** Rep. 659, 3 S. W. 759; Crawford v. State, 40 Tex. Cr. Rep. 344, 50 S. W. 378.

4 Howard v. State, 37 Tex. Cr. Rep. 494, 36 S. W. 475.

5 **Alleging uttering of forged order for the payment of money** charged in the language of the statute, it is unnecessary to name the person on whom the order was passed, or the person whom the accused intended to defraud.—State v. Adams, 39 La. Ann. 238, 1 So. 455. See, also, supra, § 667, footnotes 12-14.

6 **State v. Murphy, 17 R. I. 698, 15 L. R. A. 550, 24 Atl. 473.**

7 **Bank charged as person to be defrauded** by accused in signing the name of a third person to a note, indictment or information need not aver of what accused intended to defraud the bank.—Taylor v. Com., 28 Ky. L. Rep. 1348, 92 S. W. 292.

Intent to defraud bank may be charged where the allegation is that accused drew an order upon the cashier as such.—State v. Jones, 1 McMul. L. (S. C.) 236, 36 **Am. Dec.** 257.

8 State v. Phelps, 11 Vt. 117, 34 **Am. Dec.** 672.

9 **Intent mentioned in the statute** being to defraud any particular corporation, a failure to so lay it in the indictment will be fatal.—Cunningham v. State, 49 Miss. 685.

10 **County is a "person."**—Lutterell v. State, 85 Tenn. 232, 4 **Am. St. Rep.** 760, 1 S. W. 886. See Garner v. State, 73 Tenn. (5 Lea) 213; Foute v. State, 83 Tenn. (15 Lea) 712.

ceased person;[11] the person whose name was forged,[12] or the person to whom the forged instrument was passed or uttered;[13] the payee of a certificate of deposit, whose indorsement has been forged thereon;[14] the state;[15] a township board of education,[16] and the like.

§ 669. ——————General intent to defraud. In many of the states, it has been provided by statute that the name of the party intended to be defrauded need not be set out,[1] and where such statutory provisions exist, a general allegation of intent to defraud, without setting out the name of any particular person to be defrauded,

11 See, supra, § 661, footnote 2.

12 Shinn v. State, 57 Ind. 144; State v. Stegman, 62 Kan. 476, 63 Pac. 746; State v. Patch, 21 Mont. 534, 55 Pac. 108; State v. Cleavland, 6 Nev. 181.

Alleging intent to defraud in forging a bond purporting to be the act of another whose name was signed thereto, held to be sufficient to show that accused intended to defraud the person whose name he feloniously signed to the bond.—State v. Stegman, 62 Kan. 476, 63 Pac. 746.

13 State v. Patch, 21 Mont. 534, 55 Pac. 108; State v. Cleavland, 6 Nev. 181.

14 State v. Patch, 21 Mont. 534, 55 Pac. 108.

15 Moore v. Com., 92 Ky. 630, 18 S. W. 833; Cunningham v. State, 49 Miss. 685; Lutterell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886. See Garner v. State, 73 Tenn. (5 Lea) 213; Foute v. State, 83 Tenn. (15 Lea) 712.

Intent to defraud the state should be alleged on a charge of an attempt to forge an auditor's warrant on the state treasury.—Cunningham v. State, 49 Miss. 685.

16 Intent to defraud the township board of education may be alleged where it is charged accused uttered and published a false and altered order, purporting to be drawn on him as treasurer by the township clerk.—Gregory v. State, 11 Ohio St. 329.

1 See: GA.—Dukes v. State, 94 Ga. 393, 21 S. E. 54; Brazil v. State, 117 Ga. 32, 43 S. E. 460. LA.—State v. Gaubert, 49 La. Ann. 1692, 22 So. 930. MD.—Arnold v. Cost, 3 Gill & J. 219, 22 Am. Dec. 302. MO.—State v. Warren, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191. N. Y.—People v. Martin, 2 N. Y. Cr. Rep. 51. ORE.—State v. McElvain, 35 Ore. 365, 58 Pac. 525. TEX.—Allen v. State, 44 Tex. Cr. Rep. 63, 100 Am. St. Rep. 839, 68 S. W. 286; Crayton v. State, 47 Tex. Cr. Rep. 88, 80 S. W. 839. W. VA.—State v. Tingler, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935. FED.—United States v. Jolly, 37 Fed. 108.

is sufficient.[2] Under a statute providing that an indictment or information charging forgery need not allege the particular person intended to be defrauded, the allegation of the name of the person whose name was forged, for the purpose of showing the fraudulent intent of the instrument, does not vitiate the indictment or information.[3] Thus, an indictment charging the forgery of a bank check, without alleging in the charging part an intent to defraud another, will be sufficient, although it subsequently charges an "intent to defraud the said" person named.[4] Where the effect of the forgery will not of necessity defraud a particular person, but will defraud some one, a general allegation of intent to defraud must be made.[5]

§ 670. —— ALTERING GENUINE INSTRUMENT. Any change in or alteration of a genuine written instrument, in a material part thereof, with intent to injure or defraud, by means of which alteration the instrument is given a new effect, constitutes a forgery of the whole instrument,[1] and may be specifically alleged to have been

2 ALA.—Williams v. State, 126 Ala. 50, 28 So. 632. FLA.—Darby v. State, 41 Fla. 274, 26 So. 315. LA.—State v. Foster, 32 La. Ann. 34. MO. — State v. Gullette, 121 Mo. 447, 26 S. W. 354; State v. Turner, 148 Mo. 206, 49 S. W. 988. N. J.—Rohr v. State, 60 N. J. L. 576, 38 Atl. 673.

"With intent to injure or defraud" provided by statute, a general allegation of intent to defraud is sufficient.—State v. Foster, 32 La. Ann. 34.

"With intent to injure or defraud any person" provided by statute, indictment or information must allege an intent to defraud, but need not name a particular person.—Darby v. State, 41 Fla. 274, 26 So. 315.

3 Benson v. State, 122 Ala. 100, 26 So. 119; affirmed, 124 Ala. 92, 27 So. 1.

4 State v. Swensen, 13 Idaho 1, 81 Pac. 379.

5 State v. Gavigan, 36 Kan. 322, 13 Pac. 554.

1 CAL.—People v. Brotherton, 47 Cal. 388. IND.—Bittings v. State, 56 Ind. 101. IOWA—State v. Woodard, 20 Iowa 541; State v. Maxwell, 47 Iowa 454. MASS.—Com. v. Boutwell, 129 Mass. 124. MO.—State v. Kattlemann, 35 Mo. 105. N. H.—State v. Bryant, 17 N. H. 323. N. C.—State v. Gardiner, 23 N. C. (1 Ired. L.) 27. OHIO—Haynes v. State, 15 Ohio St. 455. S. C.—State v. Floyd, 5 Strobh. L. 58, 53 Am. Dec. 689.

Inserting additional figures in

done by the alteration, or to consist of a forgery of the whole instrument.[2] An indictment or information charging forgery by the alteration of a genuine instrument must clearly set forth the particulars in which the instrument was altered,[3] so that the trial court may be able to say, as a matter of law, whether the alteration complained of was material and of such a character as to constitute the criminal offense of forgery;[4] and the alteration thus set out must be in a material part of the instrument and be such as to create, increase, diminish, or defeat some monetary obligation, or such as would secure the transfer of, or in some manner affect, property.[5]

Copy of instrument alleged to have been altered must be set forth so as to show the changed or interpolated words and their materiality, or the reason for failure to do so must be stated, it being insufficient simply to allege mere lack of knowledge.[6] The instrument alleged to have

the face of a promissory note, held not to be forgery in Com. v. Piaso, 17 Pa. Sup. Ct. 45, 18 Lanc. L. Rev. 185.

2 CAL. — People v. Brotherton, 47 Cal. 388. DEL.—State v. Marvels, 2 Harr. 527. FLA.—Hawkins v. State, 28 Fla. 363. IND.—Bittings v. State, 56 Ind. 101. IOWA—State v. Maxwell, 47 Iowa 454. ME.—State v. Flye, 26 Me. 312. MASS. — Com. v. Boutwell, 129 Mass. 124. N. C.—State v. Gardiner, 23 N. C. (1 Ired. L.) 27; State v. Weaver, 35 N. C. (13 Ired. L.) 491. S. C. — State v. Floyd, 5 Strobh. L. 58, 53 Am. Dec. 689.

Altering an instrument may constitute a forgery, and should be set out as such.—State v. Floyd, 5 Strobh. L. (S. C.) 58, 53 Am. Dec. 689.

3 IND.—Bittings v. State, 56 Ind. 101; Kahn v. State, 58 Ind. 168. MINN.—State v. Riebe, 27 Minn. 315, 7 N. W. 262. MO.—State v. Fisher, 58 Mo. 256. MONT.—State v. Mitten, 36 Mont. 376, 92 Pac. 969; affirmed in 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 926. TEX.—State v. Knippa, 29 Tex. 295.

4 IND.—Bittings v. State, 56 Ind. 101; Kahn v. State, 58 Ind. 168. MINN.—State v. Riebe, 27 Minn. 315, 7 N. W. 262. MONT.—State v. Mitten, 36 Mont. 376, 92 Pac. 969; affirmed in 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 926. N. H.—State v. Bryant, 17 N. H. 323.

5 IND.—Bittings v. State, 56 Ind. 101; Kahn v. State, 58 Ind. 168. KAN.—State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895. LA.—State v. Means, 47 La. Ann. 1535, 18 So. 514. MO.—State v. Fisher, 58 Mo. 256. TEX.—State v. Knippa, 29 Tex. 295.

6 State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895; State

been changed may also be set forth according to its original tenor, with proper allegations made as to the alterations,[7] and may also include a copy of the forged instrument before alteration, and a copy of the instrument after alterations, and the alterations themselves.[8]

Materiality of the alteration must be shown either by a description of the alteration, or by setting out the tenor, substance, and effect of the instrument alleged to have been altered or forged, both before and after the alleged alteration.[9]

Language of the statute should usually be followed, and where the statute employs the word "alter," the indictment or information should employ that term in describing the alleged offense;[10] and it seems that the offense may be thus described even though the word "alter" is not embraced in the statute under which the indictment is drawn.[11]

§ 671. —— FALSIFICATION OF RECORD OR OF ENTRIES THEREIN. An indictment or information charging the falsification of records, or of the entry of false items therein, will be sufficient where the offense alleged is plainly and substantially set forth.[1] The indictment or information must clearly and unequivocally set forth the alteration charged to have been made by the accused,[2] and must

v. Bryant, 17 N. H. 323; Franklin v. State, 46 Tex. Cr. Rep. 181, 78 S. W. 934.

7 State v. Flye, 26 Me. 312; Biles v. Com., 32 Pa. St. 529, 75 Am. Dec. 568.

8 Franklin v. State, 46 Tex. Cr. Rep. 181, 78 S. W. 934.

Wherever the grand jury could have known the facts they can not aver an excuse for not setting out the facts. The destruction of the instrument by the accused does not excuse the failure to set it out when some persons had seen the instrument.—Collum v. State, 69 Tex. Cr. Rep. 165, 153 S. W. 1144.

9 Bittings v. State, 56 Ind. 101.

10 Elsworth's Case, 2 East P. C. 986.

11 Id.

1 State v. Van Auken, 98 Iowa 674, 68 N. W. 454; Phelps v. People, 6 Hun (N. Y.) 401, 49 How. Pr. (N. Y.) 451; affirmed, 72 N. Y. 334; McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76.

2 State v. Henning, 158 Ind. 196, 63 N. E. 207; Harrington v. State,

charge a material alteration;[3] some of the cases hold that there must be specifically set out the particular part of the record falsified, in what manner the falsification was made, and must set forth the alleged false entry,[4] although there are other cases to the effect that a copy of the record need not be given.[5] It has been said that an indictment or information charging the forgery of a cancellation of a bond redeemed, is sufficient without alleging that the writing was one which, if genuine, might injure another;[6] but under a statute denouncing false entries in books of account kept by any moneyed corporation, the indictment or information should show how any pecu-

54 Miss. 490; McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76.

Court record alleged to have been altered by changing the figures of certain court-house and jail warrant, entered in the treasurer's ledger, which leaves it in doubt as to whether the forgery charged consisted in changing the number on the warrant or the changing of the number in the record book, was held to be fatally defective.—Harrington v. State, 54 Miss. 490.

Payment of judgment indorsed on record, recovered against a township, as follows: "Received payment in full of the within from the clerk. A. & A., attorneys for plaintiff. Received of H. L., trustee, one hundred and forty dollars. N. S., clerk," indictment charging the forgery of such indorsement must show that the entry was made by the firm of attorneys and that they acted as attorneys for the plaintiff; also that N. S. was clerk of the court, and having authority to execute the writing appearing above his name.—State v. Henning, 158 Ind. 196, 63 N. E. 207.

3 State v. Van Auken, 98 Iowa 674, 68 N. W. 454.

4 People v. Palmer, 53 Cal. 615; Harrington v. State, 54 Miss. 490.

Altering public record by a person not having it in charge being alleged, the indictment or information need not set out a copy of the writing alleged to have been altered, under Cal. Pen. Code § 114, and need not state the substance thereof.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

5 People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

6 **Cancellation of bond redeemed** charged to have been falsely made in that accused entered in the registry book cancellation of bond formerly redeemed and canceled, charging accused sold the bond that he should have marked canceled, is sufficient without alleging that the writing was one which, if genuine, might injure another.—State v. Zimmerman, 79 S. C. 289, 60 S. E. 680.

niary obligation was affected thereby.[7] Removal or destruction of public documents by an officer having the custody thereof being charged, the indictment or information need not set out the circumstances under which they were destroyed, or negative the existence of circumstances under which it would be lawful for the officer in charge to destroy the same, because the first is matter of evidence, and the second is matter of defense.[8] A charge of having forged an acceptance of service and waiver of citation by accused on a petition for divorce, the indictment or information need not allege that the instrument upon which the acceptance of service and waiver of citation was forged was a petition, where the tenor of the instrument is set out, and the name of the accused appears therein, this sufficiently showing the instrument to be a petition filed in court.[9]

§ 672. Unnecessary averments—In general. An instrument, to be the subject of forgery, must be one within the statute, and which, if genuine, would have some legal effect,[1] but it is not necessary that it should be shown to

7 State v. Starling, 90 Miss. 252, 42 So. 203.

8 People v. Peck, 67 Hun (N. Y.) 560, 10 N. Y. Cr. Rep. 363; affirmed, 138 N. Y. 386, 20 L. R. A. 381, 10 N. Y. Cr. Rep. 410, 34 N. E. 347.

9 State v. Stringfellow, 126 La. 720, 52 So. 1002.

1 Instrument a nullity on its face set out in the indictment or information, it will be insufficient without an added comment that it can be made to act injuriously or fraudulently by reason of matter aliunde.—People v. Tomlinson, 35 Cal. 503; Com. v. Hinds, 101 Mass. 211.

An indictment charging the forging of a married woman's deed, it being void without acknowledgment under the laws of the state where executed, held not to charge an offense because the instrument was void on its face.—Roode v. State, 5 Neb. 174, 25 Am. Rep. 475.

"The false making of an instrument merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose; but if the instrument is one made with intent to defraud, although before it can have that effect other steps must be taken, or other proceedings had upon the basis of it, then the false making is forgery, notwithstanding such steps may

be a perfect instrument,[2] and it is unnecessary for the indictment or information to allege how the instrument would create, increase, diminish, or defeat a pecuniary obligation, or how it would transfer or affect the title to property.[3] Thus, a receipted bill for goods charged to have been forged, being set out, and purporting on its face to be an instrument which may be forged under the statute, the indictment or information need not contain further allegations to show that it was such an instrument, or to show how it could be used as an instrument of fraud, or that it was so used, in fact.[4] It is not necessary to allege the existence of the debt, the discharge of which the instrument alleged to be forged was intended to represent, except under unusual circumstances;[5] or that accused was indebted to the person intended to be defrauded by such receipt;[6] or that accused sought to obtain money upon the alleged forged instrument,[7] or that he did obtain anything of value;[8] or that the person or company, whose name was forged to an order for goods,

never be taken or proceedings had."—Com. v. Costello, 120 Mass. 267.

2 IND.—Reed v. State, 28 Ind. 396; Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. MO.—State v. Fenly, 18 Mo. 445. N. Y.—Holmes v. People, 15 Abb. Pr. 154; People v. Rynders, 12 Wend. 425. TEX.—Horton v. State, 33 Tex. 79; Labbaite v. State, 6 Tex. App. 261; Morris v. State, 17 Tex. App. 666. WYO.—Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

3 FLA.—Hawkins v. State, 28 Fla. 363, 9 So. 652. LA.—State v. Fritz, 27 La. Ann. 360. MASS.—Com. v. White, 145 Mass. 392, 7 Am. Cr. Rep. 192, 14 N. E. 611. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MISS.—Cox v. State, 66 Miss. 20, 5 So. 618. MO.—State v. Fisher, 65 Mo. 437. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212. VT.—State v. Sheters, 51 Vt. 102, 31 Am. Rep. 679. W. VA.—State v. Henderson, 29 W. Va. 132, 1 S. E. 225.

4 Com. v. White, 145 Mass. 392, 7 Am. Cr. Rep. 192, 14 N. E. 611. See Com. v. Ladd, 15 Mass. 526; Com. v. Talbot, 84 Mass. (2 Allen) 161; Com. v. Costello, 120 Mass. 358.

5 Cox v. State, 66 Miss. 20, 5 So. 618.

6 State v. Henderson, 29 W. Va. 132, 1 S. E. 225.

7 State v. Stephen, 45 La. Ann. 702, 12 So. 883.

8 State v. Phillips, 78 Mo. 49.

had any goods at the designated place.[9] Deed alleged to have been forged, the indictment or information need not set out in what the forgery consisted,[10] or that, if genuine, the deed would have conveyed the title to the land,[11] and need not set out the title[12] or interest[13] of the person intended to be defrauded, or state how or in what manner it did, or could have defrauded the true owner.[14] Forgery by alteration of instrument being charged, the indictment or information need not allege that an order for the payment of money was presented to the payee,[15] or that a draft was presented to or accepted by the drawee, or that the payee received payment.[16] Receipt charged to have been forged or altered, it is unnecessary to allege dealings between the parties, or that the original receipt was delivered to the accused as an acquittance or discharge pro tanto.[17] Tax-receipt alleged to have been forged, the indictment or information need not allege that the taxes had been regularly assessed, or that they were due and properly payable.[18]

Marginal cuts, figures and devices need not be set out, even when the instrument is pleaded in hæc verba.[19]

9 State v. Fritz, 27 La. Ann. 360.

10 People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. See People v. Marion, 28 Mich. 255.

Where set out it is done ex mera gratia to the accused.—People v. Marion, 28 Mich. 255.

11 State v. Fisher, 65 Mo. 437.

12 People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594.

Compare: People v. Wright, 9 Wend. (N. Y.) 193.

13 West v. State, 22 N. J. L. (2 Zab.) 212.

14 Mere evidence which all the authorities hold need not be set out. See People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594; West v. State, 22 N. J. L. (2 Zab.) 212; R. v. Powell, 2 Wm. Bl. 787; Taylor's Case, 1 Leach 215; R. v. Goate, 1 Ld. Raym. 737, 91 Eng. Repr. 1392.

15 Hankins v. State, 28 Fla. 363, 9 So. 652.

16 Id.

17 State v. Shelters, 51 Vt. 102, 31 Am. Rep. 679.

18 Cox v. State, 66 Miss. 20, 5 So. 618.

19 See, infra, § 676.

§ 673. —— FACTS ASSUMED IN FORGED INSTRUMENT. The instrument charged to have been forged, being an instrument within the statute and valid upon its face, the indictment or information need not expressly aver the existence of all the facts assumed by the forged instrument.[1] Thus, the forging of an order in the name of the trustees of a school district, upon the county superintendent of schools, for a requisition upon the county auditor for a warrant against the county school-fund, being charged, the indictment or information need not aver the existence of the school district, or the fact that the trustees whose names were alleged to be signed to the order were the trustees of the district.[2] It need not be averred that the alleged false instrument was genuine,[3] or that the person whose name was signed to an order for goods had the disposing power over them.[4] An acquittance alleged to have been forged, it need not be averred to have been delivered to, or presented to, any one as a true and genuine acquittance or discharge.[5] Bank-check charged to have been forged, indictment or information need not aver that the proper revenue stamps had been affixed thereto,[6] or give the name of the

1 ARK.—Ball v. State, 48 Ark. 94, 2 S. W. 462. CAL.—Ex parte Finley, 66 Cal. 262, 5 Pac. 222; People v. Todd, 77 Cal. 464, 19 Pac. 883; People v. Bibby, 91 Cal. 470, 27 Pac. 781. IOWA—State v. Price, 8 Iowa 235. ME.—State v. Flye, 26 Me. 317. MASS.—Com. v. Ladd, 15 Mass. 527. MO.—State v. Yerger, 86 Mo. 33; State v. Vincent, 91 Mo. 662, 4 S. W. 430. N. C.—State v. Ballard, 6 N. C. (2 Murph.) 186. TEX.—Thomas v. State, 18 Tex. App. 214. WYO.—Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746. ENG.—R. v. Baker, 1 Moo. C. C. 231.

Compare: People v. Wright, 9 Wend. (N. Y.) 193, holding that where a mortgage is charged to have been forged in the name of A, an indictment which fails to aver that there was any such land as the mortgage described, or that A had any title thereto, is insufficient.

2 Ball v. State, 48 Ark. 94, 2 S. W. 462; People v. Bibby, 91 Cal. 470, 27 Pac. 781; Thomas v. State, 18 Tex. App. 214.

3 State v. Price, 8 Iowa 235.

4 State v. Flye, 26 Me. 317.

5 Com. v. Ladd, 15 Mass. 527.

6 Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; State v. Haynes, 46 Tex. (6 Coldw.) 552.

bank upon which drawn, or set out the indorsements thereon.[7] Bills and acceptances purporting to have been issued by the officers of a corporation, or by the agents of a natural person, being charged to have been forged, the indictment or information need not aver that such officers or agents had authority to issue such bills or acceptances;[8] and where a bond is charged to have been forged, it need not be alleged that it was attested by a certain witness.[9] Certificate of divorce, with court seal attached, alleged to have been forged, the indictment or information need not aver that the parties to the divorce proceedings were ever married.[10] Deed alleged to have been forged, the indictment or information need not aver that the deed was executed or acknowledged, as the word "deed" itself imports a completed instrument;[11] or set out what interest the alleged grantor, whose name was forged, had in the property described.[12] Judge's certificate to fee-bill, charged to have been forged, indictment or information need not aver that the person whose name purported to be signed was a judge of that court.[13] Name alleged to have been forged, need not be expressly

7 Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

Check to order charged to have been forged and in possession of accused with intent to pass it, it need not be alleged that he indorsed it. — State v. Vincent, 91 Mo. 662, 4 S. W. 430.

Indorsement of forged paper is never required to be set out, because it forms no part of the instrument. See Com. v. Ward, 2 Mass. 397; Com. v. Adams, 48 Mass. (7 Metc.) 50; Smith v. State, 20 Neb. 284, 57 Am. Rep. 832, 29 N. W. 923; Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

8 State v. Morton, 27 Vt. 316.

9 State v. Ballard, 6 N. C. (2 Murph.) 186.

10 Ex parte Finley, 66 Cal. 262, 5 Pac. 222.

11 State v. Fisher, 65 Mo. 437.

12 People v. Van Alstine, 57 Mich. 74, 6 Am. Cr. Rep. 272, 23 N. W. 594. See, also, supra, § 672, footnotes 12 and 13.

Compare: People v. Wright, 9 Wend. (N. Y.) 193.

13 State v. Maupin, 57 Mo. 205.

County or circuit in which the cause was tried and the fee-bill issued must be set out, or the indictment or information will be fatally defective.—State v. Maupin, 57 Mo. 205.

averred in those cases where the instrument is set forth according to its tenor in the indictment or information, showing the name.[14] Paper purporting to have been made by an agent in the name of his principal, alleged to have been forged, the indictment or information need not aver the agent had authority to execute such paper.[15] Pension-papers to be used in support of a claim for bounty-land, under act of congress, alleged to have been forged, the indictment need not aver that the forged papers stated all the facts requisite to entitle the accused to the bounty-land, where it is shown that he transmitted them to the pension office for the purpose of securing an allowance of his claim to the land applied for.[16] Whether a railroad company is a corporation or an association of individuals, need not be averred in an indictment charging the forgery of an officer's report of stock killed by such railroad.[17] Will charged to have been forged, indictment or information need not show that the person whose name was forged was of full age and competent to make a will,[18] or that the supposed testator had property that might have been affected thereby.[19] Writings to facilitate entering goods at custom-house, charged to have been forged, indictment need not allege the existence of the goods named in the writings.[20]

§ 674. —— VALUE NEED NOT USUALLY BE AVERRED. The value of the instrument, or of the property sought to be obtained, not being an element of the offense under the particular statute, an indictment or information need not contain an allegation as to value.[1] Thus, an indict-

14 State v. Yerger, 86 Mo. 33.

15 Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

16 United States v. Wilcox, 4 Blatchf. 385, Fed. Cas. No. 16691.

17 Jackson v. Com., 17 Ky. L. Rep. 1197, 34 S. W. 14.

18 Corbett v. State, 5 Ohio Cir. Ct. Rep. 155.

19 People v. Todd, 77 Cal. 464, 19 Pac. 883.

20 United States v. Lawrence, 13 Blatchf. 211, Fed. Cas. No. 15572.

1 Stewart v. State, 113 Ind. 505, 16 N. E. 186; State v. Maas, 37 La. Ann. 292; State v. Clement, 42 La. Ann. 583, 7 So. 685; State

ment or information under such a statute, charging the forgery by accused of a bill of exchange, without alleging the amount thereof, is sufficient;[2] or of forging or altering a chattel mortgage without averring the value of the property.[3] But where the statute denounces the making of designated instruments in writing "or writing of value," the indictment or information must aver that the writing in question was a "writing of value." Thus under such a statute, an indictment or information charging the forgery of an application for an insurance policy must allege that the insurance policy was a thing of value;[4] and where the statute prohibits the selling of a forged instrument "for any consideration," an indictment or information which omits to charge that the instrument was sold, passed or uttered "for a consideration," will be insufficient.[5]

§ 675. —— Name of person to whom forged instrument uttered or passed. There is a conflict of decision as to whether the name of the person, firm, corporation, or company to, or upon whom, an alleged forged instrument was uttered or passed, should be set out in the indictment or information.[1] This conflict of decision is due largely, if not entirely, to the difference in the wording and provisions of the statutes in the various states.[2] The weight of decision seems to be to the effect that the name of the person, firm, corporation, or company to whom the forged instrument was uttered or upon whom passed

v. Adamson, 43 Minn. 196, 45 N. W. 152; State v. Horan, 64 N. H. 548, 15 Atl. 20.

As to value, see, also, supra, § 663.

2 State v. Clement, 42 La. Ann. 583, 7 So. 685.

3 State v. Adamson, 43 Minn. 196, 45 N. W. 152.

4 State v. Horan, 64 N. H. 548, 15 Atl. 20.

5 State v. Hesseltine, 130 Mo. 468, 32 S. W. 983.

Uttering for a consideration need not be averred in the absence of a statute so requiring.—See, supra, § 657, footnote 19.

1 See, supra, § 657, footnotes 24-26.

2 Person intended to be defrauded is required to be set out in some jurisdictions (see, supra,

need not be set out, in the absence of a statutory provision requiring it to be done.[3]

§ 676. Description of instrument—In general. An indictment or information charging forgery in any of its branches should allege the false making of a written instrument,[1] and should describe the instrument alleged

§ 668), while in other jurisdictions it is not required to be set out. See, supra, § 669.

3 See, among many other cases: ALA. — Bostick v. State, 34 Ala. 267. IOWA—State v. Maxwell, 47 Iowa 454; State v. Stuart, 61 Iowa 203, 16 N. W. 91; State v. Hart, 67 Iowa 145, 25 N. W. 99; State v. Beasley, 84 Iowa 83, 51 N. W. 750; State v. Waterbury, 133 Iowa 135, 110 N. W. 328; State v. Weaver, 149 Iowa 408, Ann. Cas. 1912C, 1137, 31 L. R. A. (N. S.) 1051, 128 N. W. 559. KAN.—State v. Foster, 30 Kan. 365, 2 Pac. 628. LA.—State v. Adams, 39 La. Ann. 238, 1 So. 455; State v. Gaubert, 49 La. Ann. 1692, 22 So. 930. MASS.—Com. v. Butterick, 100 Mass. 12. NEB. — Owen v. State, 34 Neb. 392, 51 N. W. 971. N. J.—State v. Jones, 9 N. J. L. (4 Halst.) 357, 17 Am. Dec. 483. N. Y.—People v. Donlan, 186 N. Y. 4, 116 Am. St. Rep. 521, 9 Ann. Cas. 453, 19 Ann. Cas. 136, 20 N. Y. Cr. Rep. 378, 78 N. E. 569. N. C.—State v. Stanton, 23 N. C. (1 Ired. L.) 791. PA.—Com. v. Searle, 2 Binn. 332, 4 Am. Dec. 446. W. VA.—State v. Tingler, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935. ENG.—R. v. Holden, R. & R. C. C. 154.

1 **The crime of forgery** consists in the making or alteration of a written instrument to the prejudice of the rights of another. See, among other cases, Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; State v. Thompson, 19 Iowa 299. See Com. v. Chandler, Thach. Cr. Cas. 187; Com. v. Bargar, 2 L. T., N. S. (Pa.) 161.

Charging forgery by alteration of an order, which is substantially described in the indictment or information, and the names of the parties set out, with an allegation that the order was for the payment of four dollars and twenty cents, one-half payable in money and one-half in trade, and alleging the four dollars and twenty cents written in figures, "to-wit, 4.22," charging the alteration of the figures, and then alleging that the order "is in the following words and figures," setting out a copy of the altered order, sufficiently shows that the order was a written instrument.—Hawkins v. State, 28 Fla. 363, 9 So. 362.

False entry in an account relating to the business of a municipal corporation is shown by an indictment or information alleging that accused, with intent to defraud a city, entered on a writing used by it to record the loads of snow removed for its account, that one A had removed a certain number of loads, for which a certain amount was due him, which entries were knowingly false.—People v. Herzog, 47 Misc. (N. Y.) 50,

to have been forged sufficiently to enable the court to know its character.[2] To accomplish this purpose a reasonable degree of certainty is required,[3] and the description will be sufficient where it meets all the requirements in an indictment charging larceny of the instrument, if it were a subject of larceny.[4] The description of the instrument should be of the instrument as it was at the time of the making or altering,[5] and need not usually set out either the amount or value,[6] or any other matter not necessary to the validity of the instrument, such as the indorsements thereon, marginal words, figures, devices, and so forth.[7] But where the charge is of forging the indorsement itself, the alleged false indorsement must be set out,[8] and the indictment or information must affirma-

19 N. Y. Cr. Rep. 371, 93 N. Y. Supp. 357.

Receipt charged to have been forged, the word "receipt" imports a written instrument. — State v. Bibb, 62 Mo. 286.

2 State v. Stephen, 45 La. Ann. 702, 12 So. 883; People v. Stearns, 21 Wend. (N. Y.) 409; affirmed, 23 Wend. 634; People v. Dewey, 35 Hun (N. Y.) 308; United States v. Lawrence, 13 Blatchf. 211, Fed. Cas. No. 15572.

3 McDonnell v. State, 58 Ark. 242, 24 S. W. 105; State v. Stephen, 45 La. Ann. 702, 12 So. 883; State v. Jones, 1 McM. L. (S. C.) 236, 36 Am. Dec. 257; Powell v. Com., 52 Va. (11 Gratt.) 822.

"An instrument in writing purporting to be an order drawn by Sister Adeline on George Battiste, for nine dollars," held to be a sufficient description of the alleged forged instrument. — McGuire v. State, 37 Ala. 161.

Destroyed or withheld instrument misdescribed, immaterial. See People v. Herzog, 47 Misc. (N. Y.) 50, 19 N. Y. Cr. Rep. 371, 93 N. Y. Supp. 357.

4 Cocke v. Com., 54 Va. (13 Gratt.) 750; Coleman v. Com., 66 Va. (25 Gratt.) 865, 18 Am. Rep. 711; State v. Duffield, 49 W. Va. 274, 38 S. E. 577; R. v. Sharpe, 8 Car. & P. 436, 34 Eng. C. L. 823; R. v. Collins, 2 Moo. & R. 461.

5 Sampson v. People, 188 Ill. 592, 59 N. E. 427.

Indorsement thereafter will not prevent the instrument being introduced in evidence.—Sampson v. People, 188 Ill. 592, 50 N. E. 427.

6 State v. Clement, 42 La. Ann. 583, 7 So. 685.

7 **As to indorsements,** see, infra, § 686.

8 Crossland v. State, 77 Ark. 537, 92 S. W. 776; Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 268.

Uttering forged check in which accused is the payee, his indorsement being necessary to the offense must be set out.—Haslip v. State, 10 Neb. 590, 7 N. W. 331.

tively show that the indorsement set out bore such a relation to the instrument upon which it was indorsed as to be the subject of forgery.[9]

Capacity of working legal injury is essential,[10] and the indictment or information must show that the instru-

9 Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 268.

10 **Instruments capable of working legal injury.**—An instrument in the following form: "La Grange, June 19, 1881. Mr. Allen: Please let A. Garmire have team to go to Mongo, and charge same to me. T. Hudson," held to be a writing obligatory, promising to pay money, within the meaning of the statute defining the crime of forgery.—Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. See: ALA.—Anderson v. State, 65 Ala. 553. GA.—Burke v. State, 66 Ga. 157. LA.—State v. Morgan, 35 La. Ann. 293; State v. Ferguson, 35 La. Ann. 1042. MASS.—Com. v. Fisher, 17 Mass. 46. N. Y.—People v. Shaw, 5 John. 236. N. C.—State v. Keeter, 80 N. C. 472. TENN.—Peete v. State, 70 Tenn. (2 Lea) 513. FED.—United States v. Book, 2 Cr. C. C. 294, Fed. Cas. No. 14624; United States v. Brown, 3 Cr. C. C. 268, Fed. Cas. No. 14658.

An instrument as follows: "Mr. J.: Please let this man have a two dollar check on 57 East Side," being set out in indictment which set up facts to show that the instrument was a check on a commissary store of a designated company, of which J. was the manager, and was for two dollars' worth of goods; that the man whose name was forged thereto was an employee of the company and entitled to receive such check showed that the instrument was the subject of forgery.—Glenn v. State, 116 Ala. 483, 23 So. 1.

Instruments incapable of working injury.—An instrument alleged to have been forged which directed the drawee to "let the bearer have one of your smallest, with load, to charge to" the drawer, was held by the court not, per se, an order for the delivery of a pistol or other goods of any kind, and consequently that an indictment which charged accused with the forgery of such an instrument, without proper innuendos to give it a character and meaning not apparent on its face, was not sufficient to sustain a conviction.—Carberry v. State, 11 Ohio St. 410.

—An order for the payment of money, of the following tenor: "M. C. & Co., pay Binam $5.75, J. L. C.," an indictment unaided by innuendo or the statements of extrinsic facts, was held to be insufficient, because the writing, unaided, did not import an order for the payment of money (Bynam v. State, 17 Ohio St. 142), the court saying: "No definite meaning can be ascribed to the letters 'M. C. & Co.' and 'J. L. C.' They are of themselves arbitrary. The writing of itself does not purport to be by any person, natural or artificial," the actual point in the case decided being that the indictment was bad because it con-

ment alleged to have been forged is one having some legal effect,[11] although it is not necessary that it should be shown to be a perfect instrument;[12] but an instrument which bears resemblance to a genuine document which it is intended to represent, and such as is calculated to deceive, may form the basis for a charge of forgery.[13] Where the instrument is set out in the indictment or information, and purports on its face to be one of the things prohibited to be forged, there need be no further allegation to show that it was that thing, or how it could be used to defraud, or that it was so used.[14]

tained no averment to show what the letters "M. C. & Co." and "J. L. C." meant.

—Bank-check charged to have been forged, the indictment or information alleging that accused did "make and forge the following check for money, to-wit: 'No. 26. Marietta, Ga., July 17th, 1894. The First National Bank: Pay to the order of Mrs. Anna Lyons, twenty-five dollars 00/100, $25 00/100, E. C. Henderson,'—meaning C. E. Henderson of the firm of Henderson and Austin," was held to be insufficient.—Hickin v. State, 96 Ga. 759, 22 S. E. 297.

—Bond charged forged, indictment or information failing to show that there was both an obligee and an obligor, is insufficient.—State v. Briggs, 34 Vt. 501.

—Pension check drawn by an authorized officer on an assistant treasurer of the United States, directing the payment of money, charged to have been altered and forged by falsely and fraudulently placing the name of the payee thereon as his indorsement, held not to sufficiently describe any falsely made or altered writing for the purpose of securing money upon the United States, within the meaning of Rev. Stats., § 5421 (2 Fed. Stats. Ann., 1st ed., p. 303), or of defrauding the United States within the meaning of Rev. Stats., § 5418 (2 Fed. Stats. Ann., 1st ed., p. 300).—United States v. Albert, 45 Fed. 552.

11 Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54.

12 Id.

13 Id.

14 CAL. — People v. Di Ryana, 8 Cal. App. 333, 96 Pac. 919. ILL.—People v. Wilmot, 254 Ill. 554, 98 N. E. 973. KAN.—State v. Stickler, 90 Kan. 783, 136 Pac. 329. MASS.—Com. v. White, 145 Mass. 392, 7 Am. Cr. Rep. 192. MISS.—State v. Chapman, 60 So. 722. MO. — State v. Jackson, 221 Mo. 478, 133 Am. St. Rep. 477, 120 S. W. 66. WASH.—State v. Smith, 77 Wash. 441, 137 Pac. 1008.

If the instrument is of such a character as may prejudice another's rights it is sufficient, and there need be no allegation that the act was to the prejudice.—State v. Tingler, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935.

Within the rules above laid down, an application for an insurance policy, being charged to have been forged, under a statute making it a crime to counterfeit any warrant, order, or request for the payment of money, or for the delivery of any property, or of any writing of value, the indictment or information must allege, in the language of the statute, that the insurance policy was or is a "writing of value."[15] Bank-check may be described as an order for money, or as a bill of exchange,[16] but the indictment or information must set out the name of the payee thereof, or it will be insufficient.[17] Bill charged to have been forged under a fictitious name,[18] subsequent indorsements need not be set out;[19] and where a bill of acceptance drawn by accused is alleged to have been forged, an allegation that the acceptance was indorsed on the face of the instrument, is sufficient.[20] Deed charged to have been forged, the indictment or information need not set out the title of the person intended to be defrauded, nor in what the forgery consisted;[21] nor need it allege that the instrument, if genuine, would have conveyed the land, it being sufficient to say that it purported to convey the land;[22] the execution or acknowledgment of the deed need not be charged,[23] or be alleged that

15 State v. Horan, 64 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20.

16 State v. Maas, 37 La. Ann. 292; State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

17 Williams v. State, 51 Ga. 535, 1 Am. Cr. Rep. 227; State v. Curtis, 39 Minn. 357, 40 N. W. 263.

Bank-check charged to have been forged, described as payable to the order of ———, held bad on demurrer, a check not payable to bearer, or to the order of a named person, being so imperfect that it could not defraud any one. — Williams v. State, 51 Ga. 535, 1 Am. Cr. Rep. 227; but see Dukes v. State, 94 Ga. 393, 21 S. E. 54.

18 As to forgery under fictitious name, see, supra, § 662.

19 United States v. Peacock, 1 Cr. C. C. 215, Fed. Cas. No. 16019.

As to indorsements, see, infra, § 686.

20 Com. v. Butterick, 100 Mass. 12.

21 People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594.

22 State v. Fisher, 65 Mo. 437.

23 Id.

the instrument was sealed,[24] because the word "deed," in and of itself, imports a completed instrument.[25] An acknowledgment to a deed charged to have been forged, an indictment or information which sets forth the certificate of acknowledgment without venue, and without averring that the commissioner of deeds, whose name is alleged to have been forged, had authority to take acknowledgments, is fatally defective.[26] Mortgage charged to have been forged, covers an instrument partly in writ- describes the instrument as "a certain instrument in writing commonly called a mortgage, for payment of money," imports the forgery of a sealed instrument.[27] An instrument alleged to have been forged, in the following terms: "Akron, May 2, 1874, Mr. Schroeder: Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday. J. Butler," may be described as an "order for the delivery of goods and chattels," within the meaning of the statute.[28] "Paper writing" charged to have been forged, an indictment or information which ing and partly printed; the signature to the paper is what gives the character to the instrument.[29] Promissory note alleged to have been forged, it may be described by name;[30] and the indictment charging the forgery of a promissory note by the accused "for the payment of fifty centavos," is sufficient, it not being necessary to define the meaning of the word "centavos."[31]

24 **The word "deed" imports an instrument under seal.**—Paige v. People, 3 Abb. App. Dec. 439, 6 Park. Cr. Rep. 683.

25 State v. Fisher, 65 Mo. 437.

26 Vincent v. People, 15 Abb. Pr. (N. Y.) 234, 5 Park. Cr. Rep. 88.

27 People v. Dewey, 35 Hun (N. Y.) 308.

28 Chidester v. State, 25 Ohio St. 433, 2 Am. Cr. Rep. 153, distinguishing Carberry v. State, 11 Ohio St. 410, and Bynam v. State, 17 Ohio St. 142.

29 Thomas v. State, 103 Ind. 419, 2 N. E. 808; State v. Ridge, 125 N. C. 655, 34 S. E. 439; State v. Jones, 1 McM. (S. C.) 236, 36 Am. Dec. 257.

30 **As to describing instrument,** alleged to have been forged, by name, see, infra, § 683.

31 People v. D'Argencour, 95 N. Y. 624, 2 N. Y. Cr. Rep. 267, 4 Am. Cr. Rep. 240.

§ 677. —— Copy, tenor or facsimile of instrument. The common-law rule, which prevails in the absence of abrogation by statute, requires that the indictment or information shall set out the instrument alleged to have been forged or altered in hæc verba, that is, according to its tenor, and allege to do so,[1] or the failure to do so be

1 ALA.—Thompson v. State, 30 Ala. 28. ARK. — McDonnell v. State, 58 Ark. 242, 24 S. W. 105; Crossland v. State, 77 Ark. 537, 92 S. W. 776. FLA.—Smith v. State, 29 Fla. 408, 10 So. 894; West v. State, 45 Fla. 118, 33 So. 854. ILL.—Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; People v. Tilden, 242 Ill. 536, 134 Am. St. Rep. 341, 17 Ann. Cas. 496, 90 N. E. 218. IND.—Rooker v. State, 65 Ind. 86; Munson v. State, 79 Ind. 541. IOWA—State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158. KAN.—State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895. KY.—Hill v. Com., 17 Ky. L. Rep. 1135, 33 S. W. 823. LA.—State v. Sheldon, 8 Rob. 540. ME.—State v. Bonney, 34 Me. 383; State v. Witham, 47 Me. 165. MASS.—Com. v. Houghton, 8 Mass. 107; Com v. Adams, 48 Mass. (7 Metc.) 50. NEB. — Haslip v. State, 10 Neb. 590, 7 N. W. 331; Davis v. State, 58 Neb. 465, 11 Am. Cr. Rep. 435, 78 N. W. 390. N. H.—State v. Bryant, 17 N. H. 323. N. J.—State v. Gustin, 5 N. J. L. (2 South.) 744; State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449. N. Y.—People v. Kingsley, 2 Cow. 522, 14 Am. Dec. 520. N. C.—State v. Street, 1 N. C., pt. II, (1 Tayl.) 158, 1 Am. Dec. 589; State v. Twitty, 9 N. C. (2 Hawks) 248; State v. Dourdon, 13 N. C. 443; State v. Lytle, 64 N. C. 255. OHIO — McMillen v. State, 5 Ohio St. 269; Griffin v. State, 14 Ohio St. 55. S. C.—State v. Jones, 1 McMull. L. 236, 36 Am. Dec. 257. TENN.—Hooper v. State, 27 Tenn. (8 Humph.) 93; Coxdale v. State, 38 Tenn. (1 Head) 139; Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886. TEX. — Smith v. State, 18 Tex. App. 399; Thomas v. State, 18 Tex. App. 213; Miller v. State, 34 S. W. 267; Edgerton v. State, 70 S. W. 90. VT. — State v. Parker, 1 D. Chip. 298, 6 Am. Dec. 201; State v. Morton, 27 Vt. 310, 65 Am. Dec. 201; State v. Briggs, 34 Vt. 501. FED.—United States v. Smith, 2 Cr. C. C. 111, Fed. Cas. No. 16326; United States v. Britton, 2 Mas. 464, Fed. Cas. No. 14650; United States v. Wentworth, 11 Fed. 52.

Alteration charged, indictment or information must recite instrument in its altered state.—State v. Bryant, 17 N. H. 323.

Omission of figure in face of instrument in description thereof, is fatal. — State v. Street, 1 N. C., pt. II, (1 Tayl.) 158, 1 Am. Dec. 589.

Words and figures must be set out where the forgery consists in the alteration of a genuine instrument.—State v. Bryant, 17 N. H. 323.

excused,[2] and the term "tenor" imports identity,[3] or an exact copy,[4] and requires strict proof.[5] The instrument alleged to have been forged should be set forth with literal accuracy[6] as to the material parts,[7] and the instru-

2 IND. — Armitage v. State, 13 Ind. 441; State v. Callahan, 124 Ind. 364, 24 N. E. 732. N. J.—State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449. N. Y.—People v. Kingsley, 2 Cow. 522, 14 Am. Dec. 520; People v. Badgley, 16 Wend. 53; People v. Dewey, 35 Hun 308. VT.—State v. Parker, 1 D. Chip. 298, 6 Am. Dec. 735. FED.—United States v. Howell, 64 Fed. 110.

In hand of accused, that fact should be averred. — State v. Parker, 1 D. Chip. (Vt.) 298, 6 Am. Dec. 735.

As to lost, destroyed or retained instrument, see, infra, § 685.

3 State v. Townsend, 86 N. C. 676.

4 ARK.—McDonnell v. State, 58 Ark. 242, 24 S. W. 105. IND.—State v. Atkins, 5 Blackf. 458; Thomas v. State, 103 Ind. 419, 2 N. E. 808. IOWA—State v. Callendine, 8 Iowa 288. ME.—State v. Bonney, 34 Me. 383. MASS.—Com. v. Stevens, 1 Mass. 203; Com. v. Wright, 55 Mass. (1 Cush.) 46. MO.—State v. Fenly, 18 Mo. 445; State v. Pullens, 81 Mo. 387; State v. Chinn, 142 Mo. 507, 44 S. W. 245. OHIO—Dana v. State, 2 Ohio St. 91. TENN. — Fogg v. State, 17 Tenn. (9 Yerg.) 392. TEX.—Roberts v. State, 2 Tex. App. 4; Baker v. State, 14 Tex. App. 332; Miller v. State, 34 S. W. 267; Edgerton v. State, 15 Am. Cr. Rep. 271, 70 S. W. 90.

"Tenor" binds pleader to strict recital.—Com. v. Stevens, 1 Mass. 203.

5 Roberts v. State, 2 Tex. App. 4; Baker v. State, 14 Tex. App. 332; Edgerton v. State, (Tex.) 15 Am. Cr. Rep. 271, 70 S. W. 90.

6 Com. v. Stow, 1 Mass. 54; Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886.

Technical words not necessary to a sufficient description, if otherwise good. "Tenor," etc., need not be used to express the fact that the instrument is set forth with literal accuracy; "of the purport and effect following," said to be sufficient, at least where followed by a correct copy of the instrument.—State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158; State v. Duffield, 49 W. Va. 274, 39 S. E. 577.

Compare: Davis v. State, 2 Ohio St. 91.

7 **Material parts only** of instrument alleged to have been forged need be set out.—Haupt v. State, 108 Ga. 53, 75 Am. St. Rep. 19, 34 S. E. 313.

Draft subject of forgery, it is not necessary to set out figures cut therein. See, infra, § 687.

Indorsements subsequently made need not be set out. See, infra, § 686.

Marginal devices, figures, etc., need not be set out. See, infra, § 687.

Revenue stamp on check need not be set out. See, infra, § 687.

ment thus set forth must be shown in the proof with the same accuracy;[8] hence, an indictment or information charging forgery of an instrument which "is in the tenor substantially as follows," is insufficient, because the terms are contradictory.[9]

Affidavit required by statute to accompany the instrument charged to have been forged in order to validate it, the indictment or information must set out the affidavit and allege that it accompanied the instrument.[10]

Facsimile of the instrument alleged to have been forged may be substituted for a copy thereof in those cases where there is doubt or difficulty as to particular words.[11]

Under statutory provisions in some jurisdictions, the purport of the instrument may be set out without setting out the tenor thereof;[12] while in other jurisdictions it is provided by statute that the indictment need contain only a statement of the offense in ordinary and concise language, with such a description of the forged instrument as is necessary to enable the accused to understand what is intended, and to know what may be proved against him;[13] while in still other jurisdictions the statutes provide that the instrument may be described either by its purport or by the name under which it is generally known.[14]

§ 678. —— PURPORT OF INSTRUMENT. "Purport" is contradistinguished from "tenor," which we have already seen means identity, or a literal or exact copy.[1] It

8 Luttrell v. State, 185 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886.

9 Edgerton v. State, (Tex.) 15 Am. Cr. Rep. 271, 70 S. W. 90.

10 Caffey v State, 36 Tex. Cr. Rep. 198, 61 Am. St. Rep. 841, 36 S. W. 82.

11 State v. Shelden, 8 Rob. (La.) 540.

12 See, infra, § 678.

13 State v. Curtis, 39 Minn. 357, 40 N. W. 263; State v. Wright, 9 Wash. 96, 37 Pac. 313; R. v. Ead, 43 Nova Scotia 53.

14 State v. Tisdale, 39 La. Ann. 476, 2 So. 406; State v. Clement, 42 La. Ann. 583, 7 So. 685; State v. Gaubert, 49 La. Ann. 1692, 22 So. 930; State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447; Com. v. Beamish, 81 Pa. St. 389.

1 See, supra, § 677, footnotes 3 and 4.

is not necessary that an indictment or information charging forgery shall contain a purport clause,[2] it being sufficient to set out the instrument according to its tenor.[3] In fact, an indictment or information should never set out the instrument both according to "purport" and "tenor,"[4] because where the instrument is set out the purport thereof necessarily appears;[5] and where the instrument is described both by its purport and its tenor, should there be any repugnancy between the two descriptions, it will be fatal.[6]

"Purport" of an Instrument means the substance thereof as it appears on the face of the instrument to one who reads it.[7] Setting forth by "purport and effect" does not mean an exact copy,[8] but the substance of the instrument only,[9] and in this respect differs from

2 Duffin v. People, 107 Ill. 113; State v. McGardiner, 23 N. C. (1 Ired. L.) 27; Howard v. State, 37 Tex. Cr. 494, 66 Am. St. Rep. 812, 36 S. W. 475; Whitaker v. State, (Tex.) 147 S. W. 599.

3 Rhudy v. State, 42 Tex. Cr. 225, 58 S. W. 1007; Whitaker v. State, (Tex.) 147 S. W. 599.

4 State v. Pullens, 81 Mo. 387; Fogg v. State, 17 Tenn. (9 Yerg.) 392; Westbrook v. State, 23 Tex. App. 401, 5 S. W. 248.

5 State v. Pullens, 81 Mo. 387; Fogg v. State, 17 Tenn. (9 Yerg.) 392; Roberts v. State, 2 Tex. App. 4; Westbrook v. State, 23 Tex. App. 401, 5 S. W. 248; English v. State, 30 Tex. App. 470, 18 S. W. 94.

Repugnant purport clause may be disregarded.—Myers v. State, 101 Ind. 379; State v. Yerger, 86 Mo. 33.

6 See, infra, § 680.

7 ARK.—Van Horne v. State, 5 Ark. 349; McClellan v. State, 32 Ark. 609. IND.—Thomas v. State, 103 Ind. 419, 2 N. E. 808. IOWA—State v. Callendine, 8 Iowa 288. MASS.—Com. v. Wright, 55 Mass. (1 Cush.) 46. MISS.—Roberts v. State, 72 Miss. 110, 16 So. 233. MO.—State v. Fenly, 18 Mo. 445; State v. Pullens, 81 Mo. 387; State v. Chinn, 142 Mo. 507, 44 S. W. 245. N. C.—State v. Harris, 27 N. C. (5 Ired. L.) 287. OHIO—Dana v. State, 2 Ohio St. 91. TENN.—Fogg v. State, 17 Tenn. (9 Yerg.) 392.

8 Com. v. Wright, 55 Mass. (1 Cush.) 46; State v. Bonney, 34 Me. 383.

"Of the purport and effect following" is an insufficient allegation that the instrument set out is an exact copy.—Dana v. State, 2 Ohio St. 91.

But see: State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158.

9 IND.—State v. Atkins, 5 Blackf. 458. ME.—State v. Bonney, 34 Me. 383. MASS.—Com. v.

"tenor."[10] By statutory provisions in many of the states an indictment or information charging the making or altering of an instrument, is not required to set out the instrument or the alterations by tenor, but will be sufficient where it sets out the forged instrument or alteration according to purport.[11] Where the uttering of a forged written or printed instrument is charged, the indictment or information should set forth the purport of each material portion of such instrument;[12] but describing the instrument by stating what was the "purport and effect" thereof, in apparently the words of the instrument itself, is sufficient.[13] Describing instrument alleged to have been forged as a "written order to A by B to pay C two dollars in goods," held to be sufficient.[14] Set-

Wright, 55 Mass. (1 Cush.) 46. MO.—State v. Fenly, 18 Mo. 445; State v. Pullens, 81 Mo. 387; State v. Chinn, 142 Mo. 507, 44 S. W. 245. TENN.—Fogg v. State, 17 Tenn. (9 Yerg.) 392. TEX.—Miller v. State, 34 S. W. 267.

10 State v. Atkins, 5 Blackf. (Ind.) 458; State v. Callendine, 8 Iowa 288; Com. v. Wright, 55 Mass. (1 Cush.) 46.

11 ALA.—Bostick v. State, 34 Ala. 266; Jones v. State, 50 Ala. 161. CAL.—People v. Terrill, 132 Cal. 497, 64 Pac. 894; People v. Chretien, 137 Cal. 450, 70 Pac. 305. COLO.—Cohen v. People, 7 Colo. 274, 3 Pac. 385. IOWA—State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158. LA.—State v. Maas, 37 La. Ann. 292; State v. Boasso, 38 La. Ann. 202; State v. Sherwood, 41 La. Ann. 316, 6 So. 529; State v. Gaubert, 49 La. Ann. 1692, 22 So. 930. MISS.—Roberts v. State, 72 Miss. 110, 16 So. 233. MO.—State v. Fay, 65 Mo. 90; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Cr. Rep. 132; State v. Pullens, 81 Mo. 387; State v. Rowlen, 114 Mo. 628, 21 S. W. 729; State v. Imboden, 157 Mo. 83, 57 S. W. 536. N. Y.—People v. Hertz, 35 Misc. 177, 15 N. Y. Cr. Rep. 477, 71 N. Y. Supp. 489; People v. Herzog, 47 Misc. Rep. 50, 19 N. Y. Cr. Rep. 371, 93 N. Y. Supp. 357. OHIO—Chidester v. State, 25 Ohio St. 433. ORE.—State v. Childers, 32 Ore. 119, 49 Pac. 801. WASH.—State v. Wright, 9 Wash. 96, 37 Pac. 313. W. VA.—State v. Henderson, 29 W. Va. 147, 1 S. E. 225. WIS.—State v. Hill, 30 Wis. 416. WYO.—Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

In Alabama the instrument may be described either in hæc verba or according to its legal tenor and effect.—Bartlett v. State, 8 Ala. App. 248, 62 So. 320.

12 Davis v. State, 58 Neb. 465, 11 Am. Cr. Rep. 435, 78 N. W. 390.

13 Dana v. State, 2 Ohio St. 91.

14 Hill v. Com., 17 Ky. L. Rep. 1135, 33 S. W. 823.

ting forth by purport a check alleged to have been forged, it is not necessary to allege the name of the bank on which the instrument was drawn.[15] Describing an instrument alleged to have been forged as "a certain instrument in writing commonly called a 'deed,' purporting to be the act of one A, by which the interest in certain real property purported to be transferred and conveyed by A to the said B," held to be insufficient;[16] and an allegation that accused unlawfully, and feloniously made and forged a deed purporting to be the act of a fictitious person, is not sufficient; the indictment or information must allege that a fictitious name or pretended signature of a person not in existence was affixed to the instrument;[17] "purporting to be the act of A, a fictitious person" merely charges that A is a fictitious person, not that the instrument purported to be the act of a fictitious person, and is therefore bad.[18] Setting out according to purport a promissory note alleged to have been forged, it is not necessary to allege or show a revenue stamp, required by law, was affixed to it,[19] nor allege the date of making or the maturity of the note;[20] and where an indorsement on such note is charged to have been forged, it is not necessary to state the name of the maker of the note, or where it was payable.[21]

§ 679. —— Effect of videlicet clause. An indictment or information describing by setting out an instrument alleged to have been forged, should not only set out the instrument but should profess to do so.[1] This is usually accomplished by the videlicet clause, that is, by

15 Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

16 Roberts v. State, 72 Miss. 110, 16 So. 233.

17 State v. Minton, 116 Mo. 605, 22 S. W. 808.

18 Hocker v. State, 34 Tex. Cr. Rep. 359, 30 S. W. 783.

19 State v. Hill, 30 Wis. 416. See, infra, § 687.

20 Com. v. Ross, 2 Mass. 373; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506.

21 Cocke v. Com., 54 Va. (13 Gratt.) 750.

1 State v. Twitty, 9 N. C. (2 Hawks) 248.

the phrase "to-wit," or "that is to say," which serves to particularize that which is too general in what has gone before,[2] and has been said to import an exact copy,[3] although there are cases to the effect that it does not profess to give an exact copy.[4]

§ 680. —— AMBIGUITY AND REPUGNANCY—IN GENERAL. We have already seen[1] that an indictment or information charging the making of a false instrument, or the altering of a genuine instrument, must be certain both in charging as to the matter alleged and as to the person accused,[2] and that a failure in this respect is ground for quashing;[3] likewise any repugnancy in the allegations[4] between the purport clause and the tenor clause as to the instrument, where both clauses are used, will render the indictment or information bad,[5] except in those jurisdic-

2 Gilligan v. Com., 99 Va. 819, 37 S. E. 962.

3 McDonnell v. State, 58 Ark. 242, 24 S. W. 105; State v. Johnson, 26 Iowa 407, 96 Am. Dec. 158; Com. v. Stow, 1 Mass. 54; Miller v. State, (Tex.) 34 S. W. 267.

4 Dana v. State, 2 Ohio St. 91.

1 See, supra, § 654.

2 See, supra, § 660.

3 Lost note, alleged to have been forged, described as having been signed by one "Henry Wintrode or Henry R. Wintrode," held not to be uncertain or equivocal.—Hess v. State, 73 Ind. 537.

4 CAL.—People v. Eppinger, 105 Cal. 36, 38 Pac. 538; People v. Ellenwood, 119 Cal. 166, 51 Pac. 553. IND.—State v. Cook, 52 Ind. 574; State v. Dufour, 63 Ind. 567; State v. Bracken, 152 Ind. 565, 53 N. E. 838. MO.—State v. Chinn, 142 Mo. 507, 44 S. W. 245; State v. Leonard, 171 Mo. 622, 71 S. E. 1017. TEX.—Munoz v. State, 40 Tex. Cr. Rep. 457, 50 S. W. 949.

5 ARK.—McClellan v. State, 32 Ark. 609. GA.—Hichen v. State, 96 Ga. 759, 22 S. E. 297. KY.—Sutton v. Com., 17 Ky. L. Rep. 175, 30 S. W. 665. MASS.—Com. v. Ray, 69 Mass. (3 Gray) 441; Com. v. Ray, 72 Mass. (6 Gray) 441. N. H.—State v. Horan, 64 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20. S. C.—State v. Houseal, 2 Brev. 219. TENN.—State v. Shawley, 6 Tenn. (5 Hayw.) 256. TEX.—Roberts v. State, 2 Tex. App. 4; Westbrook v. State, 23 Tex. App. 401, 5 S. W. 248; Becker v. State, 18 S. W. 550; Campbell v. State, 35 Tex. Cr. Rep. 182, 32 S. W. 899; Fite v. State, 36 Tex. Cr. Rep. 4, 34 S. W. 922; Stephens v. State, 36 Tex. Cr. Rep. 386, 37 S. W. 425, 38 S. W. 997; Gibbons v. State, 36 Tex. Cr. Rep. 469, 37 S. W. 861; Booth v. State, 36 Tex. Cr. Rep. 600, 38 S. W. 196; Thulemeyer v. State, 38 Tex. Cr. Rep. 349, 42 S. W. 83; Scott v. State, 40 Tex. Cr. Rep. 105, 48 S. W. 523; Craw-

tions in which it is held that in such cases the purport clause may be regarded as surplusage and the indictment held valid.[6] Thus, where this doctrine prevails, an indictment setting forth an alleged forged note according to the tenor, is sufficient although the statement of the purport thereof is repugnant;[7] and an allegation that a note charged to have been forged was "executed and signed by" the purported maker thereof, is not invalid for surplusage or repugnant allegation, where there is otherwise sufficient matter alleged to indicate the crime and the person charged.[8]

§ 681. ——— IN NAMES OF PERSONS. The names of the parties must be accurately given, and where the purport clause alleges the instrument charged to have been forged was executed in the name of A, and sets out an instrument purporting to have been executed by B, the repugnance is fatal.[1] Where the indictment or information in setting out the names of a party or parties merely uses the initials[2] of the given name[3] or sets out the full first

ford v. State, 40 Tex. Cr. Rep. 344, 11 Am. Cr. Rep. 432, 50 S. W. 378; Glenn v. State, 65 S. W. 368; Mayers v. State, 47 Tex. Cr. Rep. 624, 85 S. W. 802; Tracy v. State, 49 Tex. Cr. Rep. 37, 90 S. W. 308; Forcy v. State, 55 Tex. Cr. Rep. 545, 117 S. W. 834. VT.—State v. Bean, 19 Vt. 530.

An indictment alleging "that said false instrument is to the tenor substantially as follows, to-wit," is bad for repugnancy.—Edgerton v. State, (Tex.) 15 Am. Cr. Rep. 271, 70 S. W. 90.

6 Myers v. State, 101 Ind. 379; Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54.

Repugnant purport clause may be disregarded where followed by the alleged forged instrument set out in hæc verba.—Myers v. State, 101 Ind. 379; State v. Yerger, 86 Mo. 33.

7 State v. Pullens, 81 Mo. 387.

8 State v. Chamberlain, 89 Mo. 129, 1 S. W. 145.

1 State v. Horan, 64 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20; Overly v. State, 34 Tex. Cr. Rep. 500, 31 S. W. 377; Campbell v. State, 35 Tex. Cr. Rep. 182, 32 S. W. 899.

2 See, supra, § 660, footnote 2.

3 Shinn v. State, 57 Ind. 144; Yount v. State, 64 Ind. 443; State v. Houseal, 2 Brev. L. (S. C.) 219; English v. State, 30 Tex. App. 470, 18 S. W. 94.

Purport clause "S. B. S. Keimer," tenor clause "Solomon B. S. Keimer."—Shinn v. State, 57 Ind. 144.

name and the instrument uses merely the initials,[4] or misspells the name,[5] the repugnance will be fatal, except in those cases where the rule of idem sonans applies.[6] But the omission of the initial letter of the middle name, in the purport clause, followed by a copy of the instrument in which such initial letter appears, will not invalidate the indictment;[7] and where the purport clause alleges a firm name and the instrument set out shows a firm name, with the letter M underneath, the omission of the letter M in the purport clause is immaterial.[8] Where the purport clause alleges the act complained of in the name of one person, and the tenor clause shows it to have been the act of another person,[9] or of more than one person,[10] the repugnancy will be fatal.[11] But

4 Yount v. State, 64 Ind. 443; State v. Horan, 64 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20; State v. Houseal, 2 Brev. L. (S. C.) 219; State v. Jones, 1 McM. (S. C.) 236, 36 Am. Dec. 257.

Compare: Yount v. State, 101 Ind. 379, where purport set out the name as "Vincent T. West," and tenor clause showed instrument purported to be signed "Dr. West," held purport clause would be rejected as surplusage.

Purport clause "Nathaniel Durkie," tenor clause "N. Durkie" (State v. Houseal, supra), and purport clause "Tristram Tupper," tenor clause "T. Tupper."—State v. Jones, supra.

5 State v. McCormick, 141 Ind. 685, 40 N. E. 1089.

Clerical error in name purporting to be signed to an instrument set out will not vitiate the indictment or information. — State v. Morgan, 35 La. Ann. 293.

6 Roberts v. State, 2 Tex. App. 4; State v. Bean, 19 Vt. 530.

7 People v. Ferris, 56 Cal. 442.

8 Young v. State, (Tex.) 40 S. W. 793.

9 Campbell v. State, 35 Tex. Cr. Rep. 182, 32 S. W. 899; English v. State, 35 Tex. Cr. Rep. 470, 18 S. W. 94; Fite v. State, 36 Tex. Cr. Rep. 4, 34 S. W. 922.

Instrument alleged to be signed M. R. L., but instrument set out purported to be signed by R. M. L., fatal (English v. State, 35 Tex. Cr. Rep. 470, 18 S. W. 94). So, also, is allegation of "Mr. Jones" in purport clause, and "Mrs. Jones" in tenor clause. — Fite v. State, 36 Tex. Cr. Rep. 4, 34 S. W. 922.

10 Fogg v. State, 17 Tenn. (9 Yerg.) 392.

11 Campbell v. State, 35 Tex. Cr. Rep. 182, 32 S. W. 899; Fite v. State, 36 Tex. Cr. Rep. 4, 34 S. W. 922; Stephens v. State, 36 Tex. Cr. Rep. 386, 37 S. W. 425, 38 S. W. 997; Gibbons v. State, 36 Tex. Cr. Rep. 469, 37 S. W. 861; Crayton v. State, 45 Tex. Cr. Rep. 84, 73 S. W. 1046.

Compare: Fogg v. State, 17 Tenn. (9 Yerg.) 392, where charge

an allegation in the purport clause that the act was done by the accused as an agent,[12] or as a partner,[13] and the copy of the instrument set out fails to designate the capacity in which the act was done, the repugnancy will not be fatal.

§ 682. ——— In names of corporations. The rules laid down in the preceding section relative to repugnancy in the names of persons, applies also in the case of repugnancy in the names of corporations. Thus, it has been said that an indictment or information charging the forgery of a check, and in the purport clause naming the bank upon which the check was drawn as the "City Bank of Dallas," but in the tenor clause setting out a check on the "City Bank," was fatally defective because of repugnance.[1] Where, in the purport clause, the indictment or information sets forth that the instrument alleged to have been forged purported to be the act of a corporation, and in the tenor clause, sets out an instrument purporting to be signed by the officers of the corporation, the repugnance is fatal.[2] Likewise in an indictment charging the forgery of a railroad ticket, in the purport clause alleging that the forgery purported to be the act of A, as agent of a named railroad company, and in the tenor clause the instrument is set out, showing that it was signed by B, the name of A nowhere appearing in the instrument, the repugnance between the purport and the tenor clause is fatal.[3] But the addition of words showing that the company was an incorporated concern will not constitute repugnance. Thus, where an indictment charged accused with forging a policy of in-

of forging instrument in name of B and instrument set out purported to be executed by B and A, the accused, held not to constitute a repugnance.

12 State v. Gustin, 5 N. J. L. (2 South.) 744.

13 Davis v. State, (Tex.) 69 S. W. 73.

1 Roberts v. State, 2 Tex. App. 4.

2 Millsaps v. State, 38 Tex. Cr. Rep. 570, 43 S. W. 1015.

3 Overly v. State, 34 Tex. Cr. Rep. 500, 31 S. W. 377.

surance of the "Traveler's Insurance Company of Hartford, Connecticut," with intent to defraud the "Traveler's Insurance Company of Hartford, Connecticut, which was then and there a corporation duly organized," does not constitute repugnance.[4]

§ 683. —— Designating instrument by name. In the absence of statutory provision it is not necessary, even if permissible, to describe the instrument alleged to have been forged by the name under which it is usually known,[1] and some of the cases hold that when the name is set out in the indictment or information, this allegation must be proved as laid,[2] although the weight of authority, and the better doctrine is thought to be, that a mistake of the pleader in designating the name of the instrument alleged to have been forged or altered, and which is set forth, will not vitiate an indictment or information otherwise good.[3] The careful pleader will charge the instrument alleged to have been forged as a certain paper writing purporting to be an instrument designated in the statute,[4] or set out the instrument in full without naming it, even in those jurisdictions in which, by statute, the instrument may be described by the name under which it is usually known, for the reason that the legal name of any particu-

4 People v. Graham, Sheld. (N. Y.) 151, 6 Park. Cr. Rep. 135.

1 State v. Stringfellow, 126 La. 720, 52 So. 1002; Bethany v. State, (Tex.) 179 S. W. 1166.

2 Bethany v. State, (Tex.) 179 S. W. 1166.

3 CAL.—People v. Way, 10 Cal. 336; People v. Ah Woo, 28 Cal. 205. GA.—Gibson v. State, 79 Ga. 344, 5 S. E. 76. IND.—Reed v. State, 28 Ind. 396; Harding v. State, 54 Ind. 359; Powers v. State, 87 Ind. 97; Myers v. State, 101 Ind. 379; Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. LA.—State v. Clement, 42 La. Ann. 583, 7 So. 685. MICH.—People v. Kemp, 76 Mich. 410, 43 N. W. 439. ENG.—R. v. Williams, 20 L. J. Rep. (N. S.), 14 Jur. 1052, 2 Eng. L. & Eq. 533.

4 People v. Rynders, 12 Wend. (N. Y.) 425, 431; Gray v. People, 21 Hun (N. Y.) 140; People v. Dewey, 35 Hun (N. Y.) 308; State v. Gardiner, 23 N. C. (1 Ired. L.) 27.

lar instrument is purely a question of law for the court.[5] Thus, it has been said that where an instrument as set out in the indictment or information is an evidence of debt, it does not matter whether such instrument is designated as a "certificate of deposit," a "deposit slip," or as a "deposit ticket."[6]

Under statute in many, if not in the majority of the states, it is sufficient to describe the instrument alleged to have been forged by the name under which it is usually known, without setting it out by tenor,[7] because under such a statute minuteness of description is dispensed with, so long as the indictment or information meets the requirement[8] that it shall notify the accused of the charge against him.[9] However, under such a statute an indictment or information which sets out in full the instrument alleged to have been forged, but fails to designate it in the purport clause by the name under which it is gener-

5 See R. v. Birch, 2 Wm. Bl. 790, 96 Eng. Repr. 464.

6 State v. Jackson, 221 Mo. 478, 133 Am. St. Rep. 477, 120 S. W. 66.

7 State v. Boasso, 38 La. Ann. 202; State v. Pons, 28 La. Ann. 43; State v. Nelson, 28 La. Ann. 46; State v. Woods, 112 La. 617, 36 So. 626; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Cr. Rep. 132; Com. v. Beamish, 81 Pa. St. 389; Com. v. Bargar, 2 L. T., N. S. (Pa.) 161.

Thus, under a statute providing "that in any indictment for forging any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same shall be usually known, without setting out a copy or facsimile thereof, or otherwise describing the same," an allegation that the accused forged "a certain promissory note, purporting to be the act of one Robert F. Springer, by which a pecuniary demand and obligation for the payment of" a sum named "by the said Robert F. Springer to the said Jacob Clinton purported to be created," is a sufficient description, the indictment alleging further, as a reason for not describing the note more particularly, that it was in the possession of the accused. — State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Cr. Rep. 132.

8 See, supra, § 654, footnotes 8 et seq.

9 State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Cr. Rep. 132. See State v. Smith, 31 Mo. 120; State v. Whatson, 65 Mo. 115; State v. Fisher, 65 Mo. 437.

ally known,[10] or which gives to it a wrong name,[11] will not be vitiated by such omission or wrong name.

—— *Illustrations under statute:* Acceptance on a bank-check may be described as "indorsement."[12] "Acquittance and discharge for money" sufficiently describes a bill of parcels purporting to be receipted.[13] Alteration of record of board of county supervisors describing the same as a "resolution," and setting out the matter alleged to have been altered, which shows the record to have been merely an allowance to a county officer, is immaterial.[14] "Bank-check" sufficiently designates an instrument in that form,[15] and a bank-check is properly described as "an order for money," or as "a bill of exchange."[16] Bond may be described as an "order for money."[17] "A

10 People v. McGlade, 139 Cal. 66, 72 Pac. 600; Gray v. People, 21 Hun (N. Y.) 140; Lassiter v. State, 35 Tex. Cr. Rep. 540, 34 S. W. 751; Hanks v. State, (Tex.) 54 S. W. 587.

Nature of instrument alleged to be forged, need not be designated by name, where set out in full.—Gray v. People, 21 Hun (N. Y.) 140.

Purport clause need not state nature of instrument. — Bethany v. State, (Tex.) 179 S. W. 1166.

11 CAL.—People v. Ah Woo, 28 Cal. 205. IND.—Harding v. State, 54 Ind. 359; Powers v. State, 87 Ind. 97; Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54. KY.—Greenwood v. Com., 11 Ky. L. Rep. 220, 11 S. W. 811. LA.—State v. Gryder, 44 La. Ann. 962, 32 Am. St. Rep. 358, 11 So. 573. TEX.—Frazier v. State, 64 S. W. 934; Emmons v. State, 43 S. W. 518.

12 State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

13 Com. v. White, 145 Mass. 392, 14 N. E. 611.

14 State v. Van Auken, 98 Iowa 674, 68 N. W. 454.

15 People v. Rynders, 12 Wend. (N. Y.) 425.

16 State v. Crawford, 13 La. Ann. 300; State v. Maas, 37 La. Ann. 292; People v. Kemp, 76 Mich. 410, 43 N. W. 439; State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

Instrument in form of cashier's check, properly described as "order for money."—Com. v. Parsons, 138 Mass. 189.

17 Miller v. State, 71 Fla. 338, 71 So. 280.

"A certain bond" alleged to have been forged, instead of stating a certain paper writing purporting to be a bond, proper designation under statute using the words "forge any deed, will, bond," etc.—State v. Gardiner, 23 N. C. (1 Ired. L.) 27.

book and writing commonly known as the duplicate of the taxes levied for the use of the school district" sufficiently describes a duplicate of taxes alleged to have been forged.[18] "Fee-bill" is a proper designation in an indictment for forging a court document of that name, without an allegation that the forgery was of a certified fee-bill.[19] "Lease" is a proper designation of an instrument of that import.[20] "Order" is a proper designation of an instrument calling for the payment of money, or the delivery of goods;[21] but it is not necessary to aver, in the language of the statute, that the alleged forged paper is "an order for the payment of money, or an instrument by which a pecuniary demand is created";[22] and an order for the payment of money drawn by accused on himself, payable to his own order, accepted and indorsed by him, may be described as a "bill of exchange."[23] "Pay-roll" is a proper designation in an indictment charging forgery, even though such an instrument is not named in the statute.[24] Promissory note alleged to have been forged, and set forth according to its tenor, need not be described as an instrument "for the payment of money";[25]

18 Com. v. Beamish, 81 Pa. St. 389.

19 State v. Haws, 98 Mo. 188, 11 S. W. 574, 12 S. W. 126.

20 Folden v. State, 13 Neb. 328, 14 N. W. 412.

21 Examples. — "To Yet Wha's store—Sirs: Please pay to Mayien Fang, the one hundred dollars which I deposited," etc., held to be an "order" within the meaning of the statute.—People v. Ah Woo, 28 Cal. 205.

"Pay W. T. C. or bearer, one fifty dollars in current funds," held to be an order for the payment of money. — State v. Coyle, 41 Wis. 267.

"Wen. 19th. Mr. Davis, please let the boy have $6.00 dolers for me. B. W. Earl," properly described as an order. — Evans v. State, 8 Ohio St. 196, 70 Am. Dec. 98.

Instrument charged to be falsely altered in its character, alleged to be an order for money, or for the delivery of goods, at the option of the holder, must be so described in the indictment.—State v. Stephen, 45 La. Ann. 702, 12 So. 883.

22 People v. Clements, 26 N. Y. 193, 5 Park. Cr. Rep. 337.

23 Com. v. Butterick, 100 Mass. 12.

24 Com. v. Bargar, 2 L. T., N. S. (Pa.) 161.

25 Com. v. Castles, 75 Mass. (9 Gray) 123.

and "promissory note" is a proper description of an instrument by which the signers promise to pay at a certain time, a specified amount of money, with interest and attorney fees, without relief from valuation or appraisement laws.[26] Receipt charged to have been forged against a "book account," is too indefinite.[27] "School voucher or check" is a sufficient description, it being evident that "voucher" and "check" mean the same thing.[28] "Warrant and order" is a proper designation under a statute speaking of a "warrant or order."[29]

§ 684. —— INSTRUMENT IN FOREIGN LANGUAGE. By the common-law rule, where an instrument alleged to have been forged was written in a foreign language, the indictment is required to set out the instrument in the language in which it was written, with an English translation thereof;[1] but under the practice in this country, in many of the jurisdictions at least, an indictment or information setting out a translation of the instrument alleged to be forged, without giving a copy thereof in the original, is sufficient.[2] Such translation, however, must include everything in the original that is material to its validity as an instrument in writing.[3] Where the signature alone is forged, and the writing is in German script, and the name as thus written in German and as written

26 People v. Bennett, 122 Mich. 281, 81 N. W. 117.

27 State v. Dalton, 6 N. C. (2 Murph.) 379.

28 Thomas v. State, 18 Tex. App. 213.

29 State v. Jones, 1 McM. L. (S. C.) 236, 36 Am. Dec. 257. See State v. Maas, 37 La. Ann. 292; State v. Holley, 1 Brev. (S. C.) 35.

1 R. v. Goldstein, 3 Brod. & B. 201, 7 Eng. C. L. 411, 7 Moo. C. P. 1, 10 Price 88, 1 Russ. & R. C. C. 473; R. v. Harris, 7 Car. & P. 429, 32 Eng. C. L. 571; R. v. Szudurskie, 1 Moo. C. C. 429.

2 People v. Ah Woo, 28 Cal. 205; Duffin v. People, 107 Ill. 113, 47 Am. Rep. 431.

3 Marginal words denoting the year in which issued, and without which the instrument would not be capable of being circulated in the country to which it belonged, a translation which omits those words will be insufficient.—R. v. Harris, 7 Car. & P. 429, 32 Eng. C. L. 571.

in English is the same, it may be set out as written, without employing English letters,[4] although it has been held necessary in such a case to allege that the signature is German script, and give the English equivalent.[5]

§ 685. —— Lost, destroyed, or withheld instrument. In those cases in which the instrument alleged to have been forged has been lost, destroyed, or for any other reason it is unobtainable—e. g., where it is withheld by the accused, or its whereabouts is unknown to the grand jury—an indictment or information setting forth the substance of the instrument will be sufficient, without setting forth the tenor,[1] where the particular reason or excuse is given for failure to set it out in hæc verba,[2] and

4 Duffin v. People, 107 Ill. 113; 47 Am. Rep. 431; Byerline v. State, 147 Ind. 125, 45 N. E. 772.

5 People v. Bennett, 122 Mich. 281, 81 N. W. 117.

1 ALA.—Du Bois v. State, 50 Ala. 139. CAL.—People v. Bogart, 36 Cal. 245. ILL.—Wallace v. People, 27 Ill. 45. IND.—Armitage v. State, 13 Ind. 441; Birdg v. State, 31 Ind. 88; Munson v. State, 79 Ind. 541; Myers v. State, 101 Ind. 379; State v. Callahan, 124 Ind. 364, 24 N. E. 732. IOWA — State v. White, 98 Iowa 346, 67 N. W. 267. MASS.—Com. v. Snell, 3 Mass. 82. N. J.—State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449; Mead v. State, 53 N. J. L. 601, 23 Atl. 264. N. Y.—People v. Kingsley, 2 Cow. 522, 14 Am. Dec. 520; People v. Badgley, 16 Wend. 53; People v. Dewey, 35 Hun 308. N. C.—State v. Peterson, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9. VT.—State v. Parker, 1 D. Chip. 298, 11 Am. Dec. 735; State v. Briggs, 34 Vt. 501. FED.—United States v. Britton, 2 Mas. 464, Fed. Cas. No. 14650; United States v. Howell, 64 Fed. 110.

2 ARK.—Crossland v. State, 77 Ark. 537, 92 S. W. 776. FLA.—West v. State, 45 Fla. 118, 33 So. 854. GA.—Taylor v. State, 123 Ga. 133, 51 S. E. 326. ILL.—Wallace v. People, 27 Ill. 45; People v. Tilden, 242 Ill. 536, 134 Am. St. Rep. 341, 17 Ann. Cas. 496, 31 L. R. A. (N. S.) 215, 90 N. E. 218. IND.—Armitage v. State, 13 Ind. 441; Birdg v. State, 31 Ind. 88; Hess v. State, 73 Ind. 537; Munson v. State, 79 Ind. 541; Myers v. State, 101 Ind. 379; State v. Callahan, 124 Ind. 364, 24 N. E. 732. KAN.—State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895. KY.—Hill v. Com., 17 Ky. L. Rep. 1135, 33 S. W. 823. ME.—State v. Bonney, 34 Me. 383; State v. Witham, 47 Me. 165. MASS.—Com. v. Houghton, 8 Mass. 107. MO.—State v. Clinton, 87 Mo. 380, 29 Am. Rep. 506; State v. Imboden, 157 Mo. 83, 57 S. W. 536. N. J.—State v. Potts, 9 N. J. L. (4 Halst.) 26, 17 Am. Dec. 449.

the statement of the substance of the instrument[3] is sufficiently full to enable the court to see that it was such an instrument as is capable of being forged under the statute.[4] An allegation by the grand jury as to mere lack of knowledge is not a sufficient reason to excuse setting out the instrument.[5] If the forged instrument is in the hands of the accused, that fact should be averred in the indictment or information;[6] any other specific excuse that may exist should be likewise fully set forth.[7]

§ 686. —— Indorsements. The indorsements upon a written instrument alleged to have been falsely made or altered, need not be set out, because such indorsements

N. Y.—People v. Kingsley, 2 Cow. 522, 14 Am. Dec. 520; People v. Hertz, 35 Misc. 177, 15 N. Y. Cr. Rep. 477, 71 N. Y. Supp. 489. N. C.—State v. Peterson, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9. OHIO—Dana v. State, 2 Ohio St. 91. TENN.—Hooper v. State, 27 Tenn. (8 Humph.) 93; Croxdale v. State, 38 Tenn. (1 Head) 140; Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886. TEX.—Webb v. State, 39 Tex. Cr. 534, 47 S. W. 356; Dudley v. State, 58 S. W. 111. VT.—State v. Parker, 1 D. Chip. 298, 6 Am. Dec. 735; State v. Briggs, 34 Vt. 501.

Loss of instrument need not be averred in the indictment or information.—State v. Peterson, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9.

Better practice in such cases is to aver the loss of the instrument, that it is in the accused's possession, or give any other sufficient excuse for not setting out.—State v. Peterson, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9.

3 ILL.—Wallace v. People, 27 Ill. 45. IND.—Birdg v. State, 31 Ind. 88. KY.—Hill v. Com., 17 Ky. L. Rep. 1135, 33 S. W. 823. MASS.—Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668. TEX.—Pierce v. State, 38 Tex. Cr. Rep. 604, 44 S. W. 492. VT.—State v. Briggs, 34 Vt. 501.

Necessity of setting forth all that is necessary to show the document forged, or that the indorsement forged bore such relation to the instrument as to be a subject of forgery, is not obviated by loss or other excuse for not setting forth the instrument.—Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668.

4 Wallace v. People, 27 Ill. 45.

5 State v. McNaspy, 58 Kan. 691, 38 L. R. A. 756, 50 Pac. 895.

6 State v. Parker, 1 D. Chip. (Vt.) 298, 6 Am. Dec. 735.

7 Partly burned instrument, or so blotted as to be illegible, the respective fact being set out, will excuse setting out the instrument by tenor, even in those cases where parol evidence can supply the missing or blotted portion.—Munson v. State, 79 Ind. 541.

form no part of the instrument.[1] Thus, where a bill is charged to have been forged under a fictitious name,[2] the subsequent indorsements thereon need not be set out.[3] Where the forgery of an indorsement is the thing that is charged, it must affirmatively appear that the indorsement, as written, became a part of an instrument which is the subject of forgery;[4] but the indictment need not show that, previous to the indorsement, the instrument was one possessing legal efficacy and obligation.[5]

§ 687. —— Marginal devices, words and figures, etc. An indictment or information charging forgery of a written instrument of any kind is required to set out such portions, only, of such instrument as are material to its

1 ARK.—Crossland v. State, 77 Ark. 537, 92 S. W. 776. MASS.—Com. v. Ward, 2 Mass. 397; Com. v. Adams, 48 Mass. (7 Metc.) 50. MO.—State v. Yerger, 86 Mo. 33; State v. Carragin, 210 Mo. 351, 16 L. R. A. (N. S.) 561, 109 S. W. 553. N. Y.—Miller v. People, 52 N. Y. 304, 11 Am. Rep. 706, 1 Cow. Cr. Rep. 535. OHIO — Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; Simmons v. State, 7 Ohio (pt. I) 116. OKLA.—State v. Curley, 161 Pac. 831. S. C.—State v. Tutt, 2 Bail. L. 44, 21 Am. Dec. 508. TEX.—Labbaite v. State, 6 Tex. App. 261; Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; Bader v. State, 44 Tex. Cr. 184, 69 S. W. 506; Brady v. State, 74 S. W. 771; Wesley v. State, 67 Tex. Cr. Rep. 507, 150 S. W. 197. VA.—Perkins v. Com., 48 Va. (7 Gratt.) 651, 56 Am. Dec. 123. WYO.—Santolini v. State, 6 Wyo. 110, 71 Am. St. Rep. 746, 42 Pac. 746. FED.—United States v. Peacock, 1 Cr. C. C. 215, Fed. Cas. No. 10019.

Indorsed merely means written upon. — Com. v. Butterick, 100 Mass. 12.

Name written upon note to show in whose hands instrument placed for collection need not be set out.—State v. Jackson, 90 Mo. 156, 2 S. W. 128.

Writing placed after execution upon an instrument charged to have been forged by making same, need not be set out.—Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215.

2 As to forgery under fictitious name, see, supra, § 662.

3 United States v. Peacock, 1 Cr. C. C. 215, Fed. Cas. No. 16019.

4 Com. v. Spilman, 124 Mass. 327, 26 Am. Rep. 668.

Loss of note does not obviate necessity of setting out the forged indorsement. — Com. v. Spilman, supra.

5 Fry v. State, (Tex.) 182 S. W. 331, where it was held unnecessary to allege the authority of the drawer of the check to make it, the charge being the forging of the indorsement of the payee.

force and validity; hence, where such an instrument is set out in hæc verba, the mottos and words in the border, or the words and figures in the margin, which do not constitute a part of the instrument, need not be set out, they constituting no essential description of the instrument.[1] That is to say, the ornamental parts of a bill, consisting of the devices, mottos, and so forth, need not be set out.[2] Likewise the figures cut in a draft charged to have been forged, need not be set out.[3] The name of a subscribing witness, not being necessary to the validity of the instrument, need not be given in an indictment or information charging its forgery;[4] and marginal notations on an instrument need not be given where the amount thereof is contained in the body of the instrument set out.[5] Bank-bills charged to have been forged, neither the numbers of the bills,[6] nor the marginal figures indicating the amount, need be set out, being no part of the bills.[7] A revenue stamp required by law to be

1 Smith v. State, 29 Fla. 408, 10 So. 894; State v. Fley, 26 Me. 312; People v. Franklin, 3 Johns. Cas. (N. Y.) 299.

Marginal figures or border words, etc., which are necessary to the validity of the instrument, must be set forth in the indictment or information.—See, supra, § 684, footnote 3.

2 State v. Sheldon, 8 Rob. (La.) 540.

3 White v. Territory, 1 Wash. Tr. 279, 24 Pac. 447.

4 People v. Sharp, 53 Mich. 523, 19 N. W. 68.

5 Langdale v. People, 100 Ill. 263.

6 Griffin v. State, 14 Ohio St. 55; State v. Carr, 5 N. H. 367.

7 CAL.—People v. Tomlinson, 35 Cal. 503. ILL.—Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. MASS.—Com. v. Bailey, 1 Mass. 62, 2 Am. Dec. 3; Com. v. Stevens, 1 Mass. 203. TEX.—Beer v. State, 42 Tex. Cr. Rep. 505, 96 Am. St. Rep. 810, 60 S. W. 962. WIS.—State v. Hill, 30 Wis. 416.

Authorities entirely harmonious to the effect that the revenue stamp attached to a written instrument, such as a check, a draft or a note, forms no part thereof. See, among many other cases, in addition to the authorities above cited: CAL.—Hallock v. Jaudin, 34 Cal. 167; Thomasson v. Wood, 42 Cal. 416. MASS.—Trull v. Moulton, 94 Mass. (12 Allen) 396; Green v. Holway, 101 Mass. 246, 3 Am. Rep. 339. MINN.—Cole v. Curtis, 16 Minn. 182; Cabbott v. Radford, 17 Minn. 320; Wilder v. Dellou, 18 Minn. 470. MISS.—Morris v. McMorris, 44 Miss. 441, 7 Am. Rep. 695. VT.—Porter v. Bank, 19 Vt. 412.

attached to the instrument alleged to have been forged, constitutes no part thereof, and an indictment or information charging the forgery need not set out or describe such stamp, or allege that one was affixed to the instrument.[8]

§ 688. Facts extrinsic to instrument—In general. We have already seen that the indictment or information must show on its face (1) that the writing charged to have been forged is one of the instruments enumerated in the statute, and (2) that it is a writing apparently valid, and if valid, obligatory.[1] In all other instances the general rule applies that if the instrument is void on its face, it is not the subject of forgery, except in those cases where an instrument, of no apparent validity, is capable of working injury by reason of extrinsic facts, and an indictment or information setting out such extrinsic facts will be supported.[2] Where the instrument is so imperfect and incomplete, in and of itself, that its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, and its capacity to injure is dependent upon extrinsic facts, such extrinsic facts may be averred in the indictment or information, and the instrument, its meaning and purport, made clear and intelligible to the court thereby; and where the averment of such extrinsic facts makes it to appear judicially with as much certainty as if the extrinsic facts were set out in the face of the instrument, and the instrument itself pleaded in hæc verba, the indictment or information will be sufficient.[3] But where the

8 Miller v. People, 52 N. Y. 304, 11 Am. Rep. 706, 1 Cow. Cr. Rep. 535.

1 See, supra, § 658.

2 Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639, 2 Am. Cr. Rep. 141; State v. Briggs, 34 Vt. 503.

3 Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639, 2 Am. Cr. Rep. 141. See: IND.—Reed v. State, 28 Ind. 396. MASS.—Com. v. Ray, 69 Mass. (3 Gray) 441. MINN.—State v. Wheeler, 19 Minn. 98, 1 Green Cr. L. 541. N. Y.—People v. Shall, 9 Cow. 778; People v. Stearns, 21 Wend. 409; affirmed, 23 Wend. 634; People v. Harrison, 8 Barb. 560. OHIO—Carberry v.

instrument alleged to have been forged is void or invalid on its face, and can not be made valid or capable of injury by the allegation of extrinsic facts, the crime of forgery can not be predicated upon it;[4] as, where the deed of a married woman is charged to have been forged, but as set out, the instrument was without acknowledgment, an acknowledgment being required under the laws of the state where executed;[5] a certificate of jurors' attendance upon court and the fees to which entitled, issued by clerk of the court, without authority or warrant of law;[6] a warrant drawn on the city treasury not in the form prescribed by ordinance, and not signed by the persons designated by law, and which is for that reason without effect or capable of injury;[7] a nudum pactum,[8] and the like.

State, 11 Ohio St. 411. TEX.—Anderson v. State, 20 Tex. App. 595; Rollins v. State, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759. VT.—State v. Briggs, 34 Vt. 503.

"An indictment or information must not only allege the false making or alteration of a writing specified in the statute, with the intent to defraud some named person or body corporate, but it must also appear on the face of the indictment that the fabricated writing either of itself, or in connection with the extrinsic facts averred, is such that, if genuine, it would be valid, in law, to prejudice the rights of the person or body corporate thus named."—Clarke v. State, 8 Ohio St. 630.

4 Territory v. De Lana, 3 Okla. 572, 41 Pac. 618. See: IDA.—People v. Heed, 1 Ida. 531. ILL.—Waterman v. People, 67 Ill. 92. ME.—Abbott v. Ross, 63 Me. 194, 16 Am. Rep. 427. MASS.—Com. v. Ray, 69 Mass. (3 Gray) 441; Com. v. Hinds, 101 Mass. 209. NEB.—Roode v. State, 5 Neb. 174, 25 Am. Rep. 475. TEX.—Anderson v. State, 20 Tex. App. 595; Rollins v. State, 22 Tex. App. 548, 58 Am. Rep. 659, 3 S. W. 759; Hendricks v. State, 26 Tex. App. 176, 8 Am. St. Rep. 463, 9 S. W. 555. VT.—State v. Briggs, 34 Vt. 503.

5 Roode v. State, 5 Neb. 174, 25 Am. Rep. 475.

6 Territory v. De Lana, 3 Okla. 572, 41 Pac. 618.

7 Raymond v. People, 2 Colo. App. 329, 30 Pac. 504, citing Travelers' Ins. Co. v. Denver, 11 Colo. 435, 18 Pac. 556; Merkel v. Berks County, 81 Pa. St. 505.

8 Examples.—"Three months after date, I promise to pay Sebastian I. Shall, or bearer, the sum of three dollars, in shoe making, at cash price; the work to be done at his dwelling house near Simon Vrooman, in Minden, August 24th, 1826. David W. Haughtailing."—People v. Shall, 9 Cow. (N. Y.)

§ 689. —— When to be alleged and sufficiency of averments. We have already seen that at common law an indictment charging forgery was extremely technical,[1] and that the instrument alleged to have been forged was required to be set out in hæc verba,[2] and this is also required under statute in many of the states.[3] Where the instrument set out is such that the court may judicially see that it might be made the vehicle of fraud and prejudice, averments of extrinsic circumstances are not necessary;[4] neither are such averments necessary where the

778. The courts say: "It is scarcely necessary to observe that the instrument set out in this indictment is not a promissory note, within the statute of Anne; and it is agreed that the writing does not come within any of the statutes of forgery, it being payable neither in money nor goods, but labor. . . . Another defect renders it utterly void, of itself, as a common law contract. It expresses no value received, nor any consideration whatever; and no action could be maintained upon it, if genuine, as a special agreement to perform labor, without averring and proving a consideration dehors the instrument."

"Bozeman, December 25, '94. Schumacher, Esq.: Please pay to the order of W. L. Evans, the amt. of twenty dollars ($20.00) and charge to him at my office. Johnson & McCarthy." — State v. Evans, 15 Mont. 539, 39 Pac. 850. The courts held the above instrument, if genuine, could not possibly damage, even if accepted; that Johnson & McCarthy were not made responsible, and Evans could accomplish as much without the instrument as with it. Johnson & McCarthy did not ask to have the amount charged to them but to Evans; that the order, as it appeared on its face, would not accomplish the advance of the money by Schumacher to Evans on the credit of Johnson & McCarthy; that Schumacher would as readily have advanced the money without the order as with it.

1 See, supra, § 654.

2 Rembert v. State, 53 Ala. 467, 25 Am. Rep. 369, 2 Am. Cr. Rep. 141.

See, also, supra, § 677.

3 Garmire v. State, 104 Ind. 444, 5 Am. Cr. Rep. 238, 4 N. E. 54; State v. Horan, 64 N. H. 548, 7 Am. Cr. Rep. 191, 15 Atl. 20; Simms v. State, 32 Tex. Cr. Rep. 277, 22 S. W. 876.

4 MASS. — Com. v. White, 145 Mass. 392, 14 N. E. 611. NEB.— Morearty v. State, 46 Neb. 652, 10 Am. Cr. Rep. 418, 65 N. W. 784. N. J.—Mead v. State, 53 N. J. L. 601, 23 Atl. 264. N. Y.—People v. Stearns, 21 Wend. 409; affirmed, 23 Wend. 634. N. C. — State v. Dourdon, 13 N. C. (2 Dev. L.) 443. PA.—Com. v. Beachop, 2 Pa. Sup. Ct. 294. TEX.—Horton v. State, 32 Tex. 79; Morris v. State, 17 Tex. App. 660. VA.—Gordon v. Com., 100 Va. 825, 57 L. R. A. 744, 41

instrument is set out, and nothing could be added by

S. E. 846. W. VA.—State v. Tingler, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935.

An indictment for the forgery of an instrument to defraud the United States is sufficient where it sets out the writing and it appears therefrom that it might have the effect to defraud, without averring generally the intent to defraud the United States, and all extrinsic circumstances need not be set out.—United States v. Lawrence, 13 Blatchf. 211, Fed. Cas. No. 15572; Meldrum v. United States, 80 C. C. A. 545, 151 Fed. 177, 10 Ann. Cas. 324.

It need not be alleged that the instrument would, were it genuine, have created, diminished, or defeated a pecuniary obligation.—State v. Barber, 105 Miss. 390, 62 So. 361; Davis v. State, 70 Tex. Cr. Rep. 253, 156 S. W. 1171.

Alteration of receipt for purchase money of farm alleged, it is not necessary to set out the transactions between the parties, and that the original receipt was delivered to the accused as an acquittance or discharge.—State v. Shelters, 51 Vt. 102, 31 Am. Rep. 679.

Bank-check alleged to have been forged, the indictment need not set out the general usage among bankers as affecting the legal operation of the check, as that matter may be proved on the trial without averment.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

Conveyance of land with knowledge that title thereto was forged being alleged, indictment need not set out fully the title alleged to have been forged, but may make a substantial statement thereof.—Whatson v. State, 78 Ga. 349.

Corporation institution intended to be defrauded need not be alleged.—People v. Biddison, 136 App. Div. (N. Y.) 525, 121 N. Y. Supp. 129, 24 N. Y. Cr. Rep. 343; affirmed in 199 N. Y. 584, 93 N. E. 378; Lamb-Campbell v. State, 72 Tex. Cr. Rep. 628, 162 S. W. 879.

Forgery of deed charged, the title of the person intended to be defrauded need not be set out; neither need it be alleged in what the forgery consisted.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594; People v. Parker, 67 Mich. 212, 11 Am. St. Rep. 578, 34 N. W. 720.

Or the manner in which the instrument might have defrauded the person whose name was attached thereto.—Page v. People, 3 Abb. App. Dec. (N. Y.) 439, 6 Park. Cr. Rep. 683.

"Gardians of the Poor 327,882, $389, No. 969, item, Walter S. Murphy. Received above warrant. W. S. Murphy," charged to have been forged, indictment sufficient without showing manner in which such instrument might have defrauded, the legal efficacy thereof being determined from the inspection of its face.—Com. v. Phipps, 40 Leg. Int. (Pa.) 180.

Order alleged to have been forged, there seems to be no necessity for alleging that it was drawn upon the corporation by a name different from the name under which incorporated, where the instrument is set out in hæc verba.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

"$5.00 as per deed" charged to

such averments.[5] In those cases, however, in which the instrument thus set out does not show on its face that it imports an obligation in respect to property or money, or is so imperfect and so obscure as to be unintelligible without reference to extrinsic facts, such extrinsic facts must be alleged as will apprise the court that the instrument has the alleged vicious capacity,[6] and the indictment or information will be sufficient where, by the allegation of such extrinsic facts, it is made judicially to appear to the court that the alleged forged instrument has the capacity of effecting fraud or injury.[7] The ex-

have been forged by erasing dollar mark and inserting a figure 2, and adding words so as to make the instrument read "25.00 as per deed; 10 per cent until paid," held to be a promissory note, and not necessary to allege extrinsic facts. —State v. Schwartz, 64 Wis. 432, 25 N. W. 417.

5 Lamb-Campbell v. State, 72 Tex. Cr. Rep. 628, 162 S. W. 879; Dillard v. State, (Tex.) 177 S. W. 99.

The forged instrument being set forth according to tenor, it is not necessary to specifically allege that the name charged to have been forged was affixed to the instrument, that fact appearing from the instrument set forth.—State v. Yerger, 86 Mo. 33.

6 ALA. — Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639, 2 Am. Cr. Rep. 141; Fomby v. State, 87 Ala. 36, 6 So. 271. IND.—Reed v. State, 28 Ind. 396; Cook v. State, 52 Ind. 574; Shannon v. State, 109 Ind. 407, 10 N. E. 87. LA.—State v. Murphy, 46 La. Ann. 45, 14 So. 920. MASS.—Com. v. Dunleay, 157 Mass. 386, 32 N. E. 356. N. Y.—People v. Savage, 5 N. Y. Cr. Rep. 541. PA. — Com. v. Mulholland, 12 Phila. (Pa.) 608, 35 Leg. Int. 112. TEX.—King v. State, 27 Tex. App. 567, 11 Am. St. Rep. 203, 11 S. W. 525.

"We, the undersigned, promise to become members of the . . . Business Men's Association, . . . and promise to pay to said association $10 each for one year membership, . . . providing all the first-class merchants in H. shall sign this instrument," shows on its face that it created a complete liability when the leading merchants of said H. had signed, only, and for that reason a charge of forgery could not be based upon it, in the absence of an averment of extrinsic facts which would give the instrument force and validity.—Carder v. State, 35 Tex. Cr. Rep. 105, 31 S. W. 678.

"Twenty milreis" set out in an indictment charging the forging of a pecuniary obligation of Brazil, is insufficient, such expression not being known to our language, and for that reason the indictment on its face does not import a pecuniary obligation. — Sanabria v. State, 24 Hun (N. Y.) 270.

7 ALA. — Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639, 2 Am.

trinsic facts thus set out must be such as to show that the instrument, if genuine, would create a liability on the part of the person sought to be injured.[8] Thus, an accountable receipt alleged to have been forged against a designated elevator company, purporting to be a receipt for certain wheat, and signed by "M. G., Inspector," the indictment or information is insufficient in the absence of an allegation of any connection between the said elevator company and said inspector;[9] and an indictment charging C, with intent to defraud L, falsely altered a receipt given to the latter by the county treasurer on payment

Cr. Rep. 141. IND.—Reed v. State, 28 Ind. 396. LA.—State v. Leo, 108 La. 496, 15 Am. Cr. Rep. 272, 32 So. 447. MASS.—Com. v. Hinds, 101 Mass. 211. MINN.—State v. Wheeler, 19 Minn. 98. N. Y.—People v. Stearns, 21 Wend. 413; affirmed, 23 Wend. 634. OHIO—Carberry v. State, 11 Ohio St. 411. TEX.—Hendricks v. State, 26 Tex. App. 176, 8 Am. Cr. Rep. 279; King v. State, 27 Tex. App. 567, 11 Am. St. Rep. 203, 11 S. W. 525; Crawford v. State, 40 Tex. Cr. 344, 11 Am. Cr. Rep. 432, 50 S. W. 378; Huckaby v. State, 45 Tex. Cr. 577, 108 Am. St. Rep. 975, 78 S. W. 942.

An indictment setting out the instrument as follows: "May 22, 1897, Mr. Brin, Ples let John Womble hame ine thing that he wornt—J. O. Thompson," without explanatory averments is fatally defective.—Womble v. State, 39 Tex. Cr. 24, 11 Am. Cr. Rep. 438, 44 S. W. 827.

This instrument, "Mr. Goldstone Please let Bare Have the sume of $5 Dollars in Grosses and charge the same to DR F T Cook," is not so incomplete or unmeaning as to need averments of extrinsic facts, and is subject of forgery. — Hendricks v. State, 26 Tex. App. 176, 8 Am. Cr. Rep. 279.

Where the forgery charged consisted in making and engraving a plate in the form of a promissory note issued by a bank in Havana, Cuba, for the payment of fifty centavos the indictment need not define the meaning of the word centavos.—People v. D'Argencour, 95 N. Y. 624, 4 Am. Cr. Rep. 240; affirming 32 Hun 178.

Railroad pass alleged to have been forged, indictment must allege the authority of the officer whose name is forged and the obligation of the company to honor it.—State v. Weaver, 84 N. C. 836, 55 Am. Rep. 647.

8 ALA. — Burden v. State, 120 Ala. 388, 11 Am. Cr. Rep. 431, 25 So. 190. CAL.—People v. Tomlinson, 35 Cal. 506. MONT.—State v. Evans, 15 Mont. 539, 28 L. R. A. 127, 48 Am. St. Rep. 701, 39 Pac. 850. TEX.—Townser v. State, 182 S. W. 1104, an order to deliver goods and charge them to purported maker.

9 State v. Wheeler, 19 Minn. 98.

of certain taxes due from L for the given year, making the receipt to represent the payment of a sum in excess of that originally expressed, will be insufficient without the averment of some extrinsic circumstances giving the receipt an operation beyond that imported by its terms.[10] Check-book stub charged to have been altered so as to make it appear that a certain check was for an amount in excess of what it was in fact drawn for, indictment on information must allege extrinsic facts showing in what manner such alteration might defraud.[11] Charging accused with having forged an instrument certifying the transfer of a note to himself by the holder, the indictment or information must specifically allege the execution and delivery of the note.[12] Fee-bill charged to have been forged, the indictment or information must set forth the name of the county or circuit in which the cause was tried, or the county in which the fee-bill accrued.[13] Order on village treasury alleged to have been forged under the name of A, as village clerk, indictment or information must further allege that the A whose name was signed to the order was not the accused, or that the accused was not the village clerk.[14] Release by landlord of all liens held by him on tenant's crop for advances being charged to have been forged, the indictment or in-

10 Clarke v. State, 8 Ohio St. 630.

Forged receipt alleged to have been uttered, an averment designating the instrument as a "receipt" does not change its prima facie character, and an allegation that it was upon its face a receipt by the rules of the bank where it was used, is insufficient because the indictment or information must show how the instrument, if genuine, would under such rules of the bank have had the effect of a receipt.—Henry v. State, 35 Ohio St. 128.

Time-check by road supervisor, indicating the performance of work of a certain value by the person therein named, alleged to have been forged, extrinsic facts must be set out showing in what manner it created a demand against the county.—State v. Gee, 28 Ore. 100, 42 Pac. 7.

11 Com. v. Mulholland, 5 W. N. C. (Pa.) 208.

12 Simms v. State, 32 Tex. Cr. Rep. 277, 22 S. W. 876.

13 State v. Maupin, 57 Mo. 205.

14 Snyder v. State, 8 Ohio Cir. Ct. Rep. 463.

formation must allege that advances had been made, thereby showing that liens existed, because if there were no liens, the landlord could not be injured by the false instrument.[15]

§ 690. ——— EXPLANATION OF INSTRUMENT. In those cases in which an explanation of the instrument alleged to have been forged is required in order to show that it was such an instrument, as may be forged under the statute, or to show that it may affect property interests, all the extrinsic matters and facts necessary thereto must be set out in the indictment or information, otherwise it will be insufficient. For example, an indictment charging accused with forging a written instrument of the following tenor: "April 28th, 1885. Dear Sir: I have nothing to do with Venie Dixon patch cotton they are welcome to it and to do as they please with it. W. W. Roberts. & all so Mary Ann the same. W. W. Roberts." meaning thereby that the Roberts named was the landlord and waived his lien on the patch cotton of one Venie Dixon, was insufficient because it failed to set out extrinsic facts showing that W. W. Roberts was the landlord, and that as such he had a lien on the "patch cotton."[1] Where accused was charged with having forged an instrument in the following form: "Due 8.25, Askew Brothers," the indictment alleging that thereby the accused meant that eight dollars, and twenty-five cents were due from Askew Brothers, who were partners, was sufficient;[2] but where the instrument alleged to have been forged was of the following tenor: "Boston, Aug. 6, 1868, St. James Hotel. I hereby certify that L. W. Hines & Co. have placed in my hotel a card of advertisements, as per their agreement by contract. J. P. M. Stetzen, Proprietor." and the

15 Williams v. State, 90 Ala. 649, 8 So. 825. See, also, Dixon v. State, 81 Ala. 61, 1 So. 69.

1 Dixon v. State, 81 Ala. 61, 1 So. 69. See, also, Williams v. State, 90 Ala. 649, 8 So. 825.

2 Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639, 2 Am. Cr. Rep. 141.

indictment did not set out extrinsic matter to show how the instrument might defraud, it was held bad.[3]

§ 691. ——— Explanation of defective expressions. In those cases in which an explanation of defective expressions in an instrument alleged to have been forged is necessary to make the instrument alleged to have been forged intelligible or effective, the extrinsic matter necessary to afford such explanation should be set out. Thus, where an order alleged to have been forged by the accused is not addressed to any person, and has an incomplete date, the indictment or information must set out facts explanatory of each omission;[1] and an order for the payment of money in the following form: "M. C. & Co.: Pay Binam $5.75. J. L. C.," being alleged to have been forged, with the intent to defraud Millen, Connable & Co., the indictment or information must further set forth extrinsic facts showing the instrument to have been a money order by an averment of the meaning of the initials used in the instrument.[2] But in those instances in which the defect is not such as to obscure the meaning, or affect the validity of the instrument, extrinsic facts need not be alleged. Thus, where the defect consists in the signing of a promissory note, in the English language, in German or Gothic characters, the letters used being the same whether the name was written in English or in German, it is not necessary to allege the identity of the name or give an English translation;[3] and it has been held that where the indictment charges the forgery of an instrument in the name of Hannah McCormick and the instrument set out purported to be signed in the name of "Hannah McGormick," it will be sufficient without further allegation as to identity.[4] The Louisiana court has

3 Com. v. Hinds, 101 Mass. 209.

1 Dixon v. State, (Tex.) 26 S. W. 500.

2 Bynam v. State, 17 Ohio St. 142.

3 Duffin v. People, 107 Ill. 113, 47 Am. Rep. 431.

4 State v. McCormick, 141 Ind. 685, 40 N. E. 1089.

held that an instrument charged to have been forged in the following tenor: "Prime Wingard 507 # Cot. T. T. P.," the indictment or information need not set out extrinsic facts in order to enable the prosecution to introduce proof to show in what the forgery consisted.[5]

§ 692. JOINDER—OF DEFENDANT. Under the general rule regarding criminal pleading,[1] all the persons interested in perpetrating and carrying out a forgery in any of its phases, may be properly joined as defendants in the same indictment.[2]

§ 693. —— OF OFFENSES—DISTINCT CRIMES. The question whether the making of a forged instrument, the having in possession of a forged instrument, with the intent to pass the same, and the uttering or passing of such instrument, constitute but one offense, or are separate and distinct offenses, seems to be purely a matter of statutory provision and statutory construction. Under some statutes it is held that the forging, having in possession, uttering and passing, are each distinct and separate offenses, and for that reason may not be joined in one indictment.[1] In those jurisdictions in which this rule pre-

5 State v. Wingard, 40 La. Ann. 733, 5 So. 54.

1 As to joinder of defendants generally, see, supra, §§ 351 et seq.

2 See People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594, in which the respondents were jointly indicted, but the question as to such joining is not discussed.

1 ARK.—Ball v. State, 48 Ark. 94, 2 S. W. 462. IND.—Beyerline v. State, 147 Ind. 125, 45 N. E. 772; State v. Fisk, 170 Ind. 166, 83 N. E. 995. IOWA—State v. McCormack, 56 Iowa 585, 9 N. W. 916, overruling State v. Nichols, 38 Iowa 110; State v. Bigelow, 101 Iowa 430, 70 N. W. 600; State v. Blodgett, 143 Iowa 578, 21 Ann. Cas. 231, 121 N. W. 685. KY.—Huff v. Com., 19 Ky. L. Rep. 1064, 42 S. W. 907; Messer v. Com., 26 Ky. L. Rep. 40, 80 S. W. 489; Com. v. Miller, 115 S. W. 234. LA.—State v. Snow, 30 La. Ann. 401; State v. Hahn, 38 La. Ann. 169. MICH.—People v. McMillan, 52 Mich. 627, 18 N. W. 390; People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594. MINN.—State v. Wood, 13 Minn. 121. MO.—State v. Mills, 146 Mo. 195, 47 S. W. 938; State v. Williams, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; State v. Carragin, 210 Mo. 351, 16 L. R. A.

vails, an acquittal of either charge is not a bar to a prosecution for the other.[2] Thus, in a case in which the accused was indicted under separate indictments charging the forging, having in his possession, and uttering of several forged instruments in the names of different persons alleged to be fictitious,[3] as part of one transaction, and a trial was had on which the accused was acquitted under one of the indictments, it was held that acquittal was not a bar to his subsequent trial on the other indictments.[4] And an acquittal of the crime of uttering and publishing as true has been said not to involve a finding

(N. S.) 561, 109 S. W. 553. TENN.—Buren v. State, 84 Tenn. (16 Lea) 61. TEX. — Hooper v. State, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066; Nichols v. State, 39 Tex. Cr. Rep. 80, 44 S. W. 1901; Preston v. State, 40 Tex. Cr. Rep. 72, 45 S. W. 581. WIS.—Barton v. State, 23 Wis. 587.

Acquittal of uttering not a bar to an indictment and prosecution charging the making of the forged instrument.—State v. Blodgett, 143 Iowa 587, 121 N. W. 685.

—Texas rule.—Under the statute providing that a conviction for forging, uttering or attempting to utter a forged instrument shall be a bar to any prosecution based upon the same transaction or forged instrument, a former acquittal of uttering does not bar a prosecution charging the forgery, and vice versa, as the statute makes a conviction only a bar to a second prosecution. — Green v. State, 36 Tex. Cr. Rep. 109, 35 S. W. 971; Preston v. State, 41 Tex. Cr. Rep. 300, 53 S. W. 127, 881.

Forgery is not a degree of the crime of uttering a forged instrument.—State v. Bigelow, 101 Iowa 430, 70 N. W. 600.

Forgery is not necessarily included in uttering, for one who utters need not be shown to have forged the instrument uttered.—State v. Blodgett, 143 Iowa 578, 21 Ann. Cas. 231, 121 N. W. 685.

Nebraska rule as regards the statute of limitations holds the forgery of an instrument and the uttering of such instrument by the same person constitutes a single crime within the statute of limitations.—State v. Leekins, 81 Neb. 280, 115 N. W. 1080.

2 ALA. — Harrison v. State, 36 Ala. 248. IND.—Beyerline v. State, 147 Ind. 125, 45 N. E. 772. MO.—State v. Williams, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424. TEX. — Hooper v. State, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066; Reddick v. State, 31 Tex. Cr. Rep. 587, 21 S. W. 684; Preston v. State, 40 Tex. Cr. Rep. 72, 48 S. W. 581.

3 As to forgery in fictitious name, see, supra, § 662.

4 Nichols v. State, 39 Tex. Cr. Rep. 80, 44 S. W. 1901.

that the instrument alleged to have been passed was forged by the accused, and for that reason was not a bar to a subsequent prosecution for the forgery.[5] And in a case where there were several drafts on the same sheet of paper, which were uttered and passed at the same time by the same person, it was said that, while the uttering was but a single offense,[6] the forging of each draft was a separate offense.[7]

§ 694. ——— ——— Acts or steps in the offense. Upon general principles, a single offense can not be split into separate parts, and the accused prosecuted for each of such separate parts, although each part may, in and of itself, constitute a separate offense; if the accused be prosecuted for one part, that ends the prosecution for that offense, provided such part of itself constitutes an offense for which a conviction can be had.[1] Consequently, where the several offenses charged, though distinct in point of law, yet all springing out of substantially the same transaction, or are so connected in their facts as to make substantial parts of the same transaction, or a connected series of facts, the accused can not be prejudiced in his defense by their joinder, and the court will not quash the indictment or information, or compel an election.[2] In harmony with these principles, in many of the jurisdictions, a charge of forging and a charge of uttering may be joined, on the ground that where a statute declares an act unlawful when perpetrated in any one or all of several ways, the indictment may charge the

5 State v. Blodgett, 143 Iowa 578, 21 Ann. Cas. 231, 121 N. W. 685; Beyerline v. State, 147 Ind. 125, 45 N. E. 772; Preston v. State, 40 Tex. Cr. Rep. 72, 48 S. W. 581; Hooper v. State, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066.

6 Conviction for uttering one a bar to a prosecution for uttering the others.—State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612.

7 Barton v. State, 23 Wis. 587.

1 State v. Colgate, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346.

2 Van Sickle v. People, 29 Mich. 61.

several acts in separate counts, basing each count upon the different mode specified in which the act may be committed.[3] Thus, under a statute providing that the false making or fraudulent uttering of a forged writing shall constitute forgery, an indictment or information charging the accused with making and uttering the same instrument charges but connected and consecutive parts of a single transaction.[4] On an indictment or information charging the forging and uttering of a mortgage and a

3 ARK.—McClellan v. State, 32 Ark. 609. CAL.—People v. Shotwell, 27 Cal. 394; People v. Frank, 28 Cal. 507; People v. De la Guerra, 31 Cal. 459; People v. Tomlinson, 35 Cal. 503; People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Smith, 103 Cal. 563, 37 Pac. 516. GA.—Hoskins v. State, 11 Ga. 94; Gibson v. State, 79 Ga. 344, 5 S. E. 76; Lascelles v. State, 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945. ILL.—Parker v. People, 97 Ill. 32. LA.—State v. Hahn, 38 La. Ann. 169; State v. Clement, 42 La. Ann. 583, 7 So. 685. MICH.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594; People v. Parker, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720. MO.—State v. Jackson, 89 Mo. 561, 1 S. W. 760. MONT.—Territory v. Poulier, 8 Mont. 146, 19 Pac. 594. NEB.—In re Walsh, 37 Neb. 454, 55 N. W. 1075. N. Y.—People v. Rynders, 12 Wend. 425; People v. Adler, 140 N. Y. 331, 10 N. Y. Cr. Rep. 554, 35 N. E. 644; People v. Tower, 135 N. Y. 457, 10 N. Y. Cr. Rep. 229, 32 N. E. 145, affirming 10 N. Y. Cr. Rep. 95, 17 N. Y. Supp. 395. N. C.—State v. Keeter, 80 N. C. 472. OHIO—Devere v. State, 5 Ohio Cir. Ct. Rep. 509, 3 Ohio Cir. Dec. 249. S. C.—State v. Houseal, 2 Brev. L. (S. C.) 219. TENN.—Foute v. State, 83 Tenn. (15 Lea) 712; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886. TEX.—Boles v. State, 13 Tex. App. 656; Chester v. State, 23 Tex. App. 577, 5 S. W. 125; Peterson v. State, 25 Tex. App. 70, 7 S. W. 530; Crawford v. State, 31 Tex. Cr. Rep. 51, 19 S. W. 766; Lovejoy v. State, 40 Tex. Cr. Rep. 89, 48 S. W. 520. VT.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201. VA.—Rasnick v. Com., 4 Va. (2 Va. Cas.) 356. FED.—In re Adutt, 55 Fed. 376.

Possession of several forged bank-notes or bank-bills of different banks being charged, all of which were taken from accused at one and the same time, he having been tried and convicted of having one of them in his possession, was held to be a bar to a trial on a charge of having each of the other notes of the different banks.—State v. Benham, 7 Conn. 414.

4 State v. Klugherz, 91 Minn. 406, 1 Ann. Cas. 307, 98 N. W. 99; In re Walsh, 37 Neb. 454, 55 N. W. 1075; Devere v. State, 5 Ohio Cir. Ct. Rep. 509, 3 Ohio Cir. Dec. 249.

note purporting to be secured thereby, at one and the same time, and to the same party, it was held that the making of the note and the mortgage, and the uttering of the same, constituted but one transaction, and could be included in an information charging the forging and uttering of both instruments.[5] Where a person uttered, at a bank, several forged checks at one time and by the same act, it was held that he committed but one offense, and that a conviction for uttering one of the checks was a bar to a prosecution for uttering the others.[6] And where accused was charged with having forged a constable's account against the county, and in connection therewith, in furtherance of his intention to defraud the county, forged an affidavit to the same, and also forged what purported to be a certificate of a justice of the peace to such affidavit, it was held that the account, affidavit, and the certificate constituted collectively but one instrument, and that the act of forging all of these instruments constituted but one transaction.[7]

§ 695. —— Of counts. In those jurisdictions in which it is held that forging a written instrument and the uttering or passing of such forged instrument, constitute two separate and distinct offenses,[1] a charge of making and a charge of uttering or passing can not be joined in the same indictment;[2] but the general rule is that where, under the statute, several distinct acts connected with the same general offense, and subject to the same penalties, are punishable separately and as distinct crimes where committed by different persons, or at different times, they may, when committed by the same person, at the same time, be considered as representing steps or stages in

5 People v. Sharp, 53 Mich. 523, 19 N. W. 168; State v. Moore, 86 Minn. 422, 61 L. R. A. 819, 90 N. W. 787.

6 State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612.

7 Rosekrans v. People, 5 Thomp. & C. 467.

1 See, supra, § 693.

2 Messer v. Com., 26 Ky. L. Rep. 40, 80 S. W. 489.

the same offense, and for that reason may be combined in the same count[3] of an indictment or information, and be treated as a single violation of law.[4] Hence, where a series of acts being enumerated by the statute, either of which separately or altogether may constitute the offense of forgery, an indictment or information which charges all the acts enumerated in the offense, with reference to the same instrument, charges but one offense; and the pleader may, in his discretion, charge them all in the same count,[5] or in separate counts,[6] and in either form,

[3] See, post, footnote 5, this section.

[4] State v. Mead, 56 Kan. 690, 44 Pac. 619.

On a charge of forging and uttering a mortgage, and also charging the forgery and uttering of an acknowledgment, the acknowledgment is to be properly treated as a part of the conveyance.—People v. Sharp, 53 Mich. 523, 19 N. W. 168. See Van Sickle v. People, 29 Mich. 61.

[5] People v. Frank, 28 Cal. 507. See, also, authorities post, footnote 7, this section.

Charging in one count the forgery of an indorsement on a bank-check, with intent to defraud a person named, and with offering the check so indorsed to such person in payment for goods purchased, held to charge but a single offense. — People v. Altman, 147 N. Y. 473, 11 N. Y. Cr. Rep. 449, 42 N. E. 180. See, to same effect: In re Walsh, 37 Neb. 454, 55 N. W. 1075; Territory v. Poulier, 8 Mont. 146, 19 Pac. 594.

Charging, in one count, the accused with forgery of a written instrument, and in another count charging him with uttering the same instrument on the same day and at the same place, was held to charge one offense only—the crime of forgery.—People v. Adler, 140 N. Y. 331, 10 N. Y. Cr. Rep. 554, 35 N. W. 644.

Conjunctive allegation of distinct acts enumerated in the statute which, separately, or together, constitute the offense charged, is proper. See, supra, § 657, footnote 31.

Multifariousness can not be charged against an indictment or information charging accused did utter, publish, and show forth in evidence a certain false and forged instrument. See, supra, § 657, footnote 30.

[6] See, supra, § 694, footnote 3; also: ARK.—Zachary v. State, 97 Ark. 176, 133 S. W. 811 (under Kirby's Dig., § 2231, subd. 7); Godard v. State, 100 Ark. 148, 149, 139 S. W. 1131. GA.—Jordan v. State, 127 Ga. 278, 56 S. E. 422. MO.—State v. Daubert, 42 Mo. 242; State v. Williams, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; State v. Carragin, 210 Mo. 351, 16 L. R. A. (N. S.) 561, 109 S. W. 553. MONT.—State v. Mitton, 37 Mont. 366, 127 Am. St. Rep. 732, 96 Pac. 926, affirming 36 Mont. 376, 92 Pac. 969. NEB.—State v.

the indictment or information will be good.[7] We have already seen that in a charge of having in possession more than one forged bank-note or bank-bill, the indictment or information may contain a count for each bank-note or bank-bill, joined in the same indictment.[8] Charging, in one count, the forging of a check of a certain tenor, and charging, in another count, the forging of a check of a given tenor, has been held to be good.[9] Where, under the statute, an indictment lies for transfer of a forged paper, knowing it to be forged, and with intent to defraud,[10] the indictment or information may contain a count charging such offense joined with another count charging the forgery itself.[11] Where accused was charged in the first count, with having forged a mortgage; in the second count, with having uttered the mortgage thus forged; in the third count, with having forged a certificate of acknowledgment; in the fourth count, with having uttered the forged certificate of acknowledgment; in the fifth count, with having forged a bond; in the sixth count, with having uttered the forged bond, the indictment was held good.[12] Various acquittances and receipts for money charged to have been forged by the accused, in the first count there being an allegation of the uttering and publishing of a forged and counterfeit acquittance and receipt for money signed by A, and also twenty-two other certain false, forged and counterfeit acquittances and receipts for money of dif-

Leekins, 81 Neb. 280, 115 N. W. 1080. N. Y.—People v. Browne, 118 App. Div. 793, 21 N. Y. Cr. Rep. 91, 103 N. Y. Supp. 903; affirmed, 189 N. Y. 528, 82 N. E. 1130. TEX.—Usher v. State, 47 Tex. Cr. Rep. 98, 81 S. W. 712. FED.—Dillard v. United States, 72 C. C. A. 451, 141 Fed. 303.

7 People v. Frank, 28 Cal. 507. See People v. Shotwell, 27 Cal. 394.

8 See, supra, § 565, particularly footnotes 8 and 9.

9 State v. Ellis, (Miss.) 73 So. 565.

10 As under Tenn. Code, § 5493.

11 Luttrell v. State, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886. See Foute v. State, 83 Tenn. (15 Lea) 715.

12 Van Sickle v. People, 29 Mich. 61.

ferent dates, for different sums, purporting to be signed by different persons; in the second count there being a charge of uttering one acquittance and receipt; in the third count there being a charge of forging and counterfeiting the same acquittance and receipt, the indictment was held to be good, on the ground that the receipts were charged to have been uttered at one and the same time and might constitute a single offense—the uttering of many forged receipts.[13]

Where the statute permits to be joined a count for forging, with a count for uttering a forged instrument, the joinder permitted applies only where the two offenses relate to the same instrument.[14]

Conviction can not be had on both counts where two or more counts are joined in the same indictment, one for the forgery and one for the uttering or passing, as that would be equivalent to a conviction for two separate and distinct offenses.[15]

§ 696. —— Duplicity. The question of duplicity in an indictment or information charging forgery, is governed by the statutory provisions and constructions already discussed, under which the acts of forging and uttering are regarded as two distinct offenses,[1] or as steps only,

13 R. v. Thomas, 2 East P. C. 934.

14 Zachary v. State, 97 Ark. 176, 133 S. W. 811.

15 ILL. — Parker v. People, 97 Ill. 32. IND.—Selby v. State, 161 Ind. 667, 69 N. E. 463. MO.—State v. Carragin, 210 Mo. 351, 16 L. R. A. (N. S.) 561, 109 S. W. 553. TEX.—Carr v. State, 36 Tex. Cr. Rep. 3, 34 S. W. 949; Pitts v. State, 40 Tex. Cr. Rep. 667, 51 S. W. 906. VA.—Johnson v. Com., 102 Va. 927, 46 S. E. 789. FED.—United States v. Carpenter, 81 C. C. A. 194, 151 Fed. 214, 9 L. R. A. (N. S.) 1043.

1 See, supra, § 693.

Under such statutes an indictment or information that charges the forgery of a deed and also the uttering of the forged deed in the same count is bad for duplicity.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594.

And an indictment charging, in one count, forgery and uttering forged instrument, is bad.—Messer v. Com., 26 Ky. L. Rep. 40, 80 S. W. 489.

in the perpetration of the same offense.[2] Where the latter doctrine prevails, an indictment or information charging, in one count, the forgery and uttering or passing of the forged instrument, is not bad for duplicity,[3] although there is authority to the effect that charging, in one count, the uttering of a check, knowing it to have been forged, and the forging of the indorsement thereon and then uttering the same, is bad for duplicity.[4] Under such statutes, duplicity can not be charged against an indictment or information alleging forging of an instrument, in one

2 See, supra, § 694.

3 State v. Swensen, 13 Ida. 1, 81 Pac. 379; Selby v. State, 161 Ind. 667, 69 N. E. 463; State v. Leekins, 81 Neb. 280, 115 N. W. 1080; Com. v. Hall, 23 Pa. Sup. Ct. Rep. 104.

An indictment charging the offense of uttering and publishing forged and counterfeit promissory notes, knowing them to be such, describing them as "sundry false, forged and counterfeit promissory notes," by describing them as five bank-notes of the Hamilton Bank in the state of Rhode Island, held not to charge various offenses in one count. — Com. v. Thomas, 76 Mass. (10 Gray) 483.

An allegation in an indictment for forgery, in a single count, of all of a series of acts named in the statute, either of which would constitute the crime of forgery, is not an allegation of two offenses, because all constitute but the single crime of forgery under § 470 Cal. Pen. Code.—People v. Harrold, 84 Cal. 567, 24 Pac. 106, following People v. Frank, 28 Cal. 507; People v. De la Guerra, 31 Cal. 459.

An indictment charging that accused forged an indorsement on a draft, and that it was afterwards indorsed by other persons, and that after the true indorsements, the accused uttered it, does not charge two offenses.—People v. Frank, 28 Cal. 507.

An indictment for forgery which charges the accused, in the same count, with having forged an indorsement on a draft and also with having uttered and passed the draft knowing the forged indorsement to have been written thereon, does not charge two offenses.—People v. Frank, 28 Cal. 507.

Compare: Wells v. Territory, 1 Okla. Cr. 469, 98 Pac. 483.

"Where making and uttering of a fictitious instrument is one continuous transaction, they may properly be charged in one count as a single offense." — Wells v. Territory, 1 Okla. Cr. 469, 98 Pac. 483, citing People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; Selby v. State, 161 Ind. 667, 69 N. E. 463, and State v. Greenwood, 76 Minn. 207, 78 N. W. 1044, 1117.

4 Wells v. Territory, 1 Okla. Cr. 469, 98 Pac. 483.

Compare: People v. Frank, 28 Cal. 507.

count, and the uttering of it in another count.[5] Forging and uttering being distinct offenses, an indictment or information charging both in the same count, is bad for duplicity,[6] although there is authority to the contrary.[7] Thus, where an indictment charging forgery sets forth, in one count, two distinct offenses requiring different punishment—e. g., forgery of a mortgage, and forgery of a receipt indorsed thereon—the indictment will be bad for duplicity.[8]

5 People v. Driggs, 12 Cal. App. 240, 108 Pac. 62; reversed on other grounds, 14 Cal. App. 507, 112 Pac. 577.

Indictment charging forgery of an instrument, in one count, and charging the utterance of the forged instrument in another count, without sufficient allegations to charge the crime of uttering, the last count must be disregarded.—State v. Mitten, 36 Mont. 376, 92 Pac. 969.

6 ARK. — McClellan v. State, 32 Ark. 609. CAL.—People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Smith, 103 Cal. 563, 37 Pac. 516. GA.—Lascelles v. State, 90 Ga. 347, 16 S. E. 945. ILL.—Parker v. People, 97 Ill. 32. LA.—State v. Hahn, 38 La. Ann. 169; State v. Clement, 42 La. Ann. 583, 7 So. 685. MICH.—People v. Van Alstine, 57 Mich. 74, 6 Am. Cr. Rep. 272, 23 N. W. 594; People v. Parker, 67 Mich. 222, 34 N. W. 720. MO.—State v. Jackson, 89 Mo. 561, 1 S. W. 760. MONT.—Territory v. Poulier, 8 Mont. 146, 19 Pac. 594. NEB.—In re Walsh, 37 Neb. 454, 55 N. W. 1075. N. Y.—People v. Tower, 135 N. Y. 457, 10 N. Y. Cr. Rep. 229, 32 N. E. 145, affirming 10 N. Y. Cr. Rep. 95, 17 N. Y. Supp. 395. N. C.—State v. Keeter, 80 N. C. 472. S. C.—State v. Houseal, 2 Brev. 219. TENN.—Foute v. State, 83 Tenn. (15 Lea) 712. TEX. — Lovejoy v. State, 40 Tex. Cr. Rep. 89, 48 S. W. 520. VT.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201. VA.—Rasnick v. Com., 4 Va. (2 Va. Cas.) 356. FED.—In re Adutt, 55 Fed. 376.

A count charging the forgery of a deed and also the uttering of the forged deed is bad for duplicity.—People v. Van Alstine, 57 Mich. 69, 6 Am. Cr. Rep. 272, 23 N. W. 594.

7 Nalley v. State, 11 Ga. App. 15, 74 S. E. 567; State v. Klugherz, 91 Minn. 406, 1 Ann. Cas. 307, 98 N. W. 99; State v. Leekins, 81 Neb. 280, 115 N. W. 1080, holding that where the acts are done by the same person they constitute but one offense.

The forging, procuring, or causing to be forged and aiding in forging are not only the same offense under the statute, but in legal contemplation the same act, so that an indictment so charging is not duplicitous.—State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

8 People v. Wright, 9 Wend. 193.

Generally speaking, an indictment or information charging forgery, which sets out two acts constituting the same offense, is not open to charge of duplicity.[9] Thus, charging in the same count the forging of a "check or bill of exchange," is not open to the objection of duplicity, the terms being synonymous;[10] and charging the various acts enumerated in the statute, any one or all of which may constitute forgery, these acts being set out in the disjunctive in the statute, an indictment charging in the language of the statute, except that they are pleaded in the conjunctive, will not render the instrument open to the objection of duplicity.[11]

§ 697. —— Remedies for misjoinder. In those cases where there is a misjoinder, under the rule of the particular jurisdiction, the accused must interpose timely objection, either by demurrer,[1] motion to quash,[2] or motion to require the prosecution to elect,[3] it being too late to avail

9 State v. Cates, 99 Me. 68, 58 Atl. 238; State v. Hastings, 53 N. H. 452.

10 State v. Maas, 37 La. Ann. 292.

As to describing a check as a "bill of exchange" or "an order for money," see, supra, § 676, footnote 16.

11 Hobbs v. State, 133 Ind. 404, 8 L. R. A. 774, 32 N. E. 1019; Rosenbarger v. State, 154 Ind. 425, 56 N. E. 914; Selby v. State, 161 Ind. 667, 69 N. E. 463.

1 People v. Shotwell, 27 Cal. 394; State v. Wood, 13 Minn. 121; People v. Tower, 135 N. Y. 457, 10 N. Y. Cr. Rep. 229, 32 N. E. 145, affirming 10 N. Y. Cr. Rep. 95, 17 N. Y. Supp. 395.

Where there is more than one offense charged in the indictment, the defect should be taken advantage of by demurrer.—People v. Shotwell, 27 Cal. 394.

2 State v. Clement, 42 La. Ann. 583, 7 So. 685.

3 People v. Shotwell, 27 Cal. 394; State v. Clement, 42 La. Ann. 583, 7 So. 685; Van Sickle v. People, 29 Mich. 61; People v. Kemp, 76 Mich. 410, 43 N. W. 439; Williams v. State, 24 Tex. App. 342, 6 S. W. 531.

Where an indictment charging forgery contains more than one count, each count charging a distinct offense, the court is not required to compel the prosecutor to elect upon which count of the indictment he will try the accused.—People v. Shotwell, 27 Cal. 394.

Where the indictment, in two counts, charged in one the forging of a draft and in the other the

himself of the error after verdict,[4] as it will not be considered on a motion in arrest of judgment.[5]

Election: The general rule is that where offenses committed by the same act, at the same time, are joined in different counts, the accused can not be confounded in making his defense, and the people ought not to be compelled to elect between counts.[6]

uttering and publishing thereof as true it is a matter of discretion with the trial court whether or not it will require the prosecution to elect on which count he will proceed to trial—Miller v. State, 51 Ind. 405, 1 Am. Cr. Rep. 230.

Forgery and uttering forged instrument being joined in the same indictment, prosecution can not be compelled to elect on which count it will proceed to trial, or go to the jury.—State v. Carragin, 210 Mo. 351, 16 L. R. A. (N. S.) 561, 109 S. W. 553.

[4] State v. Clement, 42 La. Ann. 583, 7 So. 685.

An indictment charging forging an order directed to a savings bank, containing two counts, in one of which was alleged an intent to defraud the bank, and in the other count, the allegation was of an intent to defraud the depositor whose name was forged, on which a general verdict of guilty was rendered, it was held that an entry of a nolle prosequi as to the first count, after the verdict, did not invalidate the proceedings.—Rounds v. State, 78 Me. 42, 6 Am. Cr. Rep. 266, 2 Atl. 673.

[5] People v. Shotwell, 27 Cal. 394.

[6] State v. Shaffer, 59 Iowa 290, 4 Am. Cr. Rep. 83, 13 N. W. 306; Com. v. Miller, 107 Pa. St. 276, 5 Am. Cr. Rep. 299.

As to election not being required, see, supra, § 694, footnote 2; § 695, footnotes 12 and 13.

CHAPTER XLVIII.

INDICTMENT—SPECIFIC CRIMES.

Fornication.

§ 698. FORM AND SUFFICIENCY OF INDICTMENT.[1] Inasmuch as the crime of fornication is purely a statutory offense,[2] it is sufficient for an indictment or information to charge the alleged offense in the language of the statute denouncing it,[3] or substantially in that language,[4] where the statute contains all the elements of the offense.[5] The crime

1 As to forms of indictment, see Forms Nos. 765, 1817.

2 Fornication was not indictable at common law, although the offense was contra bonus moris, unless committed so openly as to be a public nuisance, in which case it was indictable as a nuisance, not as fornication.—Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Anderson v. Com., 26 Va. (5 Rand.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 26 Va. (5 Rand.) 634; State v. Foster, 21 W. Va. 767.

3 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; State v. Chandler, 96 Ind. 591; Cannedy v. State, 58 Tex. Cr. Rep. 184, 125 S. W. 31.

4 ALA.—Pace v. State, 69 Ala. 231, 44 Am. Rep. 513; affirmed, 106 U. S. 583, 27 L. Ed. 207, 1 Sup. Ct. Rep. 637. GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. IND.—State v. Johnson, 69 Ind. 85; State v. Chandler, 96 Ind. 591; State v. Smith, 18 Ind. App. 179, 47 N. E. 685. MONT.—Territory v. Corbett, 3 Mont. 50. N. C.—State v. Fore, 23 N. C. (1 Ired. L.) 378; State v. Lyerly, 52 N. C. (7 Jones L.) 158; State v. Tally, 74 N. C. 322. PA.—Gorman v. Com., 124 Pa. St. 536, 17 Atl. 26. UTAH—People v. Colton, 2 Utah 458.

5 ARK.—Crouse v. State, 16 Ark. 566. GA.—Bigby v. State, 44 Ga.

need not be designated by the statutory name where the criminal acts are set out.[6] It has been said that the offense is sufficiently described by charging an unlawful "bedding and cohabiting" together;[7] but this is an obiter holding, only, in the case, and it is thought that something further must be alleged under most, if not all, the present statutes.[8] It is held in some cases that the act constituting the offense need not be stated.[9] The allegations must in all cases be sufficiently full and precise to cover every element under the terms of the statute under which the indictment or information is drawn; that is to say, the particular requirements of the statute under which drawn, must be fully complied with. Thus, the statute prohibiting a man and woman, being unmarried to each other, from living together as husband and wife, an indictment or information simply charging that a named woman accused "did bed to, and live with" a named man, is insufficient;[10] and where the statute requires that both parties shall be, at the time of the act complained of, single or unmarried, the indictment must state that both parties, at the time of the illicit intercourse, were unmar-

344; Bennett v. State, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919. IND.—State v. Stephens, 63 Ind. 542. N. C.—State v. Cox, 4 N. C. (Term Rep. 165) 597. TEX.—Jones v. State, 29 Tex. App. 347, 16 S. W. 189; Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367. VA.—Anderson v. Com., 26 Va. (5 Rand.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 26 Va. (5 Rand.) 634. WIS.—State v. Shear, 51 Wis. 460, 8 N. W. 287.

6 Alexander v. State, 122 Ga. 174, 50 S. E. 56.

Charging living together in fornication is sufficient without setting out the acts constituting the offense.—Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182.

7 See discussion, infra, § 702.

8 State v. Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

9 ALA.—Pace v. State, 69 Ala. 231, 44 Am. Rep. 513; affirmed, 106 U. S. 583, 27 L. Ed. 207, 1 Sup. Ct. Rep. 637. IND.—Robinson v. State, 51 Ind. 113; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Johnson, 69 Ind. 85; State v. Chandler, 96 Ind. 591. N. C.—State v. Lyerly, 52 N. C. (7 Jones L.) 158; State v. Tally, 74 N. C. 322. VA.—Scott v. Com., 77 Va. 344.

Charge that the defendants, a man and woman, "did live together in fornication" is sufficient.—Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182.

10 Crouse v. State, 16 Ark. 566.

ried to each other, and the prosecution must prove this allegation to be a fact,[11] although there are cases to the contrary.[12] The statute defining "fornication" as "the living together and carnal intercourse with each other, or habitual carnal intercourse without living together, of a man and woman both being unmarried," an indictment or information which fails to follow the language of the statute, but merely charges habitual carnal intercourse, is insufficient.[13]

Surplusage, under the general rule of criminal pleading in this as in other crimes, will be disregarded. Thus, where the indictment or information charges the commission of the alleged offense on a designated date "and on divers other days and times, before and after that day," these added words may be rejected as surplusage.[14] And the same is true of other like unnecessary allegations.[15]

§ 699. Particular allegations—As to marriage. There is an irreconcilable conflict in the adjudicated cases as to whether an indictment or information charging fornication shall contain allegations as to marriage of the parties to another, or to each other. This conflict is due to two causes: (1) The diversity in the statutory provisions

11 Bennett v. State, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919, distinguishing Hopper v. State, 54 Ga. 389; Kendrick v. State, 100 Ga. 360, 28 S. E. 120; Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367.

12 See discussion, infra, § 699.

13 Cannedy v. State, 58 Tex. Cr. Rep. 184, 125 S. W. 31.

14 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. See Shelton v. State, 1 Stew. & P. (Ala.) 208; McLane v. State, 4 Ga. 341; State v. G. S., 1 Tyl. (Vt.) 295, 4 Am. Dec. 724; Gallagher v. State, 26 Wis. 425.

15 "The crime of fornication" being charged in the indictment, there being no such crime provided for or designated in the statute prohibiting and punishing fornication and adultery between persons within a specified degree of consanguinity, does not vitiate the indictment or information, where it is otherwise sufficient to charge the offense under the statute, under the rule that unnecessary allegations will be disregarded. — Territory v. Corbett, 3 Mont. 50.

relating to and punishing the offense, and (2) the diversity of definition and opinion as to the true meaning of the word "fornication." The safer and better course on the part of the pleader is thought to be to allege facts negativing the marriage of the parties to each other,[1] and where the offense, under the statute, is punishable only when committed by an unmarried woman, the fact that she was unmarried should be alleged;[2] although there are well reasoned cases to the effect that this allegation is unnecessary, as being a matter of defense,[3] the contention being that the charge of fornication raises the necessary presumption that the woman was unmarried, and that, consequently, the prosecution is not required either to allege or prove that fact.[4]

§ 700. —— As to time. The indictment or information should allege a particular day upon which the act com-

1 State v. Dickinson, 18 N. C. 349.

See, also, authorities cited supra, § 698, footnote 10.

Under a statute defining fornication as "habitual [carnal] intercourse with each other, of a man and woman, both being unmarried," an indictment omitting to allege "both being unmarried" would be fatally defective.—Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. Cr. Rep. 802, 39 S. W. 367.

Teacher charged with sexual intercourse with pupil, under Ohio Rev. Stats., § 7024, it is unnecessary to aver that they were not husband and wife. — Easley v. State, 29 Ohio Cir. Ct. Rep. 568.

2 GA.—Bennett v. State, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919. MASS.—Com. v. Murphy, 84 Mass. (2 Allen) 163. TEX.—Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367. VT.—State v. Searle, 56 Vt. 516.

.The allegation that "neither of the said persons being then and there lawfully married to another person then living" sufficiently charges that they were unmarried. —Stebbins v. State, 31 Tex. Cr. Rep. 294, 20 S. W. 552.

Fornication is sexual intercourse by an unmarried woman with any man.—Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

3 State v. Stephens, 63 Ind. 542; State v. Sharp, 75 N. J. L. 201, 66 Atl. 926; affirmed, 70 Atl. 1012.

The law then throws the burden of showing marriage upon the accused. — State v. McDuffie, 107 N. C. 885, 12 S. E. 83; State v. Peeples, 108 N. C. 769, 13 S. E. 8; State v. Cutshall, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

4 Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600.

plained of was committed, and this will be sufficient,[1] it not being necessary to allege that the offense was a continuing one,[2] and where it is alleged to have been a continuing offense, the continuando may be rejected as surplusage.[3] Time of the offense may be laid on any date before the finding and return of the indictment, or the presentation of the information, and within the period of limitation,[4] dating back from the date of the finding of the bill, or the presenting of the information.[5] The fact that the indictment or information charges a different time from that in the affidavit upon which founded—e. g., charges a specific day, and the affidavit charges a continuing offense between two dates named—will not vitiate the instrument.[6]

§ 701. —— As to guilty intent. In fornication, guilty intent need be neither alleged nor proved,[1] because guilty intent in such an offense, in the very nature of things, can not be shown except as such intent is established by

1 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Bridges v. State, 103 Ga. 21, 29 S. E. 859; Com. v. Calef, 10 Mass. 153; Hinson v. State, 7 Mo. 244.

2 Charging commencement of crime before statute in effect, with continuando clause carrying it to a day beyond the time when it took effect, indictment held to be sufficient.—Nichols' Case, 47 Va. (7 Gratt.) 589.

3 GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. N. H.—State v. Nichols, 58 N. H. 41. UTAH—State v. Thompson, 31 Utah 228, 87 Pac. 709. WIS.—Gallagher v. State, 26 Wis. 423. FED.—United States v. La Coste, 2 Mas. C. C. 129, 140 Fed. Cas. No. 15548. ENG.—R. v. Sadi, 1 Leach C. C. 468; R. v. Redman, 1 Leach C. C. 477.

4 See Com. v. Burke, 3 Lanc. L. Rev. (Pa.) 138.

Failure to allege offense committed within the preceding twelve months, held not to render the indictment demurrable.—Jolley v. State, 5 Ala. App. 135, 59 So. 710.

5 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. See Shelton v. State, 1 Stew. & P. (Ala.) 208; McLane v. State, 4 Ga. 341; State v. G. S., 1 Tyl. (Vt.) 295, 4 Am. Dec. 724; Nichols' Case, 47 Va. (7 Gratt.) 589.

6 State v. Record, 16 Ind. 111.

1 State v. Cutshall, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

Habitual sexual intercourse shown, the crime is established.—State v. Cutshall, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

habitually engaging in unlawful sexual intercourse by the parties charged. If the prosecution must show guilt beyond the intent to do the act, the parties not being married to each other, those who live in habitual sexual intercourse believing it to be lawful, as Mormons, free-lovers, and the like, would be free from prosecution for this violation of the penal statutes.[2] Fornication, like adultery, is a joint physical act, but there need not be a joint criminal intent; the bodies must concur in the act, but not necessarily the minds. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party; that is to say, one may be guilty and the other innocent by reason of insanity, fraud, mistake, and the like; but the innocence of one party will not relieve the party with the guilty intent.[3]

§ 702. —— Living together—Cohabitation. Where, in the statutory definition of fornication, living together and cohabitation is an essential element, it is manifestly somewhat difficult to state the composite facts constituting the offense, and for this reason it has been said to be sufficient simply to charge living together in fornication.[1] We have already seen that the obiter holding, maintaining that the simple allegation of an unlawful "bedding and cohabiting together" is a sufficient description of the offense, does not seem to meet the requirements, and for that reason is insufficient,[2] because the weight of authority is to the effect that to constitute cohabitation, in the sense in which it is used in the statute, a man and a woman, not being married to each other, must live or dwell

2 State v. Cutshall, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107, distinguishing and doubting State v. Mainor, 28 N. C. (6 Ired. L.) 340.

3 State v. Cutshall, supra. See Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207; Ledbetter v. State, 21 Tex. App. 344, 17 S. W. 427.

1 Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182.

The acts constituting the offense need not be stated. See, supra, § 698, footnote 8.

2 See, supra, § 698.

together as husband and wife and indulge in illicit intercourse;[3] it will not embrace occasional acts of illicit intercourse—e. g., as between master and servant dwelling together as such in the same house[4]—because this does not constitute a "living together" or "cohabitation" in the sense in which those phrases are used in such statute.[5]

3 ARK. — Sullivan v. State, 33 Ark. 187; Turney v. State, 60 Ark. 259, 29 S. W. 893; McNeely v. State, 84 Ark. 484, 106 S. W. 674. FLA.—Luster v. State, 23 Fla. 339, 2 So. 690; Pinson v. State, 28 Fla. 735, 9 So. 706; Thomas v. State, 39 Fla. 437, 22 So. 725; Penton v. State, 42 Fla. 560, 28 So. 774; Whitehead v. State, 48 Fla. 64, 37 So. 302. IND.—State v. Chandler, 96 Ind. 591; Jackson v. State, 116 Ind. 464, 19 N. E. 330; Van Dolsen v. State, 1 Ind. App. 108, 27 S. E. 440. IOWA—State v. Marvin, 12 Iowa 499. KAN.—State v. Cassida, 67 Kan. 171, 72 Pac. 522. MASS.—Com. v. Calef, 10 Mass. 153. MINN. — State v. Williams, 94 Minn. 319, 102 N. W. 722. MISS.—Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Kinard v. State, 57 Miss. 132; Granberry v. State, 61 Miss. 440. MO.—State v. Sekrit, 130 Mo. 401, 32 S. W. 977; State v. Chandler, 132 Mo. 155, 53 Am. St. Rep. 483, 53 S. W. 797; State v. Osborne, 39 Mo. App. 372; State v. Dashman, 124 Mo. App. 238, 101 S. W. 597. NEB.—State v. Way, 5 Neb. 283; Sweenie v. State, 59 Neb. 269, 80 N. W. 815. PA.—Yardley's Estate, 75 Pa. St. 207. TEX. — Richardson v. State, 37 Tex. 346. VA.—Jones v. Com., 80 Va. 18. W. VA.—State v. Miller, 42 W. Va. 215, 24 S. E. 882; State v. White, 66 W. Va. 45, 66 S. E. 20. FED. — Cannon v. United States, 116 U. S. 55, 29 L. Ed. 561, 6 Sup. Ct. Rep. 278, affirming 4 Utah 122, 7 Pac. 369.

4 **Living together in same house as master and servant,** and not as husband and wife, occasional clandestine sexual intercourse does not constitute the statutory offense of "living together in unlawful cohabitation." — Richey v. State, 172 Ind. 134, 139 Am. St. Rep. 362, 19 Ann. Cas. 654, 87 N. E. 1032; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465, citing Searls v. People, 13 Ill. 597; Wright v. State, 5 Blackf. (Ind.) 358, 35 Am. Dec. 126; State v. Marvin, 12 Iowa 499; Com. v. Calef, 10 Mass. 153; State v. Jolly, 3 Dev. & B. L. (S. C.) 110, 32 Am. Dec. 656.

Two clandestine acts of intercourse between a married man and his servant girl, held not to constitute fornication.—Richey v. State, 172 Ind. 134, 139 Am. St. Rep. 362, 19 Ann. Cas. 654, 87 N. E. 1032.

5 ALA.—State v. Smith, 39 Ala. 554; Quartemas v. State, 48 Ala. 269; Hall v. State, 53 Ala. 463; Bodiford v. State, 86 Ala. 67, 11 Am. St. Rep. 20, 5 So. 559. ARK.—Crouse v. State, 16 Ark. 566; Turney v. State, 60 Ark. 259, 29 S. W. 893. FLA.—Brevaldo v. State, 21 Fla. 789; Luster v. State, 23 Fla. 339, 2 So. 690; Thomas v. State, 39 Fla. 560, 28 So. 774. GA.—McLeland v. State, 25 Ga. 477; Law-

However, it has been held, under some statutes, that living together as husband and wife for a single day consti-

son v. State, 116 Ga. 571, 42 S. E. 752; Winkles v. State, 4 Ga. App. 559, 61 S. E. 1128. ILL.—Searls v. People, 13 Ill. 597; Miner v. People, 58 Ill. 59. IND.—Wright v. State, 5 Blackf. 358, 35 **Am. Dec.** 126; State v. Gartrell, 14 Ind. 280; Gaylor v. McHenry, 15 Ind. 383; Jackson v. State, 116 Ind. 464, 19 N. E. 330. IOWA—State v. Marvin, 12 Iowa 499; State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660; State v. McDavitt, 140 Iowa 342, 132 **Am. St. Rep.** 275, 118 N. W. 370. KAN.—State v. Cassida, 67 Kan. 171, 72 Pac. 522. MASS.—Com. v. Calef, 10 Mass. 153; Com. v. Lambert, 94 Mass. (12 Allen) 177. MICH.—Delany v. People, 10 Mich. 241. MINN.—State v. Williams, 94 Minn. 319, 102 N. W. 722. MISS.—Carotti v. State, 42 Miss. 334, 97 **Am. Dec.** 465; Newman v. State, 69 Miss. 393, 10 So. 580; Schwall v. State, 21 So. 660. MO.—State v. Crowner, 56 Mo. 147; State v. West, 84 Mo. 440; State v. Coffee, 39 Mo. App. 56; State v. Osborne, 39 Mo. App. 372. NEB.—Sweenie v. State, 59 Neb. 269, 80 N. W. 815. N. C.—State v. Jolly, 20 N. C. (3 Dev. & B. L.) 108, 32 **Am. Dec.** 656. TEX.—Richardson v. State, 37 Tex. 346; Swancoat v. State, 4 Tex. App. 105; Parks v. State, 4 Tex. App. 134; Morrill v. State, 5 Tex. App. 447; Mitten v. State, 24 Tex. App. 346, 6 S. W. 196. VA.—Jones v. Com., 80 Va. 18; Pruner v. Com., 82 Va. 115. WASH.—State v. Poyner, 57 Wash. 489, 107 Pac. 181. W. VA.—State v. Miller, 42 W. Va. 215, 24 S. E. 882.

A single act, or occasional acts, not indicating a consecutive or prearranged continuation of the illicit intercourse, does not constitute living together within the statute.—Bodiford v. State, 86 Ala. 67, 11 **Am. St. Rep.** 20, 5 So. 559, citing State v. Crowley, 13 Ala. 172; Collins v. State, 14 Ala. 608; Quartemas v. State, 48 Ala. 269; Hall v. State, 53 Ala. 463.

The commission of such acts must have been under such circumstances as to show an abiding and cohabiting together in a relationship like that of husband and wife.—State v. Cassida, 67 Kan. 171, 72 Pac. 522.

They must have lived together in the same habitation as husband and wife.—State v. Chandler, 132 Mo. 155, 53 **Am. St. Rep.** 483, 53 S. W. 797.

There must be a living together as if the conjugal relation existed, and the illicit intercourse must be habitual, but it is not necessary that the acts be open and notorious, or that the parties hold themselves out to the public as husband and wife.—State v. Poyner, 57 Wash. 489, 107 Pac. 181.

Clandestine acts of sexual intercourse, however often repeated, do not constitute unlawful cohabitation, unless the parties openly and notoriously live together as paramour and concubine.—Kinard v. State, 57 Miss. 134. See Wright v. State, 5 Blackf. (Ind.) 358, 35 **Am. Dec.** 126; State v. Gartrell, 14 Ind. 280; Gaylor v. McHenry, 15 Ind. 383.

Clandestine sexual intercourse between a man and woman, not married to each other, though

tutes the act of fornication.[6] Where, under the statute, habitual carnal intercourse, without living together, constitutes fornication, an indictment or information alleging habitual intercourse, but omitting the statutory words "without living together," will be sufficient,[7] because those words do not enter into the definition of the offense, being merely descriptive of the parties.[8]

§ 703. Description of parties. An indictment or information charging fornication must so describe the parties as to bring them within the provisions of the particular statute under which the instrument is drawn. Thus, where under the statute the crime can be committed by a married man with an unmarried woman only, these facts must be distinctly alleged.[1] An indictment or information charging fornication which describes one of the persons accused as an unmarried male, and the other as an unmarried female, is not open to the objection that it does not allege that one of the parties is a man and the other a woman;[2] and a like charge that two named persons did

married to others, is not sufficient. —State v. Chandler, 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797.

Illicit intercourse between teacher and pupil on a few occasions, in school room, after school hours, does not constitute the offense denounced by statute. — Granberry v. State, 61 Miss. 400.

Habitual sexual intercourse is the gist of the offense.—Newman v. State, 69 Miss. 393, 10 So. 580.

Occasional secret acts of illicit sexual intercourse are not sufficient.—Thomas v. State, 39 Fla. 437, 22 So. 725; State v. Miller, 42 W. Va. 215, 24 S. E. 882.

6 Brown v. State, 108 Ala. 18, 18 So. 811.

7 State v. Carroll, 30 S. C. 85, 14 Am. St. Rep. 883, 8 S. E. 433.

Habitual surrender of person for mutual sexual gratification constitutes fornication. — Com. v. Lehr, 2 Pa. Co. Ct. Rep. 341, 18 Phila. 485, 43 Phila. Leg. Int. 425.

8 State v. Schroder, 3 Hill L. (S. C.) 64; State v. Cunningham, 2 Spears (S. C.) 254.

1 Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Lash, 16 N. J. L. (1 Harr.) 380, 32 Am. Dec. 397.

Fornication is sexual intercourse of an unmarried woman with any man.—Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

2 Townser v. State, 58 Tex. Cr. Rep. 453, 137 Am. St. Rep. 976, 126 S. W. 572. See Tynes v. State, 93 Miss. 119, 136 Am. St. Rep. 540, 46 So. 535; State v. Lashley, 84 N. C. 754.

"unlawfully cohabit together, and have sexual intercourse with each other," they "not being married to each other," is not open to the objection that it does not allege them to be a man and a woman, for this presumption necessarily follows.[3] The fact that the indictment or information described the woman as a "spinster" whereas the evidence shows her to have been married, is not ground for an arrest of judgment;[4] charging that Sam Means had sexual intercourse with Frances Slayton, and that Sam Means was a man "and the Slayton an unmarried woman," the words "the Slayton" were held to obviously refer to the above mentioned Frances Slayton.[5] Where an indictment charging a man with fornication alleged that the name of the woman was unknown, this will not render the instrument insufficient.[6] Under the Texas statute, it seems that an indictment charging fornication which fails to allege that both parties to the offense were unmarried, is fatally defective.[7]

§ 704. Joinder of offenses. It has been said that as fornication is an essential fact constituting crimes arising out of illicit carnal connection, and is included within them,[1] consequently, that in an indictment charging seduction accused may be convicted of fornication,[2] upon the well recognized principle that there may be a conviction for a lesser under an indictment for a greater

3 Tynes v. State, 93 Miss. 119, 136 Am. St. Rep. 540, 46 So. 535.

4 State v. Guest, 100 N. C. 410, 6 S. E. 253.

5 Means v. State, 99 Ga. 205, 25 S. E. 682.

6 Jolley v. State, 5 Ala. App. 135, 59 So. 710.

7 Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367.

1 Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542.

2 Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542. See Com. v. Miller, 4 Phila. (Pa.) 214; Com. v. Taland, 14 Phila. (Pa.) 435.

Acquittal under indictment for seduction is a bar to a subsequent indictment for fornication.—Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542; Nicholson v. Com., 91 Pa. St. 390.

offense,[3] although there are authorities to the contrary.[4] On a like reasoning it is held, in some jurisdictions, to be a well-settled rule of criminal procedure that on an indictment for adultery, with proper allegations, a conviction can be had, under appropriate evidence, for fornication. The question is said not to be whether one offense includes the other, but simply one of allegation, and that if all the necessary elements to constitute fornication are charged in the indictment or information, a conviction of that crime may be had,[5] although there are cases to the contrary.[6]

§ 705. Joinder of parties. The question whether an indictment or information charging fornication shall join both the accused as defendants in one indictment, or whether they shall be proceeded against in separate indictments, is in some jurisdictions a matter of statutory regulation. Under some statutes the accused are required to be indicted severally.[1] Where there are no statutory regulations or requirements, the accused may be indicted separately,[2] or jointly,[3] at the election of the prosecution; and it has been said that where they are jointly indicted under a charge of an unlawful "bedding and cohabiting together" the offense is sufficiently described, and the charge sustained by showing a habitual surrender of the person of one for the gratifica-

3 State v. Bierce, 27 Conn. 319; Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542; Com. v. Davidheiser, 20 Pa. Co. Ct. 200; Com. v. Johnston, 12 Pa. Co. Ct. 216, 2 Pa. Dist. Rep. 273; Gorman v. Com., 124 Pa. St. 536, 17 Atl. 26.

"Seduce" implies the commission of fornication.—State v. Bierce, 27 Conn. 319.

4 State v. Lash, 16 N. J. L. (1 Harr.) 380, 32 Am. Dec. 397.

5 Cosgrove v. State, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367. See Smitherman v. State, 27 Ala. 23.

6 State v. Lash, 16 N. J. L. (1 Harr.) 380, 32 Am. Dec. 397; Pena v. State, 46 Tex. Cr. 458, 80 S. W. 1014.

1 Foster v. State, 41 Ga. 582.

2 State v. Cox, 4 N. C. 597.

3 Ledbetter v. State, 21 Tex. App. 344, 17 S. W. 427.

Com. v. Elwell, 43 Mass. (2 Metc.) 190, 35 Am. Dec. 398; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207.

tion of the other,[4] but this holding is purely obiter,[5] and not thought to be sound.[6]

§ 706. Joinder of counts. It is a well-settled principle of criminal pleading that where two or more crimes arising out of the same act or transaction are of a kindred nature and liable to punishment of the same general character, they may all be joined, in several counts, in the same indictment,[1] although the doctrine does not prevail in some jurisdictions,[2] and the contrary practice is required by statute in still other jurisdictions.[3] On the principle that crimes of a kindred nature arising out of the same act or transaction may be united in the same indictment, an indictment or information charging fornication has been held to properly charge counts of fornication in connection with counts for abduction,[4]

4 State v. Jolly, 20 N. C. (3 Dev. & B. L.) 108, 32 Am. Dec. 656.

5 See, supra, § 698, footnote 8.

6 See discussion, supra, § 702.

1 Com. v. Mullen, 150 Mass. 394, 23 N. E. 51; Com. v. Rosenthal, 211 Mass. 50, Ann. Cas. 1913A, 1003, 97 N. E. 609.

2 State v. Johnson, 50 N. C. 221; State v. Watts, 82 N. C. 656; State v. Lee, 114 N. C. 844, 19 S. E. 375; Withers v. Com., 5 Serg. & R. (Pa.) 59.

3 Short v. People, 27 Colo. 175, 60 Pac. 350; Logen v. United States, 144 U. S. 263, 36 L. Ed. 429, 12 Sup. Ct. Rep. 617; Williams v. United States, 168 U. S. 382, 42 L. Ed. 509, 18 Sup. Ct. Rep. 92.

4 Com. v. Rosenthal, 211 Mass. 50, Ann. Cas. 1913A, 1003, 97 N. E. 609.

Joinder of offenses.—"Illicit carnal connection is called by different names, according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is simple fornication. When it causes the birth of an illegitimate child, it is fornication and bastardy. When the man who commits it is married, it is adultery. When the parties by whom it is done are related to one another within certain degrees of consanguinity or affinity, it becomes incest. Where it is preceded by fraudulent acts (including a promise of marriage) to gain the consent of the female, who is under twenty-one years of age and of good repute, it assumes another name, and by the statute is called seduction. But the body of all these offenses is the illicit connection. In each case the essential fact which constitutes the crime is fornication."—Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542.

adultery,[5] bastardy,[6] seduction,[7] and rape,[8] these all being crimes of a kindred nature which may arise out of the same transaction.

§ 707. —— Duplicity and election. The joinder of different offenses in different counts, in the same indictment or information charging fornication, is subject to the general rules regarding duplicity. Under some statutes there may be a joinder, in one count, charging different kindred offenses of varying degrees—e. g., fornication and bastardy,[1] without being open to the objection of duplicity. An indictment charging fornication on a specified day and on "divers other days," will not render it void for duplicity.[2] Where several counts are joined embracing a statement of the crime in different forms, or crimes of kindred nature and varying degrees of the same offense, the prosecution can not be compelled to elect upon which of the counts the trial will be had.[3]

5 State v. Hinton, 6 Ala. 864; Com. v. Burk, 2 Pa. Co. Ct. Rep. 12.

See, supra, § 705.

6 Nicholson v. Com., 91 Pa. St. 390; Com. v. Kammerdiner, 165 Pa. St. 222, 30 Atl. 929; Com. v. Burk, 2 Pa. Co. Ct. Rep. 12.

On an indictment charging fornication and bastardy in one count, and adultery in another, accused may be found guilty on both counts.—Com. v. Burk, 2 Pa. Co. Ct. 12.

7 Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542.

Act for fornication and bastardy, may be included in an indictment for seduction. — Nicholson v. Com., 91 Pa. St. 390.

8 Jackson v. State, 91 Wis. 253, 64 N. W. 838.

1 Com. v. Burk, 2 Pa. Co. Ct. Rep. 12.

2 See State v. Briggs, 68 Iowa 416, 27 N. W. 358.

3 Jackson v. State, 91 Wis. 253, 64 N. W. 838.